IN THE MATTER OF

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

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

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

MEMORIAL OF RAYMOND L. LOEWEN

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Claimant/investor Raymond L. Loewen respectfully submits this Memorial pursuant to Article 38(1)(a) of the Arbitration (Additional Facility) Rules of the International Centre for the Settlement of Investment Disputes ("ICSID").

I. INTRODUCTION

1. Claimant/investor Raymond L. Loewen is a Canadian citizen and the founder of claimant/investor The Loewen Group, Inc. ("TLGI"). Mr. Loewen was TLGI's Chief Executive Officer, Chairman of its Board of Directors, and major investor during the period in question, personally holding approximately 13% of its outstanding shares of stock. Mr. Loewen brings this claim for relief under Chapter 11 of the North American Free Trade Agreement ("NAFTA") for damages to his investment in TLGI and to his business and personal reputation arising from the unjust and discriminatory prosecution of the case of Jeremiah J. O'Keefe, Sr., et al. v. The Loewen Group, Inc., No. 91-67-423, Circuit Court for the First Judicial District, Hinds County, Mississippi ("the O'Keefe litigation"), and the grossly excessive verdict and coerced settlement in that case.

2. The shockingly inequitable $500 million verdict rendered against TLGI in the O'Keefe litigation was the result of a trial riddled with unfair, unlawful, and ultimately successful efforts to goad the jury into a fury of anti-Canadian xenophobia and racial chauvinism. These wrongful appeals to national and racial bias took place under the approving eye of the presiding judge, an elected official of the State of Mississippi, and featured inflammatory and irrelevant testimony from Mike Espy, a former Mississippi Assistant Attorney General, United States Congressman, and United States Secretary of Agriculture.

3. Throughout the trial, plaintiffs' counsel deliberately focused the jury's anger and contempt upon Mr. Loewen as the human face of TLGI. Repeatedly referring to TLGI not as a free-standing corporation, but as "Ray Loewen's group," plaintiffs' counsel harped ceaselessly and unnecessarily upon Mr. Loewen's Canadian citizenship and residency, openly accused him of exploiting black Americans, and implied, in the most crude and heavy-handed way, that Mr. Loewen was a racist.

4. The effect of this improper mixture of nationalistic and racial appeals upon the jury was reflected not only in the wildly excessive verdict, but also in the remarks of the jury foreman, who emerged from the jury's deliberations to publicly brand Mr. Loewen as "this Canadian who didn't know anything about blacks," and "a rich, dumb Canadian politician who thought he could come down here and pull the wool over the eyes of a good ole' Mississippi boy."[1]

5. The miscarriage of justice that began at trial was completed by the Mississippi Supreme Court's arbitrary refusal to reduce the amount of the $625 million appeal bond, despite the fact that the underlying $500 million verdict included a $400 million punitive damages award that was more the 200 times the amount of any punitive damages award ever upheld by that court. Faced with the imminent enforcement of a judgment representing 78% of its entire net worth, with no practical avenue of appeal, and only hours from filing for bankruptcy, TLGI and Mr. Loewen were forced to settle the O'Keefe litigation for $175 million – a grossly excessive

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

sum representing 35 times the combined value of all of the assets involved in the underlying litigation.[2]

6. The well-publicized verdict and coerced settlement in the O'Keefe litigation severely damaged Mr. Loewen and his investment in TLGI. As a direct result of the unfair and discriminatory treatment to which he was subjected in the Mississippi courts, the value of Mr. Loewen's shares in TLGI plummeted on November 1, 1995, the day that the O'Keefe verdict was announced, and remained artificially low even after the settlement was announced on January 29, 1996. Because he not only owned a controlling block of shares in TLGI, but was also considered a corporate "insider" by virtue of his position as Chief Executive Officer and Chairman, securities laws prevented Mr. Loewen from mitigating his stock losses by selling off shares of TLGI during this decline. On the contrary, owing to his prominent position within TLGI and his desire to help stabilize the company, Mr. Loewen was urged to buy, and did buy, substantial additional shares of stock in an unsuccessful effort to restore investor confidence.

7. The financial and personal repercussions of the O'Keefe litigation continued to damage Mr. Loewen well beyond the initial impact of the cash settlement payments and drop in stock value. For three years after the forced settlement, Mr. Loewen struggled to lead TLGI out of the financial and managerial problems that were a direct result of the O'Keefe verdict and coerced settlement. During that time, the company beat back a hostile takeover bid prompted by TLGI's weakened condition. Since that time and continuing to the present, the company and Mr. Loewen have also been subjected to securities class action lawsuits in which Mr. Loewen has been named as an individual defendant.

[2] Unless otherwise indicated, all dollar amounts listed herein are in U.S. dollars.

8. Mr. Loewen also suffered the loss of his senior management team in the wake of the O'Keefe verdict and coerced settlement, and was unable to attract quality replacements for these key employees due to the decline in his own and the company's reputation, as well as TLGI's inability to offer competitive compensation packages to such employees.

9. The wounds that the O'Keefe litigation inflicted on TLGI's financial health ultimately proved fatal. The company declared bankruptcy in June 1999, due in large part to the lingering effects of the O'Keefe verdict and coerced settlement.

10. Because of his public identification with the company, as well as plaintiffs' success in targeting him as the symbol of TLGI's alleged corporate greed and dishonesty, the O'Keefe litigation also caused lasting damage to Mr. Loewen's business and personal reputation. After being labeled as a "dumb Canadian" and a racist, unscrupulous businessman on the front pages of the *New York Times* and *Washington Post,* Mr. Loewen was deprived of the continued opportunity to effectively lead his company and to deal with shareholders, top management, business partners and competitors. Mr. Loewen was discharged as an officer of the corporation and reduced to "co-Chairman" of the Board of Directors in October 1998. He was forced from the company entirely in April 1999.

11. It is thus ironic and ultimately unfair that Raymond Loewen – the *one person* before this Tribunal who personally endured the O'Keefe trial and its aftermath,[3] and against whom the Mississippi jury directed its nationalistic and racial animus – is now without any authority or control over the company that he founded and led to prominence over the past three decades.

[3] There has been a substantial change in the shareholders of TLGI since the O'Keefe verdict, such that TLGI is now a vastly different entity than it was at that time.

12. Having been discriminated against and denied both procedural and substantive due process in the U.S. courts, Mr. Loewen, pursuant to the express provisions of NAFTA, now requests the equitable and even-handed treatment provided for foreign investors and their investments under NAFTA. The events that took place during the O'Keefe litigation and the mistreatment that Mr. Loewen suffered therein constitute clear violations of NAFTA Articles 1102, 1105, and 1110, for which the United States stands directly liable under NAFTA Article 105.

13. Application of the plain wording of NAFTA and mainstream international law to the admitted facts of this case compels only one conclusion – that the United States must be held responsible for this deplorable denial of justice, and required to make Mr. Loewen whole for the damages he has suffered.

II. STATEMENT OF RELEVANT FACTS[4]

A. Raymond L. Loewen and The Loewen Group, Inc.

14. Raymond L. Loewen was born on June 27, 1940 in Steinbach, Canada, a small rural town in the province of Manitoba with a population of approximately 2,000. (Trial Transcript ["Tr.] at 4988-89). Mr. Loewen's father Abraham owned a small, part-time funeral home that served the town's needs by performing approximately 120 funerals per year. (Tr. at 4989). Beginning at the age of 12, Mr. Loewen, together with his 11 brothers and sisters, helped

[4] Mr. Loewen adopts and incorporates herein by reference each of the statements of fact set forth in the joint Notice of Claim and in the Memorial filed contemporaneously herewith by TLGI that are not, in the interests of brevity, specifically restated herein. References to the Notice of Claim, Trial Transcript, and Appendix are indicated where appropriate. To the extent not set forth in any previous submission, the additional facts set forth herein will be the subject of testimony by Mr. Loewen and others during the oral procedures in this matter. Mr. Loewen respectfully reserves the right to supplement or amend this Memorial based upon the Government's response, if any, to the discovery requests submitted by Mr. Loewen and TLGI. Mr. Loewen also requests the right, pursuant to Article 38(1)(c) of the ICSID Additional Facility Rules, to file a reply to any counter-memorial filed by the Government.

Abraham run the family funeral business, assisting with everything from home visits through the final funeral ceremonies.

15. In 1961, Abraham Loewen fell ill and became unable to manage the funeral home. Mr. Loewen, then 21 and one of the youngest of the Loewen children, returned from Briar Crest Bible College in Saskatchewan and took over management of the family business. (Tr. at 4990). At the time, gross revenues from the funeral home amounted to approximately $23,000 per year. (Tr. at 4989).

16. Over the next five years, Mr. Loewen worked to stabilize and grow the funeral business, applying himself to both the arduous physical work and the other, less tangible business aspects of his profession. (Tr. at 4990-91). While struggling to maintain the business's customers, equipment, and credit, he learned hard-won lessons concerning hiring, marketing, merchandising, business negotiations, and finance. During this time, he also met and married his wife Anne. Anne Loewen immediately joined in the work of managing the family business, as she would continue to do for the next 30 years.

17. Mr. Loewen founded the business that ultimately became TLGI in 1966, when he and Anne acquired the Green funeral home in Fort Frances, Ontario. (Tr. at 4992). Several years later, in 1969, Mr. Loewen and his wife purchased two additional funeral homes in Vancouver, British Columbia. (Id.). Mr. Loewen continued to run these businesses and to slowly buy other small funeral homes in Canada for the next six years, until 1975. (Tr. at 4993).

18. During this period, Mr. Loewen developed a unique method of acquiring individual funeral homes through a "succession planning" method that, unlike traditional asset purchase methods, allowed these largely family-operated businesses to plan and to participate in the future ownership and control of the business. As a result of the success of this technique and

the personal and professional manner in which he conducted his affairs, Mr. Loewen garnered a business and personal reputation that ultimately led to his being asked to run for the provincial legislature in 1975. (Tr. at 4993).

19. After four years in the legislature, Mr. Loewen returned to private life and to business, diversifying his interests to include real estate development. (Tr. at 4993). As Canadian interest rates soared and the real estate market in British Columbia faltered in the early 1980s, Mr. Loewen once again began acquiring funeral homes as a means of growth. (Tr. at 4993-94). By 1985, Mr. Loewen owned approximately 20 funeral businesses with gross revenues of roughly $5 million. (Tr. at 4994).

20. Mr. Loewen acquired most of these businesses with financing provided by the Canadian Commercial Bank. (Tr. at 4994). When the Canadian Commercial Bank declared bankruptcy in 1986, the receiver in bankruptcy called in all of its outstanding notes, including those held by Mr. Loewen and his wife. (Tr. at 4994-95). In order to avoid bankruptcy themselves, Mr. Loewen and his wife formed TLGI, a publicly-held corporation, raising capital through the sale of stock in the newly-formed company. (Id.).

21. Over the next five years, Mr. Loewen focused his energies exclusively upon the business of TLGI, which was the operation and acquisition of an ever-increasing number of funeral homes. (Tr. at 4996). During this period, TLGI created an American subsidiary, Loewen Group International, Inc. ("LGII"), to carry forward its investment in these funeral homes and funeral services businesses in the United States. (Notice of Claim ["Notice"] at ¶ 15). TLGI owns 85% of the shares of LGII, and controls the operations of that subsidiary. (Id.).[5]

[5] For purposes of this Memorial, the term "TLGI" shall, unless otherwise indicated, also include LGII.

22. TLGI's continued emphasis on personal relationships with its newly-acquired funeral businesses continued to stand it in good stead during these years, particularly in contrast to the more harsh consolidation techniques of its rivals. Throughout this period, TLGI's reputation and the popularity of its "succession planning" method of acquisition grew rapidly, as did the company. Between 1988 and 1995, the number of funeral homes operating under TLGI's umbrella increased from 98 to 815. The company's companion businesses in cemetery properties and funeral insurance grew commensurately.

23. By 1995, TLGI was financially robust and poised for continued and even greater growth, boasting a compound annual growth in earnings per share of 33% since 1987, strong regional partnerships throughout the U.S. and Canada, a continuing stream of acquisitions averaging $10 to $20 million each at the rate of approximately 150 per year, and highly favorable debt ratings, financing terms, and lines of credit through which to fund its ever-increasing size and profitability.[6]

24. Mr. Loewen's personal reputation as an honorable and highly successful businessman grew, as did TLGI, the company that he led as its founder, Chairman, Chief Executive Officer, namesake, and most visible public representative. Based upon his own growing reputation as a business and political leader, as well as TLGI's rapidly-escalating fortunes, Mr. Loewen was able to assemble a talented and dedicated senior management team whose efforts only served to accelerate the company's growth through the late 1980s and early 1990s. Through this team and through his own individual leadership, Mr. Loewen successfully instilled a superior sense of purpose and high morale within TLGI, such that it was firmly

[6] For example, TLGI's debt rating was BBB+, or investment-grade debt; it held a line of credit of $500,000,000, which it was about to increase to $750,000,000; and borrowed money at only .5 percent over the London InterBank Offered Rate.

established as the industry leader and preferred acquisition partner in the funeral services industry.

B. The O'Keefe Litigation

1. Factual Background

25. By 1990, the growth of TLGI and LGII had brought Mr. Loewen's business interests as far south as the southern coast of the State of Mississippi, where LGII acquired 90% of Reimann Holdings, Inc. ("Reimann"), a funeral services and funeral insurance company. (Tr. 94-95).

26. Reimann's competitor in the funeral business was Jeremiah O'Keefe, former mayor of Biloxi, Mississippi, and the owner of a string of local funeral service and insurance companies. (Tr. 94-95; 416-22). O'Keefe's holdings included Gulf National Insurance, ("Gulf National"), an insurance company in the business of providing, among other things, insurance against the cost of funeral services. (Tr. at 416-22).

27. Shortly after LGII acquired Reimann, Reimann in turn purchased Wright & Ferguson Funeral Home ("Wright & Ferguson"), a family-run funeral home that had previously done business exclusively with Gulf National. (Tr. 3049-51; 3061). After being acquired by Reimann, however, Wright & Ferguson began to do business with both Gulf National and competing insurance companies owned by LGII.

28. O'Keefe reacted to LGII's acquisitions by mounting a campaign to arouse public sympathy for his own businesses based upon their American ownership, while stirring up local prejudice against LGII based solely upon its Canadian ownership. As part of this campaign, O'Keefe mailed an advertisement to potential customers, falsely advising them that "[t]he

majority of the board of directors [of LGII] are Canadian.... Obviously, prices are raised and profits go out of the U.S.A." (Tr. at 96-97; see Tr. at 4476-77).

29. O'Keefe launched a second round of xenophobic advertisements in July 1990, this time decrying the sale of American landmarks such as Rockefeller Plaza to foreign investors, and stating that Reimann "sold out controlling interest to a chain in Canada." (Tr. at 98-99; 2689-91).

30. In December 1990, O'Keefe launched his third and most vicious broadside against LGII and its Canadian ownership, falsely claiming that "Reimann is now owned by a Canadian firm, financed by over [$]25 million from a Hong Kong bank." (Tr. at 104-05; 2694-96). Comparing LGII's acquisition of Reimann to the Japanese sneak attack on the American naval forces at Pearl Harbor in 1941, O'Keefe's third advertisement reminded readers of the death toll from that attack and of his own service in the American military during World War II. (Id.).

31. Not satisfied with reaching the public through this direct-mail advertising campaign, O'Keefe also placed advertisements on billboards that prominently displayed the U.S. and Mississippi flags adjacent to the names of the O'Keefe funeral homes, while listing the names of the "Lowen [sic] Company" and Reimann under the Canadian and Japanese flags. (Tr. at 4421-22). These billboards stridently proclaimed that the O'Keefe-owned businesses "keep your money in the local economy," while profits from Reimann and other Loewen-owned businesses were sent to Canada and Japan. (Id.).

32. By February 1991, O'Keefe's year-long, anti-Canadian crusade had begun to take effect. A newspaper article appeared in the Mississippi Sun Herald on February 17, 1991,

accusing Reimann of deceptive practices and of violating Mississippi law by failing to declare its Canadian ownership. (Tr. at 4471-72).

33. Shortly thereafter, the Mississippi Attorney General's Office wrote a letter to LGII, warning that it could violate Mississippi consumer-protection statutes by failing to advertise the nature of its ownership. (Tr. at 4471-73). Although LGII responded to this inquiry with a complaint of its own concerning O'Keefe's jingoistic and inaccurate advertisements, the Mississippi government took no action whatsoever to stop O'Keefe's campaign. (Tr. at 4473-87). Neither did the Mississippi Attorney General ever take any action whatsoever against Reimann based upon its alleged failure to properly advertise or announce its Canadian ownership. (Tr. at 4480, 4487).

34. Ironically, during the same time that O'Keefe was comparing LGII to the Japanese attack on Pearl Harbor and lamenting the encroachment of foreign investment into southern Mississippi, he was also attempting to sell his funeral homes and insurance businesses to LGII. (Tr. at 106, 1329-49). O'Keefe was in need of funds because, among other things, he had depleted the reserves of his insurance businesses to dangerous levels. As part of these sales negotiations, O'Keefe traveled to Canada on three or four occasions and met with Mr. Loewen. (Tr. at 4996).

35. When these negotiations failed to yield a satisfactory result, O'Keefe filed suit against LGII for allegedly interfering with O'Keefe's business dealings with Wright & Ferguson. (Appendix to Notice of Claim ["App."] at A20-23).

36. On August 19, 1991, O'Keefe and LGII reached an agreement under which O'Keefe agreed to drop his suit against LGII, to sell to LGII two funeral homes worth between $2 and $2.5 million, and to assign to LGII the rights to an option to purchase a certain cemetery

tract worth $19,500. In return, Loewen agreed to sell O'Keefe an insurance company and trust fund worth between $3.3 and $4 million, and appoint O'Keefe the exclusive provider of certain insurance products. (Tr. at 227, 320; App. at A598-608; A632, A661). Taken together, the total value of all of the properties and rights involved on both sides of this proposed transaction was no more than $8 million.

37. However, the August 1991 agreement was only tentative, and left crucial contract terms open, such as the price to be paid for the funeral and insurance businesses. (Tr. at 664-78; App. at A75-76; A630-31). When the parties disagreed on these terms, O'Keefe amended his pending lawsuit against LGII to attempt to enforce that agreement according to his demands, and to accuse LGII of fraud and violation of Mississippi antitrust laws. (App. at A88, A225). It was on these amended charges – for which O'Keefe initially claimed a total of $5 million in economic damages, and never claimed more than $26 million in such damages – that trial commenced on September 13, 1995. (App. at A33; Tr. at 1).

2. Procedural Background

38. By bringing suit not only against TLGI and LGII, both of which are headquartered outside of Mississippi, but also against Wright & Ferguson, a Mississippi corporation, O'Keefe effectively barred Mr. Loewen and TLGI from access to the U.S. federal courts under federal diversity jurisdiction. See 28 U.S.C. §§ 1332, 1441.

39. The doctrine of federal diversity jurisdiction in United States law is based upon precisely the same concepts of fairness and comity, and the same fear of discrimination against foreigners, that forms the foundation of NAFTA. Under 28 U.S.C. § 1332, an American who is sued in the state courts of a foreign U.S. state by a local plaintiff, or any alien sued in any

American state court, has the right to remove the case from the state court (where the judges, like Judge Graves in the O'Keefe litigation, are often popularly elected by the local citizenry) to federal court, where the trial judges are appointed for life by the President of the United States. U.S. Const. Art. III.

40. The intent of this provision is to protect defendants from precisely the type of local prejudice that plagued the proceedings at issue here. See Pease v. Peck, 59 U.S. (18 How.) 595, 599 (1856); Brown v. Flowers Industries, Inc., 688 F.2d 328, 330 n.1 (5th Cir. 1982) (diversity jurisdiction permits nonresident defendant to seek federal forum to avoid partisanship that state courts might show for their own citizens), cert. denied, 460 U.S. 1023 (1983).

41. Unfortunately, because federal jurisdiction under 28 U.S.C. § 1332 requires "complete diversity" among the parties – that is, that each party-plaintiff be of different citizenship from each party-defendant, a plaintiff may deny a nonresident defendant the protections of diversity jurisdiction by the procedural dodge of joining to the action additional defendants who are also residents of the plaintiff's state. Plaintiffs in the O'Keefe litigation used this maneuver to keep TLGI from removing the case to federal court by naming Wright & Ferguson as a titular defendant.

42. Plaintiffs openly revealed their ulterior motive in adding Wright & Ferguson as a defendant by repeatedly assuring the jury that they had "no beef" against Wright & Ferguson or its owner, local resident and businessman John Wright. See Tr. at 56 (Mr. GARY: "I'll be the first to tell you, you see Mr. John Wright over there, this distinguished looking gentleman over here, we've got no beef with him, none whatsoever"); Tr. at 5709 (Mr. GARY: "That's what we keep saying, Mr. Wright really is not in this, he's really not in it."); App. at A371 (Mr. GARY [reassuring potential juror who knew a member of the Wright family]: "Now, we have Mr. John

Wright over here in the courtroom.... He's a party to this lawsuit for technical reasons.... Jerry [O'Keefe] had no beef with John Wright... Just because the Wright name is on [the Complaint] you understand we're suing The Loewen Group?").

43. Thus, rather than having the charges against him and his companies heard by a life-tenured federal district judge and a jury drawn from a 13-county area, Mr. Loewen was brought before the Circuit Court for the First Judicial District of Hinds County, Mississippi. See Uniform Local Rules of the United States District Courts for the Northern and Southern District of Mississippi (establishing Jackson Division of the Southern District of Mississippi, comprised of Hinds County and 12 other counties).

44. The First Judicial District of Hinds County is a court created by the State of Mississippi. See Miss. Code § 9-7-3(1). According to the 1990 U.S. census, the population of Hinds County was 254,441, slightly more than half of whom were black.[7] The case was assigned to Judge James Graves, who is black, and who was elected to office from an electoral district that had been deliberately drawn under U.S. civil rights statutes to contain a majority of black voters. See Martin v. Mabus, 700 F.Supp. 327 (S.D. Miss. 1988); see generally Voting Rights Act of 1965, 42 U.S.C. § 1973.

45. The jury was comprised of eight blacks and four whites, all of whom had been potentially exposed to O'Keefe's anti-Canadian, anti-Loewen flyers and bulletin boards. According to the local rules of court of the First Judicial District, a verdict in a civil case required only a vote of nine of 12 jurors.

46. Plaintiffs' lead counsel was Willie E. Gary, Esquire, an outspoken and controversial attorney from the State of Florida. Mr. Gary, who is black, travels in his personal

[7] The Twenty-First Census of the United States (1990).

jet aircraft (the "Wings of Justice"), maintains his own Internet website (www.williegary.com), and appears at his own "Celebrity Golf Classic" and other public events in the company of such noted African-American civil rights activists as Jesse Jackson and Dick Gregory. Mr. Gary's flamboyant lifestyle and over-the-top courtroom tactics have been the subject of considerable media attention. See, e.g., B. Harris, *From Migrant Shack to Posh Mansion*, Jackson Advocate, Nov. 16-22, 1995, at B1; Y. Samuel, *Florida Attorney to Receive State King Award*, St. Louis Post-Dispatch, Jan. 8, 1998, at B1; *Lifestyles of the Rich and Famous* (American television show profiling celebrity homes and lifestyles).

47. Surprisingly, although the total economic damages claimed in the O'Keefe litigation was never more than $26 million, Mr. Gary sent TLGI a written settlement demand of $125 million in June 1995, some three months before trial began. Unaware of what was to come, TLGI rejected this demand as preposterous and extortionate, and concentrated its efforts on preparing for trial.

3. Trial

48. From his opening statement to his closing argument on damages, Mr. Gary executed a trial strategy designed to portray Raymond Loewen as a bigoted Canadian tycoon bent not only upon swindling Jerry O'Keefe, staunch American patriot and "good ole' Mississippi boy," but also upon exploiting poor, black Mississippians. These flagrant and intentional appeals to nationality and race are amply documented in the Notice of Claim, and particularly in appendices A to the Affidavit of Richard Neely, Esquire, former Chief Justice of the West Virginia Supreme Court of Appeals, which appears as Exhibit B to the Notice of Claim.

49. For purposes of emphasis, however, the following are particularly egregious examples of plaintiffs' discriminatory statements and appeals, each of which was condoned either explicitly or implicitly by the presiding judge.

a. Anti-Canadian Sentiment

50. In the American trial system, an attorney's first opportunity to speak to the jury often occurs during voir dire, the process of questioning potential jurors under judicial supervision in order to detect possible bias and ensure the selection of a jury panel that can render judgment fairly. Plaintiffs' counsel, and in particular Mr. Gary, deliberately misused the voir dire process to infect the jury from the outset with anti-Canadian, pro-American sentiment.[8]

51. Mr. Gary opened his remarks to the pool of potential jurors by proudly announcing that he represented "one of their own, Jerry O'Keefe." (App. at A328). Mr. Gary then deliberately contrasted American Jerry O'Keefe with Mr. Loewen's Canadian citizenship, saying "The Loewen Group, Ray Loewen, Ray Loewen is not here today. The Loewen Group is from Canada. He's not here today." (App. at A356).

52. Enlarging on his central "us vs. them" theme, Mr. Gary asked the members of the jury pool to confirm their belief in the principle that Mr. Loewen and Canadian corporations should be held to what he described as the American standard of justice. "Ray Loewen, Ray Loewen is not – this group is from Canada.... Just because the group is from Canada, you still have to give them a fair trial.... But do you also agree that if they come down to Mississippi to

[8] Indeed, Mr. Gary subsequently authored a lawyer's primer based on the O'Keefe litigation, in which he concedes that, "while the primary aim of questioning is to reject those who are unsuitable and keep those most likely to see things one's way, the process of questioning also orients the remaining jurors to one's position." (App. at A523). Contrasting his own "plain-spoken" style with the "traditionally conservative practice" of his opponent, Mr. Gary notes that "opposing attorneys may dislike this sort of rhetorical argument-making, but the process still exists as a unique opportunity to communicate with the jury as one person to another." (Id.).

do business in Mississippi, they've got to play by the same rules?" (App. at A356). TLGI counsel objected to these questions, but was overruled. (App. at A357).

53. During the remainder of voir dire, Mr. Gary took every opportunity to remind the potential jurors that Mr. Loewen and "his group" were from Canada, while plaintiffs and the potential jurors were Americans, acting as part of the American justice system. For example, Mr. Gary rarely referred to Mr. Loewen or TLGI without some mention of their Canadian citizenship. (See, e.g., App. at A356-57; A373, A383). At the same time, Mr. Gary asked the jury to confirm their belief in and commitment to the American justice system and the laws of the State of Mississippi. (App. at A329, A353, A365, A367).

54. Mr. Gary also used the voir dire process to begin identifying Mr. Loewen personally as the representative of the corporate defendants, LGI and LGII. In addition to the remarks cited above, Mr. Gary made reference to the fact that the suit was "against The Loewen Group, Ray Loewen, the group that he represents," or "The Loewen Group, Ray Loewen and his group," and asked potential jurors if they knew "Ray Loewen and his group out of Canada, the Loewen Group," and whether they would be uncomfortable returning a verdict for over $600 million dollars "against Ray Loewen and his group." (App. at A373, A377, A382, A388).[9]

55. As with O'Keefe's previous anti-Canadian advertising campaign, his counsel's repeated references to the Canadian citizenship of Mr. Loewen and his companies had the desired effect. One potential juror stated (in the presence of the remaining jury pool) her belief that foreign corporations *could not* be given a fair trial in Hinds County, while another stated that a foreign corporation *should not* receive a fair trial "because of special tax breaks that foreign

[9] Interestingly, this $600 million damages figure is the same figure that Mr. Gary had quoted in public, pre-trial remarks to the congregation of a large Hinds County African-American church as representing "the answer to his prayers." See ¶ 91, below.

corporations receive." (App. at A487-88). Amazingly, Judge Graves refused to excuse the latter juror for cause, forcing defense counsel to use one of its peremptory strikes to remove that juror. (App. at 495-96).

56. Plaintiffs' drumbeat of anti-Canadian remarks continued unabated throughout opening statements, sometimes cynically couched in insincere exhortations to the jury not to treat Mr. Loewen and "his group" any differently because they were Canadian. For example, the first attorney to address the jury, Michael Allred, immediately made the following remarks:

> I want to say this up front, and the defendants suggested this. This is not about Canada. I've traveled to that wonderful country. It has wonderful people, almost as fine as we have here in Mississippi.... so we're not against Canada. *We're just against a man who happens to live in Canada whose name is Ray Loewen...*

(Tr. at 12) (emphasis added).

57. Minutes later, however, Mr. Allred called upon the jury to condemn and punish Mr. Loewen, the foreign interloper, for allegedly preying upon poor Americans:

> Ray Loewen seeks to destroy competition... He wants to raise prices upon the backs of the poor people who need to bury their loved ones. That's his purpose. He does this in Mississippi, Louisiana, Tennessee, Pennsylvania, Canada.... At law, those are called fraud, breach of good faith, and it's 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 in the poorest state in our nation.

(Tr. at 38, 42).

58. Mr. Gary, who also opened for the plaintiffs, spoke at length concerning O'Keefe's American citizenship and his war service in the defense of "our country." (Tr. at 50-51). He then continued the vilification of Mr. Loewen:

> You see, you've got to understand Ray Loewen. It ain't about where he's from. It's about the man.... The evidence is going to show Ray Loewen will tell you one thing looking in your face, and no sooner than you turn your back, he'll stick it in you. That's Ray Loewen... Ray Loewen descended on the State of Mississippi and signed an extension of the agreement...You know, what Ray Loewen didn't understand is that when he decided to come to Mississippi and put this man... out of business... he was dealing with not only a man that went out and fought for his country, he was dealing with a fighter.

(Tr. at 54, 58).

59. At the same time that he built up O'Keefe's bona fides as a patriotic American, Mr. Gary continued to identify Mr. Loewen as personifying TLGI and its alien citizenship by reminding the jury that "the O'Keefe family just didn't start in Mississippi in 1990 like Ray Loewen did. [O'Keefe] started with his great-grandfather 130 years ago... in Ocean Springs, Mississippi." (Tr. at 49).

60. Mr. Gary's opening statement also contained an extensive reference to the letter sent from the Mississippi Attorney General to Reimann concerning potential violations of Mississippi consumer protection laws based upon its supposed failure to advertise its Canadian ownership. By continued references to this inconclusive, inflammatory, and ultimately irrelevant correspondence throughout the trial, plaintiffs quite literally invoked the power of the State of Mississippi and its citizenry against the Canadian intruders. For example, Mr. Gary characterized the Attorney General's letter as follows in his opening remarks:

> 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, this is to their lawyer. Y'all see that, this is to the Loewen Group up in Canada, and it says to them, "We're writing you on behalf of the Mississippi Attorney General's Office, Consumer Protection" – that's their people, that's not just Jerry, the people, members of the jury.

(Tr. at 61).

61. Mr. Gary concluded his opening statements by asking the jury to "say with your verdict to Ray Loewen, `no more, not in the State of Mississippi and hopefully nowhere else, but no more.'" (Tr. at 78).

62. During the body of the trial, Mr. Gary continued to harp ceaselessly and unnecessarily on Mr. Loewen's Canadian nationality, as contrasted with O'Keefe's American citizenship and war record. Mr. Gary's direct examination of Jerry O'Keefe was a paean to his fight against foreign aggressors during World War II, and featured the same references to the Japanese attack on Pearl Harbor that had appeared in O'Keefe's advertising campaign. See, e.g., Tr. at 2004-07.

63. Mr. Gary also emphasized the O'Keefe family's deep roots in Mississippi, as compared to the relatively recent arrival of "The Loewen Group out of Canada." (Tr. at 2034). After establishing that O'Keefe had been active in the local funeral trade for more than 45 years, Mr. Gary asked, irrelevantly but pointedly, "How long have Ray Loewen and his group been in this state and in this town?" (Tr. at 2026.)

64. Long after it was firmly established in the minds of the jury, Mr. Gary continued to hammer away at the wholly irrelevant fact of Mr. Loewen's nationality and the nationality of the TLGI. In the interest of brevity, the scores of gratuitous references to Mr. Loewen's citizenship set forth in the Notice will not be repeated here.[10] Suffice it to say that there are entire sections of the trial transcript in which references to events and people "up there in Canada," as opposed to "down here in Mississippi" or "here in America" appear on literally

[10] These references are collected in Appendix A to the Affidavit of Chief Justice Richard Neely. See also Notice, ¶¶ 62, 75, 76, 80, 81 (each listing multiple and irrelevant references to the Canadian nationality and headquarters of Mr. Loewen and TLGI).

every page, until Mr. Loewen's name became inseparably linked to foreign citizenship and, by inference, aggression and deceit.

65. Frequently, these references contrasted the supposedly unfair manner in which business is done in Canada to the "American way." See Tr. at 2043 (in which O'Keefe testified that he "traveled to Canada... to see if we couldn't work out something with the Loewen people, because there's room for everybody to live and work in Mississippi."); Tr. at 63, 65-66 (in which Mr. Gary, in his opening statement, describes a meeting "up at [sic] Canada" in which O'Keefe told Loewen that if they did not respond to his demands "he was going to have to sue them, the American way...," and that an executive from TLGI then "came down to Mississippi" where O'Keefe was "down there tending to his own business, going along with his lawsuit, the American way.")

66. Mr. Gary's constant attacks against the Canadian defendants and shameless boosterism of "the American way" reached their nadir during his cross-examination of Raymond Loewen. In an obvious attempt to portray Mr. Loewen as an aloof foreign tycoon living on the labors of his American employees, Mr. Gary criticized Mr. Loewen at some length for failing to spend more time in the State of Mississippi, and even for spending the majority of the year in his home country, Canada:

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

(Tr. at 5169). For additional references to Mr. Loewen's failure to travel from Canada to Mississippi, see Tr. at 5119, 5181.

67. Once again brandishing a copy of the Mississippi Attorney General's letter concerning Reimann's alleged failure to declare its Canadian ownership, Mr. Gary was allowed to read the entire letter to the jury for a second time, even though it was completely irrelevant to the controversy at bar and had, in any case, resulted in absolutely no action by the Attorney General. (Tr. at 5174). Mr. Gary asked Mr. Loewen if he was aware that "there are state laws in Mississippi that says [sic] you can't deceive people about ownership as it relates to state versus local," or about "local versus foreign," again needlessly underscoring the different nationalities of the parties and inaccurately inferring that Mr. Loewen had attempted to conceal his or his company's nationality from the public. (Tr. at 5171, 5174).

68. One of the plaintiffs' star witnesses at trial was Alfonzo M. "Mike" Espy, a prominent black politician. Secretary Espy, who served in the Mississippi state government as a Assistant Secretary of State and Assistant Attorney General for Consumer Protection, had also represented the people of Hinds County as the state's first black Congressman. In 1993, Secretary Espy was nominated by President Clinton to serve as the United States Secretary of Agriculture. On October 3, 1994, Secretary Espy resigned his cabinet post amid allegations that he accepted gifts from corporations that were subject to regulation by the United States Department of Agriculture. A. Devroy and S. Schmidt, *Agriculture Secretary Espy Resigns Amid Ethics Probe, ex-Congressman Will Leave to Fight for 'My Good Name'*, Washington Post, October 4, 1994, at A01.

69. Even after leaving government service, Secretary Espy was subject to significant statutory restrictions on his ability to appear for or give testimony on behalf of private parties.

Under the Ethics in Government Act, 18 U.S.C. § 207 (copy attached hereto as Exhibit 1), Secretary Espy was prohibited from giving testimony "in a court of the United States or of the District of Columbia" on a variety of issues that fell within his responsibilities as Secretary for periods of one year or two years after leaving office, and in some cases permanently. When he testified on behalf of the plaintiffs in the O'Keefe litigation on September 25, 1995, or less than one year after his resignation on October 4, 1994, Secretary Espy was still within each of these restrictive periods.

70. Secretary Espy had absolutely no knowledge of any of the facts of the case or of the parties' dispute, but was called only to establish the irrelevant and racially-charged fact that, in Secretary Espy's opinion, O'Keefe was not a racist – thus inferring that Mr. Loewen was.[11]

71. In addition, plaintiffs elicited irrelevant and inflammatory testimony from Secretary Espy regarding his experience in battling unscrupulous foreign corporations as both th Mississippi Assistant Attorney General for Consumer Protection and the United States Secretary of Agriculture in order to add the stamp of governmental approval to their nationalistic and race-based attacks against Mr. Loewen.

72. Mr. Gary first sought to use Secretary Espy's former activities as Mississippi's Assistant Attorney General for Consumer Protection to deepen the jury's hostility towards marauding foreign businesses. Under Mr. Gary's prompting, Secretary Espy described his duties in this manner:

> ESPY: If you – if you had been defrauded in some way, someone had come through town, blown through Mississippi and taken your money, if some elderly person had been abused in some way through the legal system or – or taken advantage of in the consumer market –

[11] The substance of this testimony is set forth in detail in Section II.B.3.b., below.

GARY: Companies overcharging?
ESPY: Companies overcharging, pharmaceutical companies, it was consumer fraud and scam. We would take the case. We would prosecute those who we think did it. We would get restitution, give the money back.

(Tr. at 1086).

73. Although Mr. Gary's direct examination concerning his government service established the fact that Secretary Espy had been appointed to the office of U.S. Secretary of Agriculture, he abruptly cut this line of biographical questioning off with an unrelated query in order to avoid discussing the Secretary's recent resignation.

GARY: And from the Assistant Attorney General's Office, you got into politics, and you went on to serve in the President's cabinet, is that correct?
ESPY: Yes, yes, I served as Secretary of Agriculture. I resigned my congressional seat in 1992 to – to serve with Bill Clinton as his Secretary of Agriculture.
GARY: How many brothers and sisters do you have?

(Tr. at 1089).

74. On cross-examination, Secretary Espy first acknowledged that as Secretary of Agriculture, he had "no small role" in dealings with other countries under NAFTA, and particularly in promoting the sale of American agricultural commodities to other NAFTA nations. (Tr. at 1100).

75. TLGI's counsel then asked Secretary Espy whether a xenophobic "Buy American" advertising campaign such as O'Keefe had mounted against Reimann and LGII would violate the cooperative spirit of NAFTA. (Tr. at 1101). Secretary Espy replied to this hypothetical question with an entirely unresponsive and apparently deliberate diatribe describing his alleged experience in defending American wheat farmers against unfair Canadian trade practices while serving as Secretary of Agriculture. Commenting directly upon a matter within

his responsibility during his tenure as a Cabinet-level official, Secretary Espy drew a bitter contrast between the allegedly predatory conduct of Canadian wheat traders, as compared to the fair and honest trade practices in which "we" – meaning Americans – believe.

> Well, we believe in free enterprise. We believe in the free flow of goods between countries, but it was also consistent with what I did as Secretary to make sure no one took advantage of the American people. In that respect, I was very involved in certain actions which restricted Canadian products into our market because they tried to undervalue, particularly – I don't know if you want to know, but you know, we thought that their wheat, the Canadian wheat, was underpriced. They would come in and flood the markets. Our people eat a lot of pasta, and they would not buy the American wheat. They would go for the cheaper wheat which was underpriced to take over the market, and then – then they would jack up the price, and that was not right consistent with what I've done in my life, try to protect people, protect the American market. We believe in free enterprise. We don't believe in being cheated.

(Tr. at 1101-02).

76. On re-direct examination, Mr. Gary exploited this improper testimony by questioning Secretary Espy about his opinion of the NAFTA treaty itself, eliciting testimony to the effect that "everybody in America didn't agree with it," and that in fact "a lot of people" "thought it wasn't fair to the American people." (Tr. at 1109).

77. After inaccurately implying that Secretary Espy himself had been responsible for signing NAFTA (Tr. at 1109), Mr. Gary asked whether, in Mr. Espy's opinion, the intent of NAFTA was that "people had to give their word that they were going to do what they said they would do." (Tr. at 1110).

> ESPY: Yes.
> GARY: It [NAFTA] didn't mean that because you were from Canada or from Mexico or from any other country you could sign it and have no intentions of living up to it, did it?
> ESPY: True.

(Id.).

78. These final comments drew both an objection from TLGI's counsel and a request to examine Secretary Espy further. Although the Court sustained the objection, it neither instructed the jury to disregard Secretary Espy's testimony nor allowed TLGI's counsel to attempt to repair the damage done by that irrelevant and inflammatory testimony. (Tr. at 1110).

79. Whether or not Secretary Espy's testimony amounted to a violation of the letter of the Ethics in Government Act, he clearly violated the spirit of that statute by providing partisan testimony about matters that were within his responsibility as Secretary of Agriculture just months after resigning from that position. These statements resulted in precisely the harm that the Ethics in Government Act was intended to avoid, by allowing Secretary Espy to misuse his status as a government official to imbue the plaintiffs' unlawful tactics with the credibility and apparent support of the federal government. This testimony ratified the plaintiffs' xenophobic message, clothing that message in the aura of authority surrounding a member of the President's cabinet.

80. In addition, the provisions of the Ethics in Government are significant in that they show that, although recently resigned from the federal government, Secretary Espy was still subject to substantial control by the United States government regarding his public appearances and testimony.

81. During his re-direct examination, Mr. Gary also took Secretary Espy through the irrelevant Attorney General's letter for a *third* time, once more emphasizing that the letter bore the "seal of the State of Mississippi" and falsely accusing Mr. Loewen and his companies of attempting to unlawfully conceal their nationality and controlling interest in Reimann. Driving the point home yet again for any juror who might not have grasped his heavy-handed

nationalistic and protectionist themes, Mr. Gary asked Secretary Espy answer the following rhetorical question:

> GARY: Why is it important for people, no matter whether you're from Canada or from any other country, to come into Mississippi and to do business and try to do business with a local company, you're a foreign company, and try to give the impression that you're something you're not.?
> ESPY: For that very reason. You can't give the impression that you're something [American] that you're not. If you are, you are; if you're not, you're not, and you should not try to misrepresent that you're not.
> GARY: Now, when you were with the state attorney's office, did you take these matters lightly?
> ESPY: Well, I'm very proud of my term there. We were very serious about enforcing the Mississippi Consumer Protection Act.
> GARY: Now – and when you wrote letters of this nature to put people on notice that you were going to be after them if they didn't shape up, were you serious about that?
> ESPY: Extremely serious.

(Tr. at 1107-08).

82. Thus, plaintiffs improperly used Secretary Espy's status as a government official to invoke both the power of the State of Mississippi and the United States government on their behalf and against Mr. Loewen.

83. The plaintiffs returned repeatedly to their anti-Canadian, pro-American theme in their closing arguments. Mr. Gary described O'Keefe as a man who fought for the American jury system in World War II, and who would still "stand up for America, and he has." (Tr. at 5544). Picking up this theme again towards the end of his remarks, Gary reminded the jury that O'Keefe "fought, and some died for, the laws of this nation, and [Loewen is] going to put him down for being American." (Tr. at 5588).

84. Mr. Gary also repeated Secretary Espy's testimony concerning alleged Canadian trade practices verbatim, comparing Mr. Loewen and TLGI to Secretary Espy's tale of rapacious

Canadian wheat traders in the manner in which TLGI allegedly bought Mississippi funeral homes, and then "no sooner than they got it, they jacked up the prices down here in Mississippi." (Tr. at 5587-88). Increasing the nationalistic fervor of his remarks, Mr. Gary characterized the letter from the Mississippi Attorney General's Office as "saying, 'Look, I don't care about your coming, no matter where you come from, but don't come down here claiming, don't come claiming to be local when you know you're foreign, because that's against the law.'" (Tr. at 5551).

85. Echoing Secretary Espy's testimony about his career protecting Mississippians from foreign interlopers who had "come through town, blown through Mississippi and taken your money," Mr. Gary described Mr. Loewen as rampaging through Hinds County "like gang busters. Ray came sweeping through, took over Wright & Ferguson, and Mr. Wright told you the first thing they did was raise prices." (Tr. at 5548).

86. Mr. Gary again donned the false halo of impartiality, while in fact urging the most radical partiality, by piously proclaiming that the lawsuit had nothing to do with nationality. "He [Secretary Espy] didn't make an issue about Canada and America. This 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." (Tr. at 5586-87).

87. As with all of his remarks to the jury, Mr. Gary's closing was littered with unnecessary references to Mr. Loewen's nationality. Among other things, Mr. Gary claimed that the American owners of Reimann, after selling their company to LGII, were treated worse than dogs, not receiving so much as a pat on the back from "those people out of Canada." (Tr. at 5570). Mr. Gary also continued to direct caustic and chauvinistic comments at Mr. Loewen

directly, stating that while David Reimann "was down here on the firing line doing the work, making the profits, Ray Loewen was up there spending the money." (Tr. at 5570).

88. Gary capped his closing arguments with yet another comparison between the conduct of Mr. Loewen and his Canadian-owned companies and the Japanese sneak attack on Pearl Harbor. (Tr. at 5593-94). Recounting once again for the jury how the brave young O'Keefe had responded to that attack by immediately attempting to join the American armed forces, Mr. Gary stated that O'Keefe was motivated in his lawsuit by the same "pride in America" that led him to volunteer to fight the Japanese in 1941. (Id.).

89. The final shots in plaintiffs' war of words against Mr. Loewen and Canada were fired during the punitive damages phase of the trial. Mr. Gary told the jury that the purpose of such damages was to "make sure that this doesn't happen to the citizens of Mississippi or the citizens of this nation again," and urged them to award heavy punitive damages so that "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, [and]... take their properties." (Tr. at 5797). "One billion dollars, one billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may not ever get this chance again. And you're not just helping the people of Mississippi, but you're helping . . . families everywhere." (Tr. at 5809). As shown by the resulting $400 million punitive damages award, this direct appeal to American nationalism and anti-Canadian sentiment had its desired effect.

b. Racial Bias

90. In addition to the prejudicial errors relating to the anti-Canadian bias, the O'Keefe litigation was also marred by the plaintiffs' cynical manipulation of racial issues to sway the

majority-black jury against the white defendants in general, and against Mr. Loewen in particular. Indeed, plaintiffs and their counsel were not alone in this effort. Judge Graves made a number of comments during the trial that indicated not only his acute awareness of plaintiffs' tactics, but also his express approval of them.

91. Mr. Gary began his campaign to enlist local black support for his client's cause even before the trial started, when he spoke at the Addison United Methodist Church, a Hinds County church with a large black congregation. (App. at A397, A741). Mr. Gary addressed the congregation from the pulpit in his capacity as plaintiffs' counsel, advising them that his "prayers would be answered" by a verdict of $600 million or greater in the case. (App. at A741). In response, the minister of the church and a number of its black members appeared repeatedly at the trial in an ostentatious show of support for O'Keefe. (App. at A741).

92. On several other occasions during the trial itself, Mr. Gary addressed the Hinds County black community as a guest on a radio talk show popular in that community. (App. at A742).

93. Both of these direct, extra-judicial appeals to the black community occurred despite an order from Judge Graves barring counsel from discussing the case in public. (Tr. at 1123). Although TLGI's counsel complained of this conduct both during and after the trial, Judge Graves did nothing to prevent it or to address the prejudice flowing from this misconduct (App. at A742).

94. During opening statements, plaintiffs' counsel Michael Allred began the process of racial polarization by reminding the eight blacks on the 12-person jury that churches and funeral homes in Mississippi still tended to be segregated by race, and that "these businesses that Loewen bought were those that served primarily the white community." (Tr. at 16).

95. In his opening statement, Mr. Gary immediately began to position O'Keefe, the white "son of slave owners" (App. at A521) as being free from racism, and in fact sympathetic to the plight of blacks in the American South. Referring to O'Keefe's service as mayor of Biloxi, Mississippi during the "turbulent" 1960s and 1970s, the height of the American civil rights movement, Mr. Gary advised the jury that "you need to know that not only did he stand up for what was right now, but he stood up for what was right then when he said to the Ku Klux Klan [an American secret society of violent white racists] and Dr. [Martin Luther] King and all them, he didn't want them to march for good reasons. He told them "No, you won't get a permit [to conduct a demonstration] in my city." (Tr. at 53).

96. Thus, in the first minutes of his opening remarks, Mr. Gary invoked two of the most racially galvanizing images in the American South – the Ku Klux Klan and Dr. Martin Luther King – and ranged his client with Dr. King in the historic struggle for civil rights.

97. Plaintiffs continued this blatant strategy of portraying O'Keefe as the non-racist white litigant, effectively smearing Mr. Loewen with a charge of racism. Pursuant to this strategy, plaintiffs called several witnesses whose sole purpose was to testify that O'Keefe was not a racist.

98. The first of these witnesses was Mike Espy. After testifying at length about his struggle to become Mississippi's first black Assistant Attorney General and first black elected to Congress, Secretary Espy was asked the following, wholly irrelevant question: "As an African-American in Mississippi trying to go out and be the best that you could be to represent your people or what have you, what did Jerry bring to the table that inspired you from that respect?" In response, Espy noted that he had encountered racial prejudice in his political career, but that

O'Keefe "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).

99. Plaintiffs also called Earl Banks, another prominent local black politician, to offer further proof of O'Keefe's lack of racial prejudice. Mr. Banks provided irrelevant testimony concerning racial segregation in the funeral service industry, and described O'Keefe as being "unusually" willing to strike partnerships and do business with black funeral home operators and families. (Tr. at 1118-19).

100. This barrage of inflammatory testimony about O'Keefe's lack of racial animus effectively labeled Mr. Loewen, the white Canadian, as a racist. In order to avoid conceding that tacit but highly effective accusation by a lack of response, TLGI sought to call two witnesses from the National Black Baptist Convention, with which it had just signed an agreement regarding funeral services, to show that it too did business with black organizations and individuals.

101. In response to Mr. Gary's objection to this testimony, Judge Graves made several extraordinary statements that revealed his complete appreciation of the illegal strategy of race-based advocacy that plaintiffs' counsel had been pursuing.

> Well, I'm as sensitive to racial issues, Mr. Gary, as anyone, believe me, but from the very first – well, actually, before the trial started, race has been injected into this case, and nobody has shied away from raising it when they thought it was to their advantage... I mean, that's been happening on the plaintiffs' side. Now, maybe there's other motivation for doing it, but it certainly looks like, in the vernacular of the day, the race card[12] has already been

[12] As noted in the Notice of Claim, the phrase "the race card" was immortalized by the sensational murder trial of O.J. Simpson, in which the defendant's flamboyant counsel won an acquittal from a majority-black jury in the face of overwhelming evidence by portraying one of the investigating detectives as a racist, effectively turning the trial into a referendum on racial issues. See *Simpson Lawyer Says Defense Overplayed Race*, Reuters World Service, Oct. 3, 1995. Significantly, the O'Keefe litigation was tried in the glare of the lurid publicity surrounding O.J. Simpson trial, which ended in a controversial and racially divisive acquittal on October 5, 1995, in the midst of the O'Keefe trial.

> played.... So all I know is I know what's going on, and I know the jury knows what's going on. So if everybody wants to keep it going on, the race card has been played, so everybody's got one in their [inaudible], apparently. [Speaking to Mr. Gary] *Just enjoy it. It's a great day. We've got black folks. They want to bring black folks in.... Now we all know what's going on. It's on the table.*

(Tr. at 3595-97) (emphasis added).

102. By these remarks, Judge Graves openly acknowledged and expressly condoned the plaintiffs' use of "the race card" to affect the jury's view of the litigants. More importantly, Judge Graves overtly aligned himself with Mr. Gary, a black lawyer, against Mr. Loewen and his white counsel. Most telling is Judge Graves' use of the phrase "we" to describe to himself and Mr. Gary in stating that "[w]e've got black folks" to describe the prior testimony of plaintiffs' witnesses such as Secretary Espy and Earl Banks, while referring to Mr. Loewen and his counsel as "they" in discussing TLGI's attempt to call witnesses from the National Black Caucus. Judge Graves closed this frank expression of judicial partisanship by improperly urging Mr. Gary to "enjoy" the "great day" when white litigants such as O'Keefe and Mr. Loewen would vie with each other for the favor of black jurors by producing the most influential black witnesses to speak on their behalf.

103. On at least one other occasion, Judge Graves made a telling remark from the bench that revealed his obvious race-consciousness and orientation toward plaintiffs' counsel. Before trial began on the morning of October 24, 1995, Judge Graves advised counsel that he had received a telephone message from Baldwin-Lee, a Hinds County funeral home that served a predominantly white clientele. Judge Graves went on to comment: "I don't know why anyone from Baldwin-Lee would have been calling my house.... I thought there was a black market and a white market, and obviously, you know which one I would fall in." (Tr. at 5010-11).

104. Mr. Gary attempted to turn TLGI's mention of the National Baptist Convention contract to plaintiffs' advantage by claiming, without any evidentiary support whatsoever, that the contract had been only a means to defraud the black membership of that organization by agreeing to sell them burial vaults at inflated prices, and then refusing to allow the black customers to be buried through the allegedly white-oriented funeral homes that TLGI controlled. "To add additional insult to injury, ladies and gentlemen of the jury, 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 5799-5800).

105. The effect of this toxic compound of jingoistic nationalism and open racial appeals was obvious in the jury's runaway verdict of $100 million in compensatory damages and $400 million in punitive damages. If any further proof were needed, it was supplied by the jury foreman himself, who publicly announced after the trial 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." N. Bernstein, *Brash Funeral Chain Meets Its Match in Old South*, New York Times, Jan. 27, 1996, at A1. The jury foreman further described Mr. Loewen as "this Canadian who didn't know anything about blacks, trying to say he was creating jobs for these black people he loved so much. But it looked to us like he was ripping them off." C. Loose, *Black Churches Selling Out, Funeral Home Owners Say; Pact with Firm is Threat*, Washington Post, August 30, 1997, at A1.

C. Verdict, Appeal, and Settlement

106. The jury initially returned a verdict of $260 million that, according to the verdict sheet, represented multiple damage awards for the same injuries. (App. at A651-58). Because

Judge Graves failed to inform the jury that the damages phase of trial would be bifurcated into compensatory and punitive damages segments, the jury intended this initial verdict to cover "both loss [sic] damages ($100,000,000 million) and punitive damages ($160,000,000 million)." (App at A659; see Tr. at 5752-53)

107. Rather than declare a mistrial based upon this improper verdict, or poll the jury to clarify their confusion and determine their intent – both of which TLGI's counsel requested that he do – Judge Graves unilaterally "reformed" the jury's combined compensatory and punitive damages verdict to a compensatory damages verdict of $100 million. (Tr. at 5742-44). He then advised the jury that, while he "accepted" its $100 million compensatory damages verdict, the jury would have to consider the issue of punitive damages again after further evidence on that issue. (Id.). In making these remarks, Judge Graves made it plain to the jury that he intended to rush through the entire punitive damages phase of the trial in just one day. (Tr. at 5754: "My expectation is that we're going to complete that today, and I'm going to make every effort, believe me, to ensure that that process is completed today.")

108. After this limited presentation of evidence, the jury was exposed to yet another round of inflammatory rhetoric from plaintiffs' counsel. As before, Mr. Gary used Mr. Loewen as personifying, and in fact interchangeable with, TLGI. See Tr. at 5797 ("Now, you think that Ray Loewen would sell all of that business, all of those companies... for $411 million dollars?); Tr. at 5801 ("[a high punitive damages verdict will] say to Ray Loewen, 'No more, no more.'"). Once again, Mr. Gary touched on racially divisive issues, accusing TLGI of attempting to make "billions of dollars" by buying black cemeteries away from black churches and reselling them. See Tr. at 5800 ("They want to take the unimproved cemeteries, as he said, black cemeteries... they're given to the churches by great-grandfathers and grandfathers, they want to take them, and

he's going to get them for nothing, and then resell them, and they're going to make billions of dollars").

109. Fueled by this additional appeal to their prejudices, and guided by Judge Graves' tacit instruction that the previous $160 million punitive damages verdict was insufficient, the jury quickly returned a verdict of $400 million in punitive damages.

110. Mr. Loewen recalls that his first reaction to the jury's verdict was to lower his head into his hands in shock and mortification. Soon, however, he was actively involved in TLGI's attempts to appeal and reverse that inequitable verdict.

111. The procedural history of TLGI's struggle to gain appellate review of the tragedy of discriminatory treatment that occurred in the O'Keefe trial is set forth at length in the Notice of Claim and affidavits thereto, as well as in the Memorial of TLGI, and will not be repeated here. As Chief Executive Officer and Chairman of TLGI, Mr. Loewen participated in the company's numerous attempts to obtain funding for the $625 million supersedeas bond, as well as discussions concerning TLGI's extremely limited range of options in the seven desperate days between the Mississippi Supreme Court's sudden lifting of the stay of execution on the $500 million judgment and the date on which plaintiffs could begin to execute on that judgment.

112. During this critical period, Mr. Loewen met with bankers across the United States and Canada, seeking a way to post the enormous bond amount without bankrupting the company. Ultimately, Mr. Loewen concurred with the conclusion that further judicial appeals would be impractical, and that the only viable option available to TLGI was to settle the claim on the best terms possible, given its severely compromised position.

113. Mr. Loewen personally believed that a settlement of the claim, although coerced and wildly unfair, was preferable to bankruptcy. Specifically, Mr. Loewen felt that bankruptcy

would effectively "break the company," injuring its reputation and ability to obtain financing such that it would never recover. In contrast, Mr. Loewen hoped that a settlement would allow the company to live on and continue to operate as an acquisition company, bruised but commercially viable.

114. Aside from these compelling financial considerations, several additional considerations increased the pressure upon Mr. Loewen to favor settling the O'Keefe litigation rather than throw TLGI into bankruptcy. As TLGI's Chairman and personal spokesman to many of the company's shareholders, Mr. Loewen felt both a fiduciary and a moral duty to those shareholders to keep the company alive and out of bankruptcy if at all possible, so that they might someday recover the value of their investments.

116. In addition, Mr. Loewen understood that bankruptcy would leave the many families from whom TLGI had made "succession-planning" acquisitions as unprotected creditors of the corporation, who would likely receive little if any of the funds due them. To have simply walked away from these business partners would have been contrary to the corporate culture that Mr. Loewen had sought to instill in TLGI from its earliest days.

117. For all of these reasons, as well as the stark financial consequences of bankruptcy, Mr. Loewen supported TLGI's decision to attempt to settle rather than declare bankruptcy. The company eventually negotiated a $175 million settlement that was finalized literally within hours of the time at which TLGI would have been forced to declare bankruptcy in order to avoid execution of the $500 million judgment.

D. Aftermath: The Effect of the Coerced Settlement on Mr. Loewen

118. In the wake of the O'Keefe litigation and the ensuing settlement, both Mr. Loewen's personal finances and those of the company he founded over 30 years ago have been shattered. First, and most obviously, the value of Mr. Loewen's investment in TLGI dropped precipitously upon news of the verdict. As noted in the attached Exhibits, TLGI's stock fell from $40.00 per share on October 31, 1995, the day before the verdict was announced, to $18.62 on January 25, 1996, the day before the announcement of the settlement agreement. Even after the settlement was announced, TLGI's stock only recovered to the $30 range, representing the continuing effects of the coerced settlement in depressing the value of that stock.

119. As of October 31, 1995, Mr. Loewen owned 6,057,543 shares of TLGI common stock, as well as options to purchase an additional 850,000 shares. At the time, TLGI had roughly 48 million shares of stock outstanding. Due to the controlling nature of his block of stock and his position as a corporate officer and insider, U.S. and Canadian securities regulations prohibited Mr. Loewen from selling his shares in the wake of the O'Keefe verdict. See, e.g., 15 U.S.C. § 78p; Securities Act, R.S.O. § 76 (Can.) (restricting ability of corporate officers, directors, and holders of more than 10% of the stock of a corporation to sell shares of stock). Thus, unlike the average investor, Mr. Loewen was unable to mitigate his damages by selling off any part of his investment in the company during the long and steep slide in the stock's value. [13]

120. On the contrary, the banking community and other investors urged Mr. Loewen to purchase *additional* shares of stock as a sign of confidence during this dark period, and in an attempt to restore the confidence of other investors and banks. Mr. Loewen responded to this

[13] Mr. Loewen's wife, Anne, also owned 2,254,838 shares of TLGI stock, which she was similarly unable to sell.

call by borrowing $145 million to purchase an additional 4,015,325 shares of TLGI stock over the next three years, securing the loan with his original 6 million shares in the company.[14]

121. During this same period, Mr. Loewen waived his right to a salary and bonus, which averaged roughly $1 million per year. Instead, and in a further effort to help TLGI through its financial crisis by decreasing expenditures, increasing earnings per share, and showing continued confidence in and leadership of the company, Mr. Loewen accepted options on additional shares of TLGI stock in lieu of his salary.

122. Mr. Loewen lost virtually all of his holdings in TLGI on November 2, 1998, when the TLGI's stock price fell so low that the Canadian Imperial Bank of Commerce seized 10,062,125 of Mr. Loewen's shares to satisfy the loans he had taken out to purchase the additional 4 million shares after the O'Keefe verdict.

123. In October 1998, after it became apparent that the bank would seize control of his shares, Mr. Loewen was dismissed from his position as TLGI's Chief Executive Officer and reduced to the "co-Chair" of its Board of Directors. He was forced to resign as co-Chairman on January 22, 1998, and ultimately forced from the Board entirely on April 12, 1999.

124. All of Mr. Loewen's stock options were cancelled in December, 1998, 45 days after he lost his employment with the company. At the same time, Mr. Loewen was deprived of the cash investments he had made in other TLGI incentive and benefits programs in the years prior to the O'Keefe verdict.

[14] Ironically, Mr. Loewen was held up as the human symbol of TLGI by two different parties with very different agendas. Plaintiffs' counsel portrayed Mr. Loewen as personifying all that was allegedly evil, greedy, and vicious about TLGI, while the company's bankers pointed him out to investors as TLGI's stout helmsman in the storm that followed the verdict.

125. Today, Mr. Loewen is the record holder of 10,738 shares of TLGI common stock, valued at roughly $10,000.

126. As is typical in the wake of such a precipitous drop in stock value, the O'Keefe verdict also spawned a number of securities lawsuits against both TLGI and Mr. Loewen personally. These actions, which are still pending, continue to place a drain upon Mr. Loewen's time and energies.

127. In addition to the loss of the value of his investment, Mr. Loewen and TLGI suffered the loss of crucial members of the company's senior management team. Due to the relatively unglamorous nature of the funeral services business, it is often necessary to offer above-average compensation, including stock option plans, in order to attract and hold top managers and executives. In the wake of the O'Keefe settlement and its depressing effect on both TLGI's stock price and company morale, TLGI lost the services of key executives who had been instrumental in the company's success in the years before the O'Keefe litigation. Some of these linchpin employees were overcome by the stress of attempting to right the business after the O'Keefe litigation, while others were hired away by competitors. In each case, Mr. Loewen found himself unable to replace these essential executives due to the pall that hung over TLGI in the wake of the Mississippi verdict, and the company's sudden inability to offer the necessary type of compensation packages.

128. As indicated by his inability to either hold his top management team together or to recruit replacements for those who abandoned the company, Mr. Loewen also suffered severe and lasting injury to his reputation as a businessman and a man of personal integrity. By deliberately focusing the jury's enmity and national prejudice on Mr. Loewen, plaintiffs' counsel ensured that every deceitful and bigoted act or motive ascribed to TLGI would be personally

attributed to Mr. Loewen. From the opening minutes of the trial, in which he was vilified as a man "who would build rich fortunes upon the misery and the poverty of burying loved ones of the people in the poorest state in our nation," and who "will tell you one thing looking in your face, and no sooner than you turn your back, he'll stick it in you," to the post-trial comments of the jury foreman who ridiculed him as an inept, dishonest, and racist "Canadian politician," Mr. Loewen was the subject of ceaseless scorn and invective. The jury's outrageous verdict only served to confirm and draw attention to these criticisms. Due to the Mississippi Supreme Court's arbitrary refusal to reduce the amount of the appeal bond, Mr. Loewen was denied the opportunity to rebut these allegations and rebuild his reputation by a successful appeal.

129. For a businessman at Mr. Loewen's level – who acquires financing, attracts business partners, employees and investors, and negotiates agreements based largely on his reputation for business acumen, trustworthiness, and success – little could be more devastating than the verdict in the O'Keefe litigation.

III. STATEMENT OF THE LAW[15]

A. Governing Law

130. NAFTA's express terms dictate that disputes arising under Chapter 11 shall be decided under the language of the Agreement itself and applicable rules of international law. NAFTA Article 1131(1). Thus, the controlling legal standard in this claim springs primarily from the language of Chapter 11 itself.

[15] As with its Statement of Facts, many of the points of law pertinent to Mr. Loewen's claim are identical to those pertaining to TLGI's claim. Thus, and to avoid repetition of these common themes, Mr. Loewen incorporates herein by reference those elements of TLGI's legal arguments not otherwise set forth in this section that set forth these common themes.

131. The treatment to which Mr. Loewen was subjected during the O'Keefe litigation violated at least three substantive NAFTA provisions: Article 1102, which required the United States to accord to Mr. Loewen, as a foreign investor, no less favorable treatment than it accords to its own investors; Article 1105, which required the United States to accord to TLGI, as an investment of Mr. Loewen's, treatment in accordance with international law, including fair and equitable treatment and full protection and security; and Article 1110, which prohibits any signatory party from the direct or indirect expropriation of an investment, or any measure tantamount to such expropriation, except where these measures are taken for a public purpose, on a non-discriminatory basis, and in accordance with due process of law.

132. This Tribunal need therefore look no farther than the plain language of NAFTA for a clear and concise rule against which to measure the treatment afforded Mr. Loewen in the Mississippi courts. This rule is founded upon the twin standards of equity and non-discrimination, requiring the signatory governments to provide, and to guarantee the provision of, fair, equal, and proportionate treatment to each others' investors and investments. See NAFTA Implementation Act, Statement of Administrative Action, H.R. Doc. 103-159, 103d Cong., 1st Sess., v. 2 (1993) ("Statement of Administrative Action"); L. J. Herman, *Settlement of International Trade Disputes – Challenges to Sovereignty – A Canadian Perspective*, 24 Can.-U.S. L. J. 121 (1998) (describing NAFTA Chapter 11 obligations as "broad in scope," including the obligation to provide nationals of other NAFTA signatories with "fair and equitable treatment").

133. Given NAFTA's fundamentally equitable premise and incorporation by reference of established international law principles, it is not surprising that those principles are wholly in accord with NAFTA's requirement of fair and non-discriminatory treatment among nations and

their investors. For example, the Restatement (Second) of Foreign Relations Law of the United States § 166(1) (1965) ("Restatement"), states clearly that discrimination against an alien because of his nationality or because he is an alien departs from the international standard of justice. As indicated in the Restatement, the United States has long championed this basic precept of non-discrimination, which has in turn been successfully invoked against it in prior arbitrations. See Restatement § 165 reporter's note 1; Norway v. United States, Proceedings of the Tribunal of Arbitration (1922), 17 Am. J. Int'l. L. 362, 383-93 (1923).

134. It is an equally well-established principle of international law that a trial or other judicial proceeding that will affect the rights or property of an alien must be tried fairly and before an impartial tribunal. See, e.g., Restatement §§ 181, 182 (under international standard of justice, aliens must receive fair treatment during trial or other proceeding to determine their rights and liabilities; listing the first factor relevant to determining fairness of proceeding as "whether the alien has had the benefit of an impartial tribunal or administrative authority").

135. The United States has not been alone in its willing adoption of this requirement that civilized nations treat each others' citizens at least as well as they treat their own citizens and citizens of any other nation. Indeed, such "national treatment" provisions are a standard part of international trade and investment treaties that precede NAFTA. See, e.g., Model U.S. Bilateral Investment Treaty, art. II; Canada-United States Free Trade Agreement, January 2, 1988, art. 1602, reprinted in 27 I.L.M. 281 (1989).

B. Mr. Loewen's Right and Ability to Bring This Claim

1. Standing

136. Mr. Loewen has standing to bring this claim against the United States under NAFTA Articles 1116 and 1117. Article 1116 provides that an "investor of a Party" may submit a claim for arbitration based upon another party's breach of its obligations under NAFTA Chapter 11 that has caused direct harm to the investor. Article 1139 further defines an "investor" as "a national or enterprise of a party that seeks to make, is making, or has made an investment." Here, Mr. Loewen is a Canadian national who has made an investment and has been directly and personally harmed by the United States' breach of its obligations under NAFTA Chapter 11.

137. Mr. Loewen also has standing to bring this claim under NAFTA Article 1117, which allows an investor of a party to submit a claim for another party's breach of its NAFTA Chapter 11 duties on behalf of an enterprise of another party that the investor owns or controls either directly or indirectly. Here, Mr. Loewen is a Canadian investor who brings this claim for the United States' breach of its obligations under Chapter 11 that resulted in injury to LGII, TLGI's American subsidiary and another named defendant in the O'Keefe litigation. LGII is an enterprise of the United States that Mr. Loewen owned or controlled during the relevant period through his ownership or control of a controlling block of the stock of TLGI, which in turn owned 85% of LGII.

138. Significantly, Article 1117 permits both TLGI and Mr. Loewen to recover for damages to LGII due to the United States' breach of its obligations under NAFTA. See NAFTA Articles 1117, 1139 (allowing an "investor" to recover for injuries to an enterprise of another signatory party owned or controlled by the investor; defining "investor" to include both natural persons and enterprises); see also D. H. Price and P.B. Christy, *Overview of the NAFTA*

Investment Chapter, printed in *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas* 165, 174 (Judith H. Bello, et al., eds. 1995) (noting that Article 1117 "permits the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment").

139. Finally, and of equal importance, is Mr. Loewen's firm equitable standing to bring this claim. As discussed below, Mr. Loewen has a unique entitlement to recover for injuries to himself and to his investment in TLGI, not only because of his prominent position in the company as its founder, Chairman, Chief Executive Officer, and major stockholder, but also because, as the focus and human target of the plaintiffs' attacks, he personally experienced and was damaged by the nationalistic and racial animus at issue. Simply put, if Mr. Loewen does not have standing to bring this claim, then no investor ever will.

2. NAFTA's Procedural Notice, Negotiation, and Timeliness Requirements

140. Mr. Loewen has fully satisfied the notice, negotiation, and timeliness requirements for a claim under NAFTA Chapter 11. Article 1119 requires a potential claimant to give the signatory party notice of its intent to submit a claim at least 90 days before filing the claim. As documented in Exhibit G to the Notice of Claim, Mr. Loewen gave the United States proper notice of his intent to file this claim on July 29, 1998, or more than 90 days prior to the October 30, 1998 filing date of this claim.

141. As further shown by Exhibit G to the Notice of Claim, Mr. Loewen has attempted to settle this claim with the United States through negotiation as required by Article 1118. By letter dated September 25, 1998, Mr. Loewen and his counsel offered to meet with the United

States concerning this claim. Although the parties did subsequently meet to discuss a possible settlement, those discussions were not productive.

142. Finally, Mr. Loewen timely filed this claim within the three-year claims period established by Articles 1116 and 1117. Both of these Articles require that claims brought thereunder be filed within three years of the date on which the claimant first learned, or should have learned, of both the respondent's breach of its duties under NAFTA and the harm resulting to the claimant therefrom. Here, the date on which Mr. Loewen first learned or could reasonably have learned of his injury arising from the travesty in the Mississippi courts was November 1, 1995, the date on which the jury returned its verdict on compensatory damages. Mr. Loewen submitted this Notice of Claim on October 30, 1998, or less than three years thereafter.

3. Lack of Waiver

143. The United States may argue that TLGI's settlement of the O'Keefe litigation before bringing this claim acts as a waiver of any right to recovery in this forum. Any such contention would be without merit as a matter of both law and equity.

144. As a matter of law, a claim under NAFTA is separate and distinct from any underlying claim that, as here, may have been the cause of or contributed to the NAFTA violation complained of. As explained in the affidavit of Sir Robert Jennings attached to the Notice of Claim as Exhibit A, this claim is not an attempt to appeal the O'Keefe decision, but an entirely different claim, under different law and against a different party, to which the events of the O'Keefe trial form only the compelling factual background. Notice of Claim, Exhibit A, at 3. Mr. Loewen and TLGI could not and have not brought this claim against O'Keefe and his

lawyers under NAFTA. Rather, the breaches of duty complained of are the responsibility of the United States.

145. For this reason, the settlement agreement in the O'Keefe matter does not waive any remedies that Mr. Loewen may have against the United States under NAFTA. Indeed, Mr. Loewen was not a party or signatory to the settlement agreement, and so could not possibly have waived any of his personal rights thereunder.

146. Further, as a matter of equity, it would be grossly unfair to hold that where, as here, an alien is trapped in an isolated and hostile jurisdiction, denounced and attacked because of his citizenship and alien status, and forced to pay an exorbitant settlement fee in order to avoid bankruptcy, his mere fact of choosing the lesser of several disastrous alternatives will estop him from seeking redress for his mistreatment. If a mob of twelve Mississippians had set upon Mr. Loewen on the back roads of Hinds County and, out of a hatred of foreigners, threatened to burn his home or lynch him if he did not pay them money, the United States would not be heard to say that his agreement to pay the ransom was a waiver of his right to make a claim under NAFTA. Here, the actions of the Mississippi jury and judiciary are no less culpable than the hypothetical mob, and perhaps more so, because they were taken under the banner of state authority and through the process of its courts.

4. Equitable Considerations Affecting Mr. Loewen's Standing and Right to Redress

147. Even beyond his full compliance with NAFTA's legal standing and pre-filing requirements, Mr. Loewen has particularly strong standing to bring his claim under basic principles of equity and other established standards of international law.

148. Although the plain language of NAFTA grants every "investor" the right to bring a claim under Chapter 11, this Tribunal need not reach the question of whether every shareholder of every company damaged by the discriminatory acts of a foreign state has standing to invoke Chapter 11's remedies. This is because Mr. Loewen's unusual prominence in both TLGI and the O'Keefe litigation give him an unmatched and uniquely strong right of redress.

149. As demonstrated by the facts set forth above and in the Notice of Claim, Mr. Loewen was the founder, Chairman, Chief Executive Officer and largest shareholder of TLGI during the events in question. He was not merely an institutional investor or a small stakeholder. Rather, to the extent that any one person could be, Mr. Loewen *was* TLGI.

150. Because of his prominence within the company, plaintiffs' counsel deliberately targeted Mr. Loewen as the personification of TLGI's Canadian citizenship, as well as its alleged racism, greed and dishonesty. Mr. Loewen is the *only* claimant before this Tribunal having *personally* suffered the kind of xenophobia and discrimination that NAFTA Chapter 11 was designed to prevent. For six weeks in the Fall of 1995, Mr. Loewen sat in the Mississippi courtroom and upon the witness stand, exposed to the harsh invective of plaintiffs' counsel and the open animus of the judge and jury. For three years thereafter, Mr. Loewen struggled to rebuild his company, his fortune, and his reputation. During this time, Mr. Loewen's ability to mitigate his losses by selling off shares was severely restricted not only by securities regulations, but also by his sense of moral obligation to TLGI's shareholders. No "ordinary" shareholder could claim to have endured these conditions.

151. NAFTA expressly provides for claims by shareholders. In addition, these facts show that, if *any* shareholder has a right of action under NAFTA Chapter 11, Mr. Loewen is that shareholder. His claims are not distant and hypothetical. His damages were and will remain a

matter of his life's history, not mere projections on a chart. Thus, to deny Mr. Loewen standing to seek redress for his damages would be contrary to both the letter and equitable spirit of NAFTA Chapter 11.

C. NAFTA Violations

1. Article 1102 – Discrimination

152. NAFTA Article 1102 provides in pertinent part that:

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

153. Article 1102 thus "sets out the basic non-discrimination rule" that requires each NAFTA signatory "to treat NAFTA investors and their investments no less favorably than its own investors and investments." Statement of Administrative Action at 120. Significantly, the drafters of Article 1102 were at pains to specifically prohibit a signatory state from requiring an

investor of another state to sell or otherwise disgorge an investment in that state because of the investor's foreign nationality.

154. There can be little doubt that Mr. Loewen and TLGI were subjected to invidious, pervasive discrimination throughout the O'Keefe litigation based upon their Canadian citizenship. As noted in the affidavit of Sir Robert Jennings, "[t]he 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"... was the weapon by which counsel for the plaintiffs was able to bring about the bizarre verdict of the jury." Notice of Claim, Exhibit A, at 4; see also Affidavit of Chief Justice Richard Neely, copy attached to Notice of Claim as Exhibit B, at 3 (concluding that "the Defendants in [the O'Keefe litigation] were subjected to invidious discrimination because they were Canadians").

155. The conclusions of these respected members of the American and English bars are amply supported by the trial record. Any fair reading of the transcript in this case can lead only to the conclusion that plaintiffs and their counsel deliberately inflamed the parochial prejudices of the jury, alternately rousing patriotic fervor in support of Jerry O'Keefe, the self-styled American war hero and defender against foreign aggressors, while inciting anger, envy, and fear against "Ray Loewen and his group" who came sweeping down from Canada "like gangbusters" to plunder the defenseless people of Mississippi. There can be no doubt that plaintiffs' ceaseless references to Mr. Loewen's Canadian citizenship and residency had their desired effect upon the jury, based both upon the wildly disproportionate size of the verdict and the post-trial comments of the jury foreman. Neither can there be any doubt that this misconduct violated the provisions of NAFTA Article 1102.

156. The abuses that occurred during the O'Keefe litigation are also contrary to "applicable rules of international law," to the extent any reference to such principles is necessary in light of Article 1102's clear prohibition against discrimination. NAFTA Article 1131(1). As noted above, the anti-discriminatory provisions of Article 1102 are in accord with settled principles of international law. See Restatement §§ 166, 181(a); S. Verosta, Denial of Justice, 1 Encyclopedia of Public International Law 1107, 1008 (1992); 8 M. Whiteman, Digest of International Law 407, 722-25 (1967)(citing Universal Declaration of Human Rights, G.A. Res. 217A (III), Dec. 10, 1948, "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").

157. A number of prior decisions have specifically relied upon analogous discriminatory behavior to find a violation of international law. For example, in Solomon v. Panama, 6 R.I.A.A. 370, 373 (1933), the Claims Commission concluded that Panamanian trial counsel's inflammatory appeals to local prejudice and anti-American sentiment violated international law by exciting "local sentiment" in favor of the plaintiff. Similarly, in In the Matter of Jennie M. Fuller, 1971 Foreign Claims Settlement Commission of the United States, Annual Report to the Congress at 53, 58-59, the United States showed that a Cuban trial that featuring anti-American "harangues" in order to inflame the tribunal constituted a violation of international law.

158. Due to the violations of both the letter of Article 1102 and international law and the resulting grossly excessive jury verdict, Mr. Loewen was compelled to sell or otherwise surrender a significant portion of the value of his investment in LGII to the American plaintiffs. As shown above, this forced disgorgement occurred "by reason of [Mr. Loewen's] nationality," as expressly prohibited by Article 1102(4)(b).

159. Thus, whether viewed under the straightforward language of Article 1102(1), (2), and (3), the specific disgorgement prohibitions of Article 1102(4)(b), or the universal rule that the whipping up of local sentiment against a foreign defendant violates international law, the blatantly discriminatory treatment to which Mr. Loewen was exposed during the O'Keefe trial represents a clear violation of the United States' obligations under NAFTA.

2. Article 1105 – Equitable Treatment and Full Protection and Security

160. NAFTA Article 1105(1) states that "[e]ach party shall accord to investments of investors of a party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Here, the United States not only failed to afford Mr. Loewen and TLGI anything approaching "fair and equitable treatment," but also failed to protect and secure them from the chauvinistic and racist attacks that spurred the jury's excessive verdict.

161. At the outset, it is important to note that the responsibility of providing "fair and equitable treatment" goes beyond the basic obligation to protect aliens from harm based upon their national status. Rather, the "fair and equitable treatment" requirement has been described as an "additional" duty over and above accepted international legal obligations, providing a safety net for foreign investors above the floor of minimum international law duties. K. Vandevelde, United States Investment Treaties: Policy and Practice 2, 76 (1992); see, e.g., F.A. Mann, British Treaties for the Promotion and Protection of Investments, 52 Brit. Y.B. Int'l L. 241, 243 (1981)("unfair and inequitable treatment is a much wider conception" than simple prohibitions on "arbitrary, discriminatory or abusive treatment" under "customary international law").

tribunal, but before a judge with an open bias toward the plaintiffs and a jury inflamed by national and racial prejudice.

b. Manifest Injustice

165. International law and the standard of "fair and equitable treatment" also requires that the result of any trial or proceeding not be manifestly unjust. A verdict or judgment is manifestly unjust "if it is so obviously wrong that it cannot have been made in good faith and with reasonable care, or if a serious miscarriage of justice is otherwise clear." Restatement § 182 comment a; see Williams v. Wallis and Cox [1914] 2 K.B. 478, 485 (describing procedural misconduct sufficient to void or remit an award as "such a mishandling of the [procedure] as is likely to amount to some substantial miscarriage of justice"); E. Borchard, The Diplomatic Protection of Citizens Abroad 340 (1916) (any "grossly unfair or notoriously unjust decision" is contrary to international law).

166. Here, the $100 million compensatory damages award represented more than ten times the total $8 million value of *all* of the assets in controversy, and almost four times the amount of the $26 million in compensatory damages that plaintiffs sought in their final Amended Complaint. This absurd inflation of actual damages is even more egregious in light of the fact that the underlying business transactions never actually closed, such that O'Keefe suffered at most only lost expectations or opportunities, not an actual injury to his own businesses.

167. The $400 million punitive damages award was even more outrageous. Even by United States standards, this verdict was wildly excessive, representing an amount more than 50 times greater than the largest punitive damages award ever *considered* by the Mississippi Supreme Court, and 200 times larger than the largest punitive damages award ever *upheld* by

that court. See Affidavit of Chief Justice Richard Neely at 3 ("Indeed, even for a plaintiff's lawyer like me, the case of O'Keefe v. Loewen, from beginning to end, descends to the level of a mockery of justice").

168. The sheer size of the verdict renders it "grossly unfair and notoriously unjust" on its face, particularly in comparison to the relatively small amount claimed to be in controversy. The Diplomatic Protection of Citizens Abroad, supra. Even without the overwhelming evidence that the excessive verdict in this case was the result of a deliberate manipulation of the jury's nationalistic and racial sentiments, the disproportionate magnitude of the verdict alone would meet the definition of a manifestly unjust decision as one that is "so obviously wrong" that it could not have been the result of reasoned decisionmaking. See Wheaton, Elements of International Law 673-74 (1863) (condemning judgments that are "manifestly unjust and partial" as representing a denial of justice, "unless the mere privilege of being heard before condemnation is all that is included in the idea of justice"); see also Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (allowing for setting aside of awards made in "manifest disregard" of the law); Ash v. Ash, (1965) Comb 357 (vacating a jury verdict of excessive damages on the grounds that the jury refused to give a reason for their excessive verdict, "thinking they have an absolute despotic power"); Riches v. News Group Newspapers, (1986) QB 256 (setting aside an exemplary damages verdict of £ 250,000 for 10 plaintiffs because the verdict was out of all proportion to the underlying facts); see generally Note, Manifest Disregard of Law in International Commercial Arbitration, 28 Colum. J. Trans. L. 449 (1990).

c. Full Protection and Security

169. The United States further breached its obligations under Article 1105 by failing to provide "full protection and security" to Mr. Loewen and TLGI against the xenophobic and racist tactics of the plaintiffs. On the contrary, the injuries done to the claimants here took place under the approving eye of the trial judge, an official of the State of Mississippi, and prominently figured the testimony of Mike Espy, former Mississippi Assistant Attorney General, United States congressman, and Secretary of Agriculture. After these injustices occurred at the trial level, the Mississippi Supreme Court effectively abdicated its duty to protect Mr. Loewen from their ill effects by providing a meaningful right of appeal.

i. Judge Graves

170. Judge Graves' rulings and comments during the course of the O'Keefe litigation demonstrate a bias and partiality that ran directly contrary to his duties as a member of the Mississippi judiciary. Specifically, Canon 3 of the Mississippi Code of Judicial Conduct states that "a judge should perform the duties of his office impartially and diligently," and lists first among a judge's "Adjudicative Responsibilities" the requirement that a judge "be unswayed by partisan interests, public clamor, or fear of criticism." Miss. Code Jud. Conduct, Canon 3(A)(1).[16]

[16] It is interesting to note that Canon 3 of the Model Code of Judicial Conduct, from which the Mississippi Code is drawn, contains an express provision requiring a judge not only to perform his own judicial duties "without bias or prejudice... including but not limited to bias or prejudice based upon race... national origin, or socioeconomic status" but also mandating that the judge "require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based on race... national origin, or socioeconomic status. Model Code of Judicial Conduct Canon 3(B)(5), (6). Although the Mississippi Supreme Court adopted seven of the 11 clauses of Canon 3 exactly as proposed in the Model Code, it pointedly declined to endorse these specific provisions against racial or national discrimination.

171. In the United States, both citizens and aliens are protected from disparate treatment based upon their race or national origin under a variety of federal statutes. For example, 42 U.S.C. § 1981 guarantees to "equal rights under law" to "all persons within the jurisdiction of the United States," including aliens. See Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 (1948); Roberto v. Hartford Fire Ins. Co. 177 F.2d 811, 813, cert. denied, 339 U.S. 929 (1949) (§ 1981 equal rights protection extends to aliens as well as citizens). Similarly, the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., prohibits discrimination in employment practices based upon race, color, religion, or national origin.

172. It is thus clear that, under United States law, Mr. Loewen was entitled to protection from the nationalistic and racist appeals of plaintiffs' counsel. Indeed, American appellate courts have consistently overturned jury awards based on appeals to juror nationalism or racism much less crude and blatant than Mr. Gary's misconduct in the O'Keefe litigation. See, e.g., General Motors Acceptance Corp. v. Baymon, 732 So.2d 262, 271 (Miss. 1999) (reversing jury verdict where plaintiff's counsel attempted to inflame the emotions of majority-black jury by playing "the race card"); LeBlanc v. American Honda Motor Co., Inc. 688 A.2d 556, 559 (N.H. 1997) (reversing trial court; granting defendant Japanese corporation's motion for mistrial on grounds that plaintiff's counsel stated in his closing argument that the case was "not about Pearl Harbor or the Japanese prime minister saying Americans are lazy and stupid"); Texas Employer's Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 862 (Tex. Ct. App. 1990) (reversing judgment on grounds that Latino lawyer's appeal for ethnic unity to majority-Latino jury were improper). These decisions, copies of which are attached hereto as Exhibit 2, show that the United States was obligated to protect Mr. Loewen from such improper appeals not only under the "full protection and security" provisions of Article 1105, but also under the "fair and

175. Throughout the case, Judge Graves also overruled objections or denied TLGI's attempts to avoid or mitigate the damage from plaintiffs' improper tactics. For example, Judge Graves inexplicably refused to excuse a potential juror for cause even after she stated her firm belief that a foreign corporation should not be entitled to a fair hearing in the United States because of "tax breaks" that such corporations allegedly receive. (App. at A487-88). Judge Graves also overruled TLGI's objection to Mr. Gary's request during voir dire that the jury agree that any Canadian company that "comes down here" to Mississippi should have to "play by the [American] rules." (App. at A356-57). Finally, Judge Graves refused to permit TLGI's counsel to attempt to repair the damage done by the irrelevant testimony of Mike Espy.

ii. Secretary Espy

176. As the transcript of his direct examination shows, plaintiffs called Secretary Espy as a witness for two reasons: first, to establish before the majority-black jury that O'Keefe, who was white, was not a racist, thereby implying that Mr. Loewen was; and second, to take advantage of Secretary Espy's prominence and position as a government official to hammer home the plaintiffs' basic nationalistic, xenophobic theme.

177. Mr. Gary deliberately drew from Secretary Espy extended and irrelevant testimony concerning his duties with the Mississippi Attorney General's Office, where he worked in the Legal Aid section defending the downtrodden from corporate aggression before moving to the Consumer Protection branch. (Tr. at 1084). Interestingly, Secretary Espy chose to describe his duties with the Consumer Protection division as defending Mississippians against foreign corporations who had "come through town, blown through Mississippi and taken your money" (Tr. at 1086).

Claim, and in the accompanying Memorial of TLGI, this set of circumstances left TLGI with no practical alternative but to negotiate a coerced and unfair settlement with plaintiffs.

185. For all of these reasons, both the conduct of the trial and the Mississippi Supreme Court's arbitrary and inequitable refusal to shield Mr. Loewen and TLGI from the results of that trial pending a proper appeal constitute a violation of both the "fair and equitable treatment" and "full protection and security" clauses of Article 1105.

3. Article 1110 – Expropriation

186. NAFTA Article 1110 provides that "no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory, *or take a measure tantamount to nationalization or expropriation of such an investment*" except for a public purpose, on a non-discriminatory basis, under due process of law, and for just compensation. (Emphasis added). Here, the actions of the jury, the trial court, and the Mississippi Supreme Court amounted to little more than an indirect expropriation of hundreds of millions of dollars belonging to TLGI and Mr. Loewen for redistribution among the O'Keefe family and the American plaintiffs' bar.

187. Significantly, expropriation can occur without any benefit flowing directly to the state, based upon the state's acting as "the instrument of redistribution" between the aggrieved alien and the local populace. A. Mouri, The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal 66 (1994). Moreover, a finding of expropriation does not depend upon the actual seizure or forfeiture of property, but can occur where an alien's rights to use or enjoy property are infringed or interfered with. Restatement (Third) Foreign Relations Law of the United States § 712 comment g (1987).

188. It has not been and can not be argued that the forced transfer of $175 million to plaintiffs and their lawyers falls within that narrow category of formal, lawful takings described in Article 1110(1)(a)-(d). Rather, the question presented here is whether, under the record before the Tribunal, this coerced exchange of money in return for the avoidance of complete financial ruin constituted a direct or indirect expropriation "or a measure tantamount to" expropriation.

189. The record plainly shows that the jury's verdict and its enforcement through the Mississippi Supreme Court's arbitrary refusal to reduce the bond or to stay execution of the judgment were an indirect but patent expropriation of funds. As pointed out in the Notice of Claim, plaintiffs' counsel skillfully and maliciously wove multiple references to the personal wealth of Mr. Loewen and the corporate wealth of TLGI among his outright appeals to national and racial bias, creating a picture of a bloated and evil cartel perched north of the American border, extending its greedy tentacles into the American heartland to "build rich fortunes upon the misery and the poverty of burying loved ones of the people in the poorest state in our nation." (Tr. at 42).

190. Examples of these multiple references to the alleged wealth of Loewen and TLGI and the relative poverty of the people of Mississippi are collected in the table attached as Exhibit C to the affidavit of Chief Justice Neely. Through these appeals, plaintiffs' counsel effectively invited the twelve Hinds County jurors to play "Robin Hood," taking from the rich foreigners and giving to their relatively poor countrymen.[17] As reflected in the jury's verdict, they responded to this invitation with a vengeance, imposing a verdict upon TLGI that far outstripped any reasonable measure of either compensatory or punitive damages.

[17] Tellingly, the jury foreman who spoke of Mr. Loewen after the verdict described him as a "*rich*, dumb Canadian," thus again confirming the efficacy of plaintiffs' improper appeals to the jury's prejudice.

political subdivisions set forth in Articles 105 and 1105 is not novel, but rather springs from fundamental tenets of international law. More than 20 years before the passage of NAFTA, one commentator noted the "firmly established principle" that acts of constituent governments will be attributed to the national government "even in regard to situations in which internal law does not provide the federal States with means of compelling the organs of component states to fulfill international obligations." 2 Y.B. Int'l L. Comm'n. 257 [1971].

196. Recognizing this principle, the United States has previously conceded its own responsibility even for the unplanned and violent acts of private citizens where those acts resulted in harm to foreign nationals. For example, the United States government voluntarily paid an indemnity to Italy when a rioting mob lynched 11 Italian nationals in New Orleans. 6 Moore's Digest 837-41 (1906). In Quantanilla Claim, (U.S. v. Mexico 1926), Opinions of the Commissioners 136, 139 (1927), the Commissioners "did not hesitate to answer in the affirmative" the question of whether, under international law, the United States could be held liable for the negligent acts of a deputy sheriff from Hidalgo County, Texas, that resulted in the death of a Mexican national. More recently, the United States Congress voted to set aside $20 million for reparations to an Italian gondola company whose equipment was damaged, and to the families of the gondola passengers killed, by the reckless act of a U.S. military pilot whose low-flying aircraft cut the gondola's cable. See R. Pyle, *Village Rejects $2 Million Offer in Gondola Accident*, Seattle Times, June 6, 1998.

197. The United States has not only conceded its own responsibility for the acts of its subordinate states and individual citizens, but has held other foreign states responsible for the misconduct of their respective citizens and government officials. For example, in Putnam v. United Mexican States (U.S. v. Mexico), Opinions of the Commissioners 222, 227 (1927) the

United States successfully argued that the Mexican government was responsible for not properly punishing a Mexican policeman who murdered an American citizen, where the policeman served only 30 months in jail before escaping under suspicious circumstances. See also Youmans Claim (U.S. v. Mexico 1926), Opinions of the Commissioners 150 (1927) (holding Mexican government responsible for injuries inflicted on American citizens by mob).

198. Conduct otherwise violative of international law is not immunized from redress simply because it occurred in the course of a judicial proceeding. On the contrary, it is well established that an unjust civil judgment or criminal sentence gives rise to a claim under international law, and may even justify reprisals by the government of the aggrieved citizen. In its brief in the Denham Claim, (U.S. v. Panama 1933), Hunt's Report 491, 500, the United States argued that the term "denial of justice" "has come to be very generally regarded in the light of reason to comprehend all acts of government authorities, legislative, executive, *and judicial*, which result in the failure of the parties to receive substantial justice at the hands of those governmental agencies after due efforts have been exerted in the pursuit of their rights." (Emphasis added). In that same brief, the United States quoted U.S. Secretary of State Buchanan's letter to Mr. Ten Eyck, Commissioner to Hawaii, to the effect that

> It is the province of [foreign] judiciaries to construe and administer the laws, and if this is done promptly and impartially towards American citizens and with a just regard to their rights they have no cause of complaint.... It is only where justice has been denied or unreasonably delayed by the courts of justice of foreign countries – where these are used as instruments to oppress American citizens or to deprive them of their just rights – that they are warranted in appealing to their government to interpose. All these are ancient and well established principles of public law....

Mr. Buchanan, Secretary of State, to Mr. Ten Eyck, Commissioner for Hawaii, August 28, 1848 reprinted in 6 Moore's Digest 273 (1906). Similarly, Wheaton's Elements of International Law

673-74 (Lawrence's ed., 1863) notes that a contemporary commentator "puts an unjust judgment upon the same footing with naked violence, in authorizing reprisals on the part of the State whose subjects have been thus injured by the tribunals of another State."

199. Thus, there can be no doubt that the United States is responsible under both NAFTA Article 105 and "ancient and well established principles of public law" for the tragic denial of justice in the O'Keefe litigation, and the resulting harm to Mr. Loewen and TLGI.

E. Damages

1. Damages Recoverable Under NAFTA and International Law

200. NAFTA Article 1135 allows a claimant to recover "money damages" or restitution of property, together with interest and costs. NAFTA is thus in accord with the traditional "make-whole" measure of damages employed under international law, which seeks to place the injured claimant in the position he would have occupied but for the act complained of. See, e.g., Martini Case, (Italy v. Venezuela 1930), 5 Digest Pub. Int'l L. 153, 158 (1935) ("reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed had that act not been committed") (quoting Chorzow Factory Case, (Germany v. Poland), 1928 P.C.I.J. (Ser. A) No. 17, at 40); Lusitania Cases, (U.S. v. Germany), 7 R.I.A.A. 32, 36 (1923) ("The legal concept of damages is judicially ascertained compensation for wrong. The compensation must be adequate and balance as near as may be the injury suffered").

201. Under this "make-whole" standard, international law recognizes the award of damages for injury to both personal and business reputation. For example, in Robert H. May (U.S. v. Guatemala), 1900 For. Rel. 648 (1900), an American claimant received $143,750.73 in

damages based upon the Guatemalan government's infringement on his property rights and breach of contract, together with injury to his "reputation, credit, and business standing." Similarly, in Stanislas-Alfred de Montebello (France v. Germany), Franco-German Mixed Arbitral Tribunal (1923), the tribunal allowed the claimant, a winery in Alsace that was seized by the German authorities in 1915, 10,000 francs for damages to the winery's business reputation arising from the allegedly shoddy methods of the Germans during their control of the business.

202. International law also allows the recovery of money damages for personal pain and suffering, so long as those damages do not amount to a penalty. In the Lusitania Cases, 7 R.I.A.A. at 36, the tribunal overrode the German counsel's objections and adopted the American counsel's position that damages for mental suffering were available under international law.

> Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards.... There can be no doubt of the reality of mental suffering, of sickness of mind as well as sickness of body, and of its detrimental and injurious effects on the individual and his capacity to produce. Why then, should he be remediless for this injury?.... To deny such reparation would be to deny the fundamental principle that there exists a remedy for the direct invasion of every right.

203. Neither NAFTA nor general principles of international law recognize the imposition of punitive damages, and Mr. Loewen seeks no such damages here. Article 1135(3).

2. Mr. Loewen's Estimated Damages[18]

204. At this time, Mr. Loewen anticipates offering proof, through the testimony of one or more expert witnesses, that he suffered the following categories of damages.

a. Loss in the Value of TLGI Stock

205. Mr. Loewen will present evidence concerning the loss in the value of the shares of TLGI stock that Mr. Loewen owned on the date of the O'Keefe verdict.

206. On October 31, 1995, Mr. Loewen was the record holder of 6,057,543 shares of TLGI stock, valued at $40.00 per share.[19] As demonstrated by the facts set forth above, and by the chart attached hereto as Exhibit 3, TLGI was in the midst of an extended period of growth, having enjoyed a particularly successful year in 1995.

207. Based upon TLGI's historical growth and performance prior to the O'Keefe verdict and coerced settlement, as well as the parallel performance of a number of similar companies both before and after the verdict, it has been conservatively estimated that, but for the O'Keefe verdict and settlement, the value of TLGI stock would have continued to rise in the manner shown on the chart attached hereto as Exhibit 4.

208. Exhibit 5 hereto shows the growing divergence between what the value of TLGI stock reasonably would have been but for the O'Keefe verdict and coerced settlement, and its

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[18] Mr. Loewen and his counsel understand that, for purposes of this Memorial, the Tribunal wishes to receive only a sketch of the claimants' damages claims. Accordingly, this section concentrates on the basic categories of damages to which Mr. Loewen is entitled and under which he will seek recovery, and the general reasons why, under the circumstances, an award of such damages is warranted. Mr. Loewen has not yet completed his estimate of the aggregate amount of his damages, but expects to do this through his testimony and the testimony of one or more experts or other witnesses at such time and through such written or oral submissions as the Tribunal may request.

[19] Mr. Loewen makes no claim based upon the additional 4 million shares that he purchased after the O'Keefe verdict. Further, while there can be no doubt of the practical, financial impact upon Mr. Loewen and his wife of the (continued ...)

actual value, in the three years after the verdict was announced. This dollar-per-share difference, multiplied by Mr. Loewen's six million shares, is the best measure of the damages to this portion of his investment in TLGI.

209. For example, the difference between the actual and projected stock price during the seven-day period ending two days before the initial verdict announcement on November 1, 1995, and the seven-day period beginning two days after that announcement, is approximately $9.03. Multiplied by Mr. Loewen's 6,057,543 shares, this drop in stock price yields an initial damages figure of $54.6 million.

210. During the initial three-month period after the verdict, both TLGI and stock market analysts reasonably expected that the notoriously excessive O'Keefe verdict would be overturned or substantially reduced on appeal. It was not until January 29, 1996, the date on which the settlement was announced and the stock market realized that there would be no escaping the Mississippi verdict, that TLGI's stock suffered the full impact of the O'Keefe verdict.

211. The difference between the value of what Mr. Loewen's shares of TLGI should have been worth during the five-day period beginning two days after January 29, 1999 (absent the O'Keefe verdict and coerced settlement) and what those shares were actually worth during that period was roughly $17.00 – translating to a loss of approximately $103 million to Mr. Loewen's investment.

212. By November 2, 1998, when Canadian Imperial Commerce Bank seized all but a few of Mr. Loewen's shares of TLGI, the difference in the projected and actual stock value had

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(... continued)
drop in the value of Anne Loewen's 2,254,838 shares, Mr. Loewen makes no claim here for any recovery based upon the injury to his wife's investment in TLGI.

217. Under both NAFTA and international law, Mr. Loewen is entitled to be compensated for this very real injury. Accordingly, Mr. Loewen will present evidence in addition to the facts set forth herein to assist the Tribunal in its assessment of this loss at such time and in such manner as the Tribunal may direct.

d. Mental Anguish and Suffering

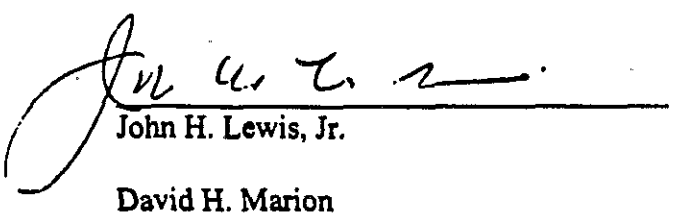
218. Under established principles of international law, Mr. Loewen is also entitled to recover damages for his mental pain and suffering resulting from the O'Keefe litigation and its aftermath. The NAFTA violations described above resulted in Mr. Loewen's being forced to endure six weeks of personal and highly public vilification as a "dumb Canadian politician," based in large part upon his foreign citizenship and impliedly racist tendencies. As a result of the coerced settlement, Mr. Loewen was forced to watch the company that he had built up over three decades spiral downward into bankruptcy over the course of just three years. During this same period, Mr. Loewen was reduced from TLGI's Chief Executive Officer, Chairman of the Board, and major stockholder to a shunned outsider holding only 10,000 nearly worthless shares. Just as TLGI was very much Mr. Loewen's personal creation, its demise has been very much his personal loss.

219. Despite the undoubted mental pain and anguish that Mr. Loewen has suffered from this series of events, he is mindful of the manner in which the O'Keefe plaintiffs misused the concept of "pain and suffering" damages to wring a disproportionate and unfair verdict from the jury. Accordingly, Mr. Loewen does not here seek any damages resulting from his own mental anguish.

doubted that this unfair, arbitrary, and grossly excessive redistribution of wealth by an American jury inflamed by nationalistic and racial appeals will, if not remedied here, continue to chill commerce between the NAFTA nations. Mr. Loewen, as the founder, Chairman, Chief Executive Officer, major shareholder, and public spokesman for the Loewen Group, was personally targeted by the plaintiffs as the focus of their xenophobic attacks, and suffered tremendous financial and reputational losses in the wake of the coerced settlement that no other investor was or could have been forced to endure. Thus, the principles of NAFTA require that damages be provided for Mr. Loewen, not only to redress his injuries, but also to serve as a guarantee, by this Tribunal, to other foreign investors that their rights will be respected if they enter into commercial transactions within the United States.

ACCORDINGLY, claimant Raymond L. Loewen respectfully requests that this Tribunal enter an award in his favor and against the United States, and award him compensatory damages, together with interest, costs, and reasonable attorneys' fees, as well as such other and further relief that the Tribunal shall deem just and proper.

Respectfully submitted,



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Dated: October 18, 1999