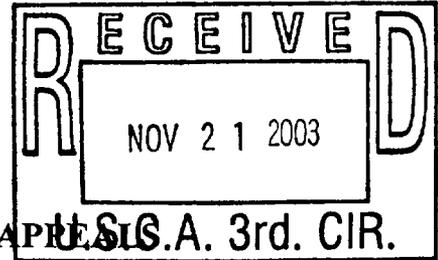


**E-Transmission
Signature to follow**

Case No. 03-4212



**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

In re KENSINGTON INTERNATIONAL LIMITED AND SPRINGFIELD ASSOCIATES, LLC,
Petitioners.

On Petition for a Writ of Mandamus to Judge Alfred M. Wolin,
United States District Judge for the District of New Jersey, sitting by
designation in the United States District Court
for the District of Delaware

Received and Filed 

11-21-03

Marcia M. Waldron,
Clerk

**RESPONSE OF CREDIT SUISSE FIRST BOSTON, AS AGENT, IN
SUPPORT OF EMERGENCY PETITION FOR A WRIT OF MANDAMUS**

Credit Suisse First Boston (“CSFB”), as Agent for the pre-petition bank lenders (the “Banks”) to Owens Corning and certain of its subsidiaries pursuant to a Credit Agreement dated June 26, 1997, respectfully submits this Response in Support of the Emergency Petition for a Writ of Mandamus filed on October 24, 2003 by Kensington International Limited and Springfield Associates, LLC (“Petitioners”).

The Banks hold approximately \$1.6 billion in pre-petition claims against Owens Corning and certain of its subsidiaries. This Court’s November 3, 2003 order directed Respondents to submit responses to the Petition by noon on November 21, five business days after David R. Gross, C. Judson Hamlin, and

other members of the District Court's committee of advisors (the "Advisors") were required to file their affidavits describing certain contacts with the District Court.

The Banks respectfully submit this Response to reiterate their support for the Petition, to bring new facts to the Court's attention, and to explain why neither the Advisors' affidavits nor the Responses submitted on November 3 and 20 by Judge Wolin dispel the facial appearance of impropriety that requires the District Court's recusal from further participation in the Owens Corning bankruptcy case. To the contrary, these submissions — both in what they say and in what they omit — only heighten the concern that a reasonable observer would have regarding the District Court's impartiality.

The conflict is simple and unavoidable: Messrs. Gross and Hamlin, who have acted since December 2001 as purportedly neutral advisors to Judge Wolin in five related asbestos bankruptcies, have throughout the same period also been acting as advocates for future asbestos claimants in another currently pending bankruptcy case, In re G-I Holdings, Inc. Because a reasonable observer might question Judge Wolin's impartiality after nearly two years of receiving ex parte input from purported "neutrals" who are really advocates, he must be recused.

Bankruptcy Judge Fitzgerald recognized the fundamental inconsistency between the roles of advocate and court-appointed neutral when she indicated at a November 17, 2003 hearing her intent to deny the debtor's

application to retain Mr. Hamlin as the representative for future claimants in the W.R. Grace bankruptcy, one of the cases in which Mr. Hamlin has been serving as an advisor to Judge Wolin. Judge Fitzgerald observed that Mr. Hamlin's role as advocate could never be reconciled with his prior role assisting Judge Wolin. As a result, Grace withdrew the application to appoint Mr. Hamlin.

The appearance of impropriety at issue here is no less stark. Indeed, that Messrs. Gross and Hamlin are nominally playing their conflicting roles in different cases actually exacerbates the problem, because all of the disclosures of their dual roles took place only in the G-I Holdings case, leaving Owens Corning creditors without notice of the conflicts. The recent filings by Judge Wolin and his Advisors do not deny the existence of Messrs. Gross and Hamlin's conflict of interest. While the affidavits are cryptic and unenlightening in describing the Advisors' specific contacts with Judge Wolin, they confirm that the conflicted Advisors have played substantial roles in the cases and were in no way "screened off" from consideration of the key asbestos-related issues as to which they are conflicted. Mr. Gross's affidavit further confirms that Judge Wolin knew about this conflict when he appointed the Advisors in December 2001 but failed to disclose it to commercial creditors in the cases pending before him.

It is not surprising that, as this story has unfolded, creditors in another bankruptcy before Judge Wolin — Grace — have now sought recusal in their case.

This reflects a growing consensus that the complex of conflicts emerging in these related asbestos bankruptcy cases threatens to undermine the public perception of fairness crucial to our system of justice.

Recusal is Compelled Here By the Fundamental Structural Conflict Regardless of Any Explanations Offered by the Advisors or the District Court

Recusal is required here because of a basic, structural conflict that creates an unavoidable appearance of impropriety. The judicial disqualification statute, 28 U.S.C. Section 455(a), requires recusal whenever a judge's "impartiality might reasonably be questioned" — an objective standard that mandates disqualification regardless of a judge's "actual impartiality" where "a reasonable person might perceive bias to exist." See Pfizer v. Kelley (In re School Asbestos Litig.), 977 F.2d 764, 782 (3d Cir. 1992) (hereinafter "School Asbestos"); see also Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859-60 (1988) (objective standard requires recusal based on appearance of impropriety even where judge did not know of disqualifying facts, so long as public might reasonably believe he or she knew).

Under that objective standard, the appearance of impropriety here is crystalline: two of the Advisors, Messrs. Gross and Hamlin, publicly appointed to act as neutral consultants to the District Court in the Owens Corning bankruptcy, are in fact advocates for future asbestos claimants in G-I Holdings. These two

roles — “neutrals” and advocates for tort claimants — are starkly irreconcilable. As advocates in G-I Holdings, Messrs. Gross and Hamlin are directly aligned with future Owens Corning asbestos claimants — a constituency that has the same interests as the G-I Holdings futures and, indeed, to a large extent will ultimately be the same claimants — while their roles as Advisors require them to remain strictly neutral and consider the interests of all creditor constituencies. Wearing these two hats requires Messrs. Gross and Hamlin one minute to confer with representatives of current and future asbestos claimants in other cases to plot common strategy and the next to interact with those same advocates and Judge Wolin as purportedly “neutral” court advisors.

This undeniable conflict is a matter of grave concern even if the District Court and the Advisors have in fact attempted to act in the utmost good faith. As advocates for tort claimants, Messrs. Gross and Hamlin cannot help but have internalized certain views with respect to tort claim issues, and even were they to attempt to compartmentalize their roles and give “objective” advice to the Court, that advice would still be informed by their roles as advocates. This basic assumption about human nature lies at the heart of conflict of interest rules and would be shared by any reasonable observer.

Messrs. Gross and Hamlin are therefore obviously conflicted and cannot continue to serve as “neutral” court advisors. They have not been

“screened off” from the District Court’s handling of the Owens Corning case — to the contrary, Judge Wolin appointed them expressly to serve as his “expert counsel” because of their “broad experience in mass tort and asbestos litigation” (see District Court Response at 4), and Mr. Gross alone billed more than 800 hours for working on the cases just through March 2003. See Affidavit of David R. Gross (“Gross Aff.”) ¶ 14. Judge Wolin therefore must be disqualified regardless of whether the Advisors actually exploited their access to influence him on behalf of asbestos claimants. See, e.g., First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 985 (9th Cir. 2000) (failure of judge to screen off conflicted law clerk would create appearance of impropriety requiring recusal); Hall v. Small Business Admin., 695 F.2d 175, 179-80 (5th Cir. 1983) (participation of law clerk with magistrate in case in which clerk’s future employers were counsel gave rise to appearance of partiality requiring magistrate’s recusal).

Indeed, the appearance of impropriety here is more severe than that involved in the School Asbestos case, which was based on the judge’s attendance at a plaintiff-oriented conference on asbestos issues. See 977 F.2d at 781-82. Here, Judge Wolin at his own initiative appointed purportedly “neutral” advisors who are actually committed advocates for one side of the asbestos dispute; failed to disclose their conflict; and heard their advice in private for nearly two years. Even assuming the completeness and truth of the Advisors’ affidavits, and a total

absence of any bias in fact, a reasonable observer would have doubts about Judge Wolin's ability to remain impartial. Failing to order recusal in the face of such a clear-cut appearance of impropriety would create the very "risk of undermining the public's confidence in the judicial process" that Section 455(a) is designed to avoid. See Liljeberg, 486 U.S. at 864.

**The Affidavits Filed By the Advisors
Only Underscore the Need for Recusal**

The affidavits submitted by the Advisors do not dispel but, to the contrary, actually heighten the appearance of impropriety, confirming the need for recusal. The affidavits confirm that the "Court Appointed Consultants," including Messrs. Gross and Hamlin, participated in a series of meetings with Judge Wolin addressing core, contested issues in the Owens Corning case and the other asbestos bankruptcies under Judge Wolin's supervision. These meetings focused on an issue not just substantive but pivotal in the case: "how to devise a system that would best allocate scarce resources, yet be approved by classes of claimants who might hold settlement veto power under existing bankruptcy law." Affidavit of William A. Dreier ("Dreier Aff.") ¶ 6(a)(v). Judge Wolin has himself recognized that such tort claim issues are "perhaps the fundamental divide between [the parties]" and "may lie at the heart of all asbestos bankruptcies." In re USG Corp., 290 B.R. 223, 224 (Bankr. D. Del. 2003).

More specifically, Judge Wolin and his advisors discussed such key issues as the manner in which asbestos claimants could have their claims heard; how to categorize sub-groups of “unimpaired” claimants; and how to address property damage claims. See Dreier Aff. ¶ 6(a)(ii)-(iv). These issues — as to which future claimants are highly adverse to commercial creditors and even to current asbestos claimants — were discussed in multi-hour meetings with Judge Wolin on January 7, January 18, February 27, and May 17 of 2002. See Dreier Aff. ¶ 6(a)(i); Affidavit of John E. Keefe, Sr. ¶ 3. Messrs. Gross and Hamlin attended all four meetings. See Affidavit of Gina M. Najolia (“Najolia Aff.”), filed in support of Recusal Motion, Exh. E at 56, 75-78; Exh. G at 24; Exh. I at 24.

Commercial creditors might justifiably be alarmed that this committee of “neutrals” defined its task primarily in terms of assuring fairness between and among asbestos claimants, while appearing to give little or no attention to the rights and interests of commercial creditors. But no inference of actual bias is necessary to establish that recusal is mandated here. The documented fact of a series of meetings on key substantive issues relevant to Owens Corning, at which advocates for future claimants attended and participated as purported “neutrals,” underscores the appearance of impropriety already created by Messrs. Gross and Hamlin’s mere appointment to conflicting official roles. However these discussions are further characterized — indeed, whatever was actually discussed at

these meetings — the fact that they even took place would create in the mind of a reasonable observer concern over Judge Wolin’s ability to remain impartial.

The affidavits submitted by Messrs. Gross and Hamlin do nothing to dispel the appearance of impropriety created by the undisputed facts summarized above. The affidavits are vague and conclusory in material respects — which is not surprising given that Judge Wolin required only very limited disclosures from the Advisors, rather than allowing them to be subjected to the kind of adversarial process that inevitably would have shed more light on their varied roles in the multiple related bankruptcy proceedings.¹

Mr. Gross states that Judge Wolin requested his assistance “to help the Court and the parties avoid or overcome the many procedural and operational complexities that bedevil asbestos-related bankruptcies,” but not to provide “any advice of a legal nature, or any legal or factual research, or any reports or evaluations of the parties’ legal or factual claims.” See Gross Aff. ¶ 6. Mr. Gross suggests that his role has been that of a mere “settlement facilitator” and that he has never “discussed, participated or assisted in any way in Judge Wolin’s decision-making function” or “discussed with Judge Wolin, in any manner or form,

¹ The facts already known to this Court should, we respectfully submit, suffice to mandate recusal under the “appearance of impropriety” standard. If the Court is not prepared to order recusal at this point, however, we respectfully submit that it should, at minimum, require that Judge Wolin allow appropriate discovery.

any legal or factual issues before the court or likely to come before the Court in any of the five bankruptcies assigned to Judge Wolin.” Id. ¶¶ 9-10.

Since Mr. Gross’s characterizations are not accompanied by any specifics, they are difficult to assess. Mr. Gross does not explain how grappling with “procedural and operational complexities that bedevil asbestos-related bankruptcies” or acting as a “settlement facilitator” can be achieved without any consideration or discussion with Judge Wolin of substantive issues affecting the asbestos bankruptcies — much less how these roles can be performed by deeply conflicted professionals without creating an appearance of impropriety. Indeed, many issues that could be described as “procedural” — e.g., creation of trust distribution procedures (“TDPs”), setting of an asbestos claim bar date, or transfer and remand disputes turning on the Bankruptcy Court’s “related to” jurisdiction — are hotly contested and crucial to most asbestos bankruptcies, including this one.

In any event, since Mr. Gross’s time records confirm that he participated in all four of the “full committee” meetings with Judge Wolin (see p. 8, above), it is difficult to see how he could have avoided joining in discussions of significant issues. Indeed, Mr. Gross’s time records document that many of his 800-plus hours personally devoted to the cases through March 2003 were spent consulting directly with Judge Wolin. Crucially, Mr. Gross appears to have been intimately involved in counseling the District Court in connection with key status

conferences, held on November 21, 2002, December 20, 2002, and January 30, 2003, at which Judge Wolin considered and addressed critical issues about the direction of the Owens Corning bankruptcy case. Mr. Gross's time records reflect that he spent several hours on the days of these conferences (and the evening of December 19) meeting with Judge Wolin regarding the Owens Corning case. See Najolia Aff., Exh. J at 17, 19-20. At each of these conferences, Mr. Gross emerged from chambers with or closely preceding the judge and actively participated in the ensuing proceedings — giving rise, at the very least, to a strong appearance of having helped shape Judge Wolin's reactions to the parties' competing positions.

The time records reflect myriad other occasions on which Mr. Gross appears to have consulted directly with Judge Wolin, either alone or in combination with others. In addition to the "full committee" meetings, Mr. Gross billed at least several hours to discussions with Judge Wolin on each of the following dates: December 27, 2001, January 4, 2002, January 15, 2002, January 26, 2003, January 29, 2002, January 30, 2002, February 11, 2002, February 14, 2002, February 21, 2002, March 14, 2002, April 4, 200, April 5, 2002, April 15, 2002, May 14, 2002, May 17, 2002, May 29, 2002, June 12, 2002, June 19, 2002, July 11, 2002, August 21, 2002, August 26, 2002, September 3, 2002, September 9, 2002, September 26, 2002, October 21, 2002, November 19, 2002, December 19, 2002, January 23, 2003, January 30, 2003, and February 19,

2003. See Najolia Aff. Exh. E at 75-78; Exh. F at 24-28; Exh. I at 19-33; Exh. J at 17-21. Mr. Gross has not yet filed a fee application for the period after April 1, 2003, but acknowledges that he has performed substantial additional services since that date. See Gross Aff. ¶ 15.

A reasonable and objective observer familiar with these facts — i.e., Mr. Gross's repeated, lengthy, intimate access to Judge Wolin in connection with the asbestos bankruptcies — would not find it credible that Mr. Gross withheld from Judge Wolin his opinions or advice with respect to the key issues in these bankruptcy cases. At the very least, Mr. Gross's activities create a strong appearance of substantive involvement in the bankruptcy cases.

The sheer volume of Mr. Gross's involvement casts doubt on his sweeping assertions that “[a]t no time have I discussed, participated or assisted in any way in Judge Wolin's decision-making function” and that “[a]t no time did my associates or colleagues undertake legal research, legal or factual analysis, or drafting for Judge Wolin's review or consideration.” Gross Aff. ¶¶ 10-11. While the appearance of impropriety here does not turn on whether Mr. Gross actually helped Judge Wolin rule on specific issues, the timesheets reflect at least one occasion on which Mr. Gross and his firm provided substantive input on an important decision that was viewed as a major victory for tort claimants. On February 8, 2002, Judge Wolin issued a significant ruling in the Federal Mogul

bankruptcy denying motions by several automobile manufacturers (the so-called “friction product defendants”) to transfer and consolidate tens of thousands of asbestos claims into one case in the U.S. District Court in Delaware. See In re Federal-Mogul Global, Inc., 282 B.R. 301 (Bankr. D. Del.), mandamus denied, 300 F.3d 368 (3d Cir. 2002). In the weeks before and after this decision, Mr. Gross, in his role as advisor, and two associates (Whitney R. Chelnik and Sonya M. Longo) spent more than 20 hours reviewing motion papers and conducting legal research on the motions to transfer, attending oral argument, and considering the appealability of Judge Wolin’s order. The time records also reflect telephone calls to Judge Wolin’s clerk, appearing to confirm that Mr. Gross’s firm was providing input to the Court. See Najolia Aff., Exh. C at 77.²

Like Mr. Gross, Mr. Hamlin attempts in his affidavit to downplay his substantive advice to Judge Wolin, likening his role to that of a magistrate employed to make recommendations only on discrete issues. See Affidavit of C. Judson Hamlin (“Hamlin Aff.”) ¶ 11. Aside from one such assignment, Mr.

² On information and belief, among the state court plaintiffs whose cases were subject to the motion to transfer — and who therefore benefited greatly from Judge Wolin’s decision denying the motions — were many clients represented by the law firm of John E. Keefe, Sr., another one of the Advisors. Judge Wolin subsequently denied a motion to disqualify Mr. Keefe based on his firm’s representation of tort claimants in cases in other courts. See Letter Opinion attached hereto as Exh. 1. Judge Wolin did not, however, address whether a conflict was presented by Mr. Keefe’s firm’s representation of clients in one of the cases in which Mr. Keefe is acting as an advisor to the Court. Indeed, we can represent that a review of state and federal court dockets reflects that Mr. Keefe’s firm, Lynch Martin, has during these bankruptcy cases represented more than 100 asbestos plaintiffs against one or more of the five defendant-debtors in these bankruptcy cases, including Owens Corning, in connection with claims that have been, or likely will be, asserted in the cases.

Hamlin maintains that he “did not discuss any substantive issues” in Owens Corning or provide “any advice or assistance to Judge Wolin on any matter pending, or likely to arise” in the case. Id. ¶ 13.

While Mr. Hamlin’s involvement in the pending cases has been more limited than that of Mr. Gross, his sweeping statements (again unaccompanied by the detail that could have been obtained through discovery) appear to be similarly overstated. First, even if his role really was limited only to that of a “magistrate,” that would not excuse him from the requirement of neutrality or render his simultaneous service as an advocate in closely related litigation any less improper. Indeed, Section 455(a) expressly applies to magistrates as well as judges.

Moreover, Mr. Hamlin’s disclaimer of substantive discussions with the District Court is undercut by his own time records, which show that he spent at least 18 hours meeting with Judge Wolin on the dates described in Mr. Dreier’s affidavit — January 7, January 18, February 27, and May 17, 2002. See Najolia Aff., Exh. E at 56; Exh. G at 24. Mr. Hamlin thus cannot deny that he has been directly involved in helping Judge Wolin determine how to solve the asbestos litigation problems lying at the heart of the bankruptcy cases pending before him.

Mr. Hamlin tries unsuccessfully to dispel the appearance of impropriety by distancing himself from partisan statements made by his counsel in the G-I Holdings bankruptcy, such as the strident attacks on Dr. Letitia Chambers,

who serves as G-I's asbestos valuation expert and performs the same function for the commercial creditors in Owens Corning. See Recusal Motion ¶ 31. Mr. Hamlin dismisses these attacks as reflecting mere "advocacy of counsel" and avers that the relevant pleadings "were drafted principally by Mr. Irwin's office." Hamlin Aff. ¶ 15. However, the fact that they reflect "advocacy of counsel" is precisely the point: advocates are not neutral, as court-appointed advisors must be. And Mr. Hamlin does not disavow the statements made on his behalf or explain how his role as a partisan advocate is in any way lessened by his not having personally drafted his counsel's briefs.³

Other recently discovered facts demonstrate that such blurring of roles is unavoidable, further underscoring the need for recusal. For example, since mid-2002, Mr. Hamlin and/or his counsel Mr. Gross have participated in a series of strategy meetings and conference calls with futures representatives in the other pending bankruptcy cases, including James McMonagle, the futures representative in Owens Corning. These contacts include a meeting in Chicago on June 3, 2002;

³ Moreover, while Mr. Hamlin represents that Mr. Irwin's office was not involved in Mr. Hamlin's activities as an advisor to Judge Wolin, it appears that Mr. Irwin did, in fact, participate at least once in the related activities of Mr. Gross. Mr. Irwin's March 14, 2002 bill in the G-I Holdings case reflects an expense item for travel to Newark, New Jersey for a February 13, 2002 meeting with Messrs. Hamlin and Gross (presumably relating to their joint advocacy role in G-I Holdings) and a separate meeting with Judge Wolin on February 14. Mr. Gross's own entry for February 14 reflects, among other things, a meeting in Judge Wolin's chambers with "(Name Withheld)." See Exh. 2 attached hereto. If, as it appears, Mr. Gross and Mr. Irwin met together with Judge Wolin, this suggests a further blurring of Mr. Gross's roles as advocate and advisor — for if he was meeting with Judge Wolin as his "neutral" advisor, in what capacity did he interact at that meeting with his G-I Holdings co-counsel?

a meeting in New York on August 2, 2002; telephone conferences on November 8, 2002, February 11, 2003, and February 25, 2003; additional in-person meetings in New York on March 2 and March 25, 2003; telephone conferences on May 12 and 27, 2003; an in-person meeting in Philadelphia on June 1, 2003, and another meeting in New York on August 27, 2003. See Mr. Hamlin's G-I Holdings time records and Mr. McMonagle's Owens Corning time records, attached hereto as Exhs. 3 and 4, respectively.

Messrs. Hamlin and Gross participated in these meetings as advocates for the G-I Holdings future asbestos claimants. Indeed, the express purpose of the meetings was to coordinate and implement a joint strategy for advancing the interests of future claimants in the related bankruptcies, including by negotiating favorable "TDP" provisions, assessing potential asbestos legislation and possible lobbying efforts, and jointly strategizing on other issues of common interest.

This extensive contact between Messrs. Hamlin and Gross acting on behalf of G-I future claimants and Mr. McMonagle (often accompanied by his counsel Kaye Scholer) acting on behalf of Owens Corning future claimants by itself creates a powerful appearance of impropriety with respect to Messrs. Hamlin and Gross's roles as "neutral" advisors to Judge Wolin. After plotting strategy with their co-advocates, the conflicted Advisors must attempt to shift gears and function as "neutral" mediators and advisors to Judge Wolin in the cases in which

their fellow futures representatives, such as Mr. McMonagle, act as advocates on the same issues. Given how quickly and often Messrs. Hamlin and Gross have been required to change hats, it is hardly surprising that Mr. Gross accidentally included 5.2 hours of G-I Holdings advocacy time on June 20, 2002 in his “advisor” fee application — especially since Mr. Gross spent 1.8 hours on the same day in telephone conferences with Judge Wolin’s chambers and had a dinner meeting with Judge Wolin and Francis McGovern the night before. See Gross Aff. ¶ 13(iii); Najolia Aff. Exh. I at 25.

Further demonstrating the blurring of roles, the original Recusal Motion noted several instances in which Messrs. Gross and Hamlin touted their experience with Judge Wolin while advocating before the G-I Holdings court. See Recusal Motion ¶¶ 29-30. A disturbing recent example indicates that this practice continues. On September 30, 2003, there was an “off the record” proceeding before Judge Wolin in the USG bankruptcy in which, on information and belief, Mr. Gross participated in his role as a “neutral” advisor to Judge Wolin. At this proceeding Judge Wolin adopted an abbreviated proof of claim form in connection with an estimation procedure for cancer claimants, as advocated by the Asbestos Claimants Committee, rejecting a more lengthy claim form advocated by the debtors. See Exh. 5 annexed hereto (Caplin & Drysdale timesheets showing attorneys at conference with Judge Wolin on September 30, 2003).

The same afternoon, Messrs. Hamlin, Gross, and Irwin (as advocates for G-I future claimants) and the G-I Asbestos Claimants Committee (represented by the same counsel that represented the Asbestos Claimants Committee in USG) appeared before Judge Gambardella to urge adoption of a similar procedure in G-I Holdings. Trevor Swett of Caplin & Drysdale told the Court that “I can report to you as can Mr. Gross, that today Judge Wolin has had a session on the estimation process in the U.S.G. case.” September 30, 2003 Transcript at 13-14 (emphasis added) (excerpts attached hereto as Exh. 6). After Mr. Swett described Judge Wolin’s approach and urged that it be followed in G-I Holdings (id.), Judge Gambardella asked to hear from the legal representative, Mr. Hamlin. Speaking on Mr. Hamlin’s behalf, Mr. Irwin said that he would “join in Mr. Swett’s articulation of the issues” and added: “We note Judge Wolin’s proceedings with interest. We’ve cited to you in the past the opinion when Judge Wolin announced this route” Id. at 15-16. It thus appears that Mr. Gross participated as a “neutral” in the District Court’s fashioning of relief favorable to asbestos claimants and then, after lunch, proceeded with co-counsel to seek similar relief as an advocate in another case based on his earlier efforts. The appearance of impropriety is, to say the least, remarkable.⁴

⁴ Not surprisingly, there are other instances in which Mr. Gross’s active practice as an advocate has led him to capitalize on developments in which he might be perceived as having had a role as Judge Wolin’s neutral advisor. For example, Judge Wolin in July 2002 issued a widely publicized fraudulent conveyance ruling in the W.R. Grace bankruptcy case permitting reliance on subsequently obtained

Significantly, Messrs. Gross and Hamlin do not really attempt in their affidavits to reconcile their conflicting roles or to confront head-on the appearance of impropriety that these roles create. Rather, they emphasize the dubious assertion that they did not, in fact, provide much meaningful substantive input in rendering many hundreds of hours of service to the District Court. Ultimately, however, the specific content of their input would matter only if they were being accused of attempting corruptly to influence Judge Wolin or if petitioners sought to demonstrate that Judge Wolin was, in fact, biased. But neither such showing is necessary to a disqualification motion under 28 U.S.C. Section 455(a). The conflict here is basic, structural, and categorical, and the objective appearance of impropriety cannot be dispelled even by the most convincing protestations of a lack of actual bias.

information concerning tort liability to determine solvency retrospectively. See Official Committee of Asbestos Personal Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.), 281 B.R. 852 (Bankr. D. Del. 2002) (hereinafter, "Sealed Air"). In the fall of 2002, Mr. Gross mediated a settlement of the Sealed Air issues. See Najolia Aff., Exh. F at 24-27. Even as Judge Wolin was issuing his Sealed Air decision and Mr. Gross was mediating in that case, Mr. Gross was also bringing a fraudulent conveyance action on behalf of the Creditors Trust in another asbestos bankruptcy, Keene Corp. In December 2002, Mr. Gross filed a brief in the Keene case (excerpts attached hereto as Exh. 7) in which he relied heavily upon Judge Wolin's Sealed Air ruling. Thus, as a partisan in the Keene case, Mr. Gross had a vested interest both in the issuance of Judge Wolin's Sealed Air decision and in the preservation thereof via the settlement Mr. Gross mediated.

**The District Court's Response to the Petition
Does Not Remedy the Appearance of Impropriety
Requiring Judge Wolin's Immediate Recusal**

The District Court Response states (at 2) that it addresses only “procedural points” raised by the Petition. However, the Response concludes with this representation apparently intended to speak to the merits of recusal:

The Court states to the Court of Appeals that it has had no communications and possesses no knowledge regarding any aspect of the In re G-I Holdings, Inc. chapter 11 proceeding, except that it is pending before the Honorable Rosemary Gambardella, U.S.B.J. and the Honorable William G. Bassler, U.S.D.J. I have never discussed the substance of this case with any of the Court Appointed Advisors.

Id. at 10. For the reasons discussed above, this limited representation is inadequate to dispel the appearance of impropriety, which flows from the Advisors' active performance of conflicting roles, regardless of whether they ever actually discussed the G-I Holdings case with Judge Wolin. Furthermore, it is not clear from Judge Wolin's statement whether he intended to suggest that he was unaware of the roles Messrs. Gross and Hamlin were playing in G-I Holdings, or merely that he had not discussed the issues in that case with them even though he knew what roles they were playing.

By contrast, Mr. Gross states in his affidavit that “[a]t all relevant times, Judge Wolin was aware of my representation of Mr. Hamlin in G-I Holdings.” Gross Aff. ¶ 8. Mr. Gross's admission would cause a reasonable

observer to ask why Judge Wolin appointed conflicted advisors, why he did not disclose their conflicts at the time of their appointment, and why he did not even disclose to this Court, in his response to the current mandamus petition, that he was aware of the conflicts all along. See United States v. Schreiber, 599 F.2d 534, 539 (3d Cir. 1979) (Seitz, C.J., concurring) (mandatory nature of Section 455 requires judge to disclose possible grounds for disqualification sua sponte if necessary); see also Moran v. Clarke, 296 F.3d 638, 649 (8th Cir. 2002) (court’s failure to disclose possibly disqualifying relationship with party “particularly worrisome”). Full and honest disclosure is a central tenet of the bankruptcy process in general and the vetting of potential conflicts in particular. See, e.g., Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314, 323 (3d Cir. 2003) (“[T]he importance of full and honest disclosure [in connection with a proposed plan] cannot be overstated.”) (citation omitted); In re BH&P Inc., 949 F.2d 1300, 1317 (3d Cir. 1991) (duty of trustees or professionals seeking employment by estate to disclose all actual or potential conflicts of interest is “[o]ne of the more salient principles of bankruptcy law”) (citation omitted).

The District Court Response also fails to disclose that Judge Wolin apparently played a role in the process of nominating one of his “neutral” advisors to serve as futures representative in the W.R. Grace bankruptcy case. On June 5, 2003, Elihu Inselbuch, lead counsel for the Asbestos Claimants Committee, billed

1.10 hours to: “Conference Judge Wolin re: future’s rep (.2); t/c David Gross re: same (.2); t/c McGovern re: same (.2); draft memo to Committee re: same (.5).” See Caplin & Drysdale Fee Application for June 1-30, 2003 (excerpts attached hereto as Exh. 8). Following these ex parte contacts with Judge Wolin and his Advisors, Mr. Inselbuch communicated on July 14 with Mr. Gross and on July 22 with debtors’ counsel, David Bernick of Kirkland & Ellis, regarding Mr. Gross’s candidacy for futures representative. See Caplin & Drysdale Fee Application for July 1-31, 2003 (Exh. 8). Thereafter, Kirkland & Ellis’s own time records reflect several entries between late July and early September 2003 pertaining to preparations for retaining a futures representative, including several references to Mr. Gross. See Kirkland & Ellis Fee Applications for July 1-31, 2003, August 1-31, 2003, and September 1-30, 2003 (excerpts attached hereto as Exh. 9).

In September 2003, Mr. Hamlin replaced Mr. Gross as the preferred candidate for futures representative. Late September time entries for both Kirkland & Ellis (Exh. 9) and Caplin & Drysdale (Exh. 8) reflect this shift. On October 13, 2003, in the face of the present recusal motion, Grace moved to appoint Mr. Hamlin as its futures representative. Thus, for at least four months Mr. Gross and then Mr. Hamlin were — apparently with Judge Wolin’s knowledge if not active support — the leading candidates for futures representative in W.R. Grace, while continuing to serve as Judge Wolin’s advisors in the five related cases.

Throughout that period no disclosure was made in the Owens Corning case (or, evidently, any of the others before Judge Wolin) that these court-appointed advisors were being considered for this partisan role before the same judge.

As noted above, Judge Fitzgerald made clear at the November 17, 2003 conference in Grace that, in view of the structural conflicts, she did not believe that Mr. Hamlin could qualify to serve as futures representative in the Grace case. The recent revelations regarding Messrs. Hamlin and Gross's advocacy roles in G-I Holdings have also led certain commercial creditors in Grace to move for Judge Wolin's recusal, on grounds similar to those set forth in the Recusal Motion. See Motion (attached hereto as Exh. 10).

Beyond its shortcomings of disclosure, the District Court Response also fails to allay concerns stemming from Judge Wolin's procedural handling of the original Recusal Motion. In explaining why he stayed all discovery on the Motion, Judge Wolin describes ex parte inquiries that he received from parties "who wished to object and to move to quash" discovery, "but were seeking the procedural guidance of the Court on how their objections should be presented." District Court Response at 8. Rather than directing these experienced advocates and former judges to the Federal Rules' well-developed procedures for obtaining a protective order or the quashing of a subpoena, Judge Wolin unilaterally "granted" an informal, ex parte "motion" to quash all discovery. He thereafter ordered that

the factual issues for initial review of the Recusal Motion be framed only by the Advisors' affidavits, without the benefit of discovery. Judge Wolin's explanation for this irregular procedure — that he sought to protect his advisors from unfair burden (see id. at 9) — fails to justify blocking appropriate inquiry into facts relevant to the Recusal Motion.

Moreover, the District Court appears still to be holding out the possibility that, if given the opportunity to rule on recusal, it may ignore the plain language of 28 U.S.C. Section 455(a) requiring recusal where a judge's impartiality might reasonably be questioned, as well as Supreme Court and Third Circuit precedent holding that this standard is triggered by an appearance of impropriety. The District Court suggests that it is still an open question "whether the party seeking recusal must show actual bias or that merely a reasonable perception of bias exists." District Court Response at 9-10. Thus, Judge Wolin's response does not provide comfort that he would either allow appropriate discovery or apply the correct legal standard if permitted to address the recusal motion on the merits.

The bulk of the District Court Response is devoted to a procedural discussion implying that the Recusal Motion was a tactically motivated attempt to disrupt the Owens Corning bankruptcy at a moment of "crisis." See generally District Court Response at 5-9. This "crisis" apparently consists of the pendency

of an important decision regarding substantive consolidation. The Banks agree that proceedings in the bankruptcy case are at a crucial point, with the Debtors attempting to force through a fatally flawed plan of reorganization. But the pendency of important issues, even hotly contested ones, does not constitute a “crisis.” And crisis or no crisis, all creditors have the right to a judge who is unbiased in fact and in appearance.

Judge Wolin appears to impugn the motives behind the recusal motion by linking it to two other motions recently brought by the Unsecured Creditors Committee — one to appoint a chapter 11 trustee and the other seeking to remedy certain structural conflicts of interest in the representation of asbestos claimants. These are both serious, substantive motions that the Bankruptcy Court has not yet decided and that may ultimately come before the District Court on appeal. It is inappropriate for Judge Wolin implicitly to disparage these motions (and the Recusal Motion) by suggesting that the filings somehow required him to “take control of proceedings” to “ensure” that the case “is not disrupted by the actions of any particular constituency free of judicial supervision” and that motions are made “for a proper purpose and not for purposes of delay or other self-serving ends.” District Court Response at 8-9. Leaving aside the pre-judgment implicit in the District Court’s comments, the separate recusal motion brought by creditors in W.R. Grace — a case in which no plan has been filed and no substantive

consolidation issue has been raised — belies any suggestion that the instant Recusal Motion was motivated by tactical considerations unique to the Owens Corning case.

Judge Wolin hints that the Recusal Motion might be rejected on grounds of waiver or untimeliness because the Advisors' appointments were a matter of public record in Owens Corning and their roles as advocates in G-I Holdings were also publicly disclosed in the record of that case. District Court Response at 5. Judge Wolin further notes that the Advisors served without objection in the Owens Corning case prior to the filing of the Recusal Motion. Id. at 5, 9. Finally, in a Supplemental Response filed on November 20, Judge Wolin expands on the waiver theme by citing the parties' "acquiescence" and "lack of objection" to ex parte conferences as a ground to question the "legitimacy" of the Recusal Motion. Supplemental Response at 4.

None of these arguments can forestall recusal. First, 28 U.S.C. Section 455(e) expressly provides that a court may accept a waiver of grounds for disqualification under Section 455(a) only if "preceded by a full disclosure on the record of the basis for disqualification." This section requires that any waiver be actual, not implied. See United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985). Here, the Advisors' conflicting roles were never disclosed to creditors in this case, and thus no party could have knowingly waived this conflict. Rather,

Judge Wolin suggests that waiver can be based on imputed knowledge of facts that are “a matter of public record” in another proceeding, pending in another Federal District, in another state. We know of no authority for such far-flung imputation of waiver.

Absent notice in the record of this case, there is no basis to disregard Petitioners’ representation (Recusal Motion at 1) that they only “recently” learned of Messrs. Gross and Hamlin’s conflicting roles in the G-I Holdings bankruptcy. Similarly, CSFB, Agent for the Banks, learned the relevant facts only upon being informed of them by Petitioners shortly before the Recusal Motion was brought. CSFB has no role in the G-I Holdings case and, in any event, never gave any express “waiver,” much less one based on “full disclosure on the record,” as required by Section 455(e). Waiver can hardly be based on the lack of objection to the Advisors’ appointment or service absent knowledge of the disabling conflict.⁵

Nor is there any basis for a finding of “untimeliness,” a distinct ground for denying recusal where a party has actual knowledge of disqualifying

⁵ Even if it could somehow be established that Petitioners, CSFB, or any other particular party had “waived” the conflict, that would not defeat the need for recusal. Waiver is effective only if all parties affected by a particular conflict join in the waiver. See Hardy v. United States, 878 F.2d 94, 98 n.5 (2d Cir. 1989) (judge can proceed under Section 455(e) only if all parties affirmatively consent). In a large, complex bankruptcy such as this, where the appearance of impropriety affects literally thousands of different parties, such universal waiver is obviously impossible. That is why courts have repeatedly held, in the closely analogous situation of conflicts affecting counsel sought to be retained by a debtor in possession under Bankruptcy Code Section 327(a), that such conflicts cannot be waived. See, e.g., In re Thompson, 2000 WL 33716961, at *4 (Bankr. D. Idaho March 1, 2000); In re Envirodyne Indus., 150 B.R. 1008, 1016 (Bankr. N.D. Ill. 1993); In re American Printers & Lithographers, Inc., 148 B.R. 862, 867 (Bankr. N.D. Ill. 1992).

facts and waits to seek relief until after the court issues adverse rulings. See United States v. York, 888 F.2d 1050, 1055 (5th Cir. 1989) (timeliness requirement “prohibits knowing concealment of an ethical issue for strategic purposes”). Here, Petitioners brought the Recusal Motion promptly upon discovering grounds for recusal and before Judge Wolin issued any important decisions in Owens Corning. The Recusal Motion was clearly timely.

Finally, Judge Wolin’s argument regarding ex parte meetings entirely misses the point — the problem here is conflict of interest, not ex parte communication as such. It is true that no party objected to Judge Wolin’s announcement at the December 20, 2001 Conference that he intended to hold ex parte discussions (although the Memorandum of this Conference attached to his Supplemental Response reflects, at page 5, that Judge Wolin simply announced that objections to this procedure were “deemed waived”). However, what has transpired since then bears little resemblance to the case management procedures Judge Wolin outlined. Rather than using ex parte communications “sparingly” as he announced he would, id. at 6, Judge Wolin has engaged in hundreds of hours of private conversations, not only with parties in this case, but also with his conflicted advisors who are anything but neutral. It is Judge Wolin’s decision to surround himself with partisan advisors without any disclosure of their conflicts to creditors

in this case — not the mere fact of ex parte communications — that mandates recusal here.

* * *

The Owens Corning bankruptcy implicates difficult and important issues affecting the interests of thousands of individuals and institutions. The decisions of the District Court in this case will allocate billions of dollars in value between and among competing parties. It is of the utmost importance that the District Court not only be unbiased in fact but have every appearance of being neutral and objective in ruling on these matters. If Judge Wolin is permitted to continue to preside over this bankruptcy case, any decisions that he issues will be tainted by the appearance of impropriety stemming from the increasingly visible conflicts of interest of his intimate advisors. This taint will complicate all further proceedings in this case, including potential merits appeals to this Court.

In this context, as the Third Circuit has noted, a judge’s “laudable sentiments” that he should “shepherd [an] extraordinarily complicated and protracted litigation to its conclusion” and not “creat[e] additional delay” are not sufficient to defeat recusal, even if a “newly assigned district judge will face a gargantuan task in becoming familiar with the case.” School Asbestos, 977 F.2d at 784. If Petitioners’ Recusal Motion and the Petition have merit, then recusal is mandated regardless of the impact on current proceedings. It is precisely because so many important decisions are yet to be made in this case, that it is especially

important for the District Court to be free of any taint. Otherwise, “the outcome of this massive, important, and widely followed case would be shrouded with suspicion.” School Asbestos, 977 F.2d at 785. “[C]reative, alternative remedies” are not an acceptable substitute for recusal when Section 455 requires it. Id. at 783. Only recusal can erase the taint.

Conclusion

For the foregoing reasons, the Banks respectfully request that this Court grant the Petition and order the immediate recusal of Judge Wolin from all proceedings in this bankruptcy case.

Respectfully submitted,

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