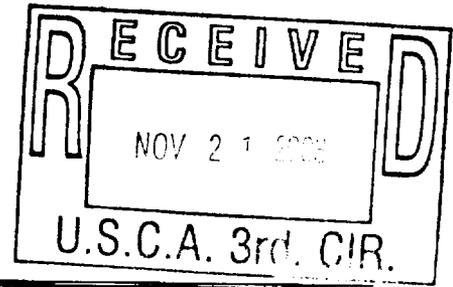


**E-Transmission  
Signature to follow**

No. 03-4212



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

**In re KENSINGTON INTERNATIONAL LIMITED AND  
SPRINGFIELD ASSOCIATES, LLC,**

**Petitioners**

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**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**

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**STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS OF USG CORPORATION ET AL. IN SUPPORT OF THE  
MANDAMUS PETITION FILED BY KENSINGTON INTERNATIONAL  
LIMITED AND SPRINGFIELD ASSOCIATES, LLC.**

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The Emergency Petition for a Writ of Mandamus filed on October 24, 2003 by Kensington International Limited and Springfield Associates, LLC (the "Petitioners") and the underlying recusal motion raise serious issues with respect to the District Court's administration of five asbestos-related chapter 11 bankruptcy cases pending in the District of Delaware (together, the "Delaware Asbestos Bankruptcies"), all of which are assigned to the Honorable Alfred M. Wolin. The

Petitioners are creditors in one of those bankruptcy cases, In re: Owens Corning. The USG Committee represents the interests of all unsecured creditors (other than asbestos claimants) in another of those Delaware Asbestos Bankruptcies, In re USG Corp et al. (No. 01-2094). The USG Committee this date will be filing a motion below seeking the recusal of Judge Wolin in the USG bankruptcy cases, on essentially the same grounds that are raised in the Petition.

The Petition demonstrates that, at a minimum, an appearance of impropriety exists that equally taints the proceedings in Owens Corning and USG, among the other Delaware Asbestos Bankruptcies. The District Court's reliance upon his Court-appointed "Consultants," David R. Gross and C. Judson Hamlin – both of whom are actively representing, and continue to represent, the interests of future asbestos claimholders in another major and highly-contested asbestos bankruptcy case pending in this Circuit, G-I Holdings Inc., *fka* GAF Corporation, and its affiliates (collectively "G-I") – creates an appearance of partiality that cannot be undone absent the recusal of Judge Wolin.

The record demonstrates that the District Court has surrounded itself with, and has been taking *ex parte* advice from, Consultants who are elsewhere advocating a partisan position directly at odds with their purported role in these cases as neutrals. The Consultants have also engaged in *ex parte* communications

with various constituencies in this case, and are in a position to communicate their extrajudicial knowledge and opinions of the facts to the Court *ex parte*.

In fact, as both the Court of Appeals for the Third Circuit and Judge Wolin himself have recognized, the legal disputes in the various asbestos bankruptcies, including the G-I bankruptcy cases, in which Messrs. Gross and Hamlin are partisan advocates, involve the same legal and factual issues that are presented in the Debtors' cases here. These include: (i) the establishment of a bar date for future claimants; (ii) the manner in which future claims are estimated for plan confirmation purposes; (iii) whether individuals with only pleural changes have been harmed; (iv) what levels of exposure are necessary to establish an asbestos-induced disease; (v) whether and to what extent future asbestos claims or “demands” are “claims” for the purposes of Bankruptcy Code; and (vi) the applicability of the discharge to future claims; and (vii) the role of the future claims representative. The valuation of a debtor’s asbestos-related liability is a “fundamental” issue that lies at the heart of these asbestos bankruptcies.

The time records of the respective Consultants reflect that the District Court has engaged in extensive and unchecked *ex parte* communications directly with the parties and with the Consultants. Their time records disclose that they have spent hundreds of hours consulting privately and *ex parte* with the Court and other parties to these bankruptcy cases, performed legal and factual research

for the Court, attending hearings and assisted the Court in preparing for hearings, meeting with party representatives, and engaging in other tasks that may have a material impact on the manner in which these cases are administered and the results that will be achieved. In all, Messrs. Gross and Hamlin had been paid more than \$620,000 for their services in this Court through early 2003, the last date that time records are available. Such unchecked *ex parte* communications are forbidden by the Code of Judicial Conduct precisely because they put into question the integrity of the judicial system, shatter the appearance of judicial impartiality and, because there is no record of the “factual” assertions or unchallenged legal arguments exchanged during such *ex parte* communications, deny any meaningful appellate review over the decisions of the District Court.

The law compels the recusal of Judge Wolin in these circumstances. Both 28 U.S.C. § 455(a), and Canon 3C of the Code of Conduct for United States Judges (the “Judicial Conduct Code”) provide that a judge “*shall disqualify himself,*” not only if the judge is in fact not impartial, but also “*if the judge’s impartiality might reasonably be questioned.*” (emphasis added). It is well established that a judge's impartiality comes into question when, as here, an advisor or assistant to the judge has an interest in the outcome of the litigation. Judicial Code § 455(b)(1) and the Judicial Conduct Code additionally require a judge to disqualify himself whenever, as is the case here, he has obtained extra-

judicial knowledge of disputed evidentiary facts concerning the proceeding, whether directly or through his advisors.

This Court has aptly held that “public confidence in the judicial system mandates, at a minimum, the appearance of neutrality and impartiality in the administration of justice.” Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 157 (3d Cir. 1993). Indeed, “impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system.” Id. These qualities are important in all judicial proceedings, and none more so than bankruptcy proceedings. See In re Ira Haupt & Co., 361 F.2d 164, 168 (2d Cir. 1966) (“The conduct of bankruptcy proceedings not only should be right but must seem right.”).

The issue is not whether the District Court is biased, or even whether Messrs. Hamlin and Gross are biased. The issue is simply whether the material participation of Messrs. Hamlin and Gross in the administration of these cases creates the *appearance* of impropriety in light of their material involvement in the G-I case as advocates on behalf of future asbestos claimants, and in light of the Consultants’ *ex parte* communications with parties in interest on the Court’s behalf. The USG Committee respectfully submits that it does.

The facts and legal issues raised by the Petition pervade the USG bankruptcy cases to the same extent as they do the Owens Corning cases. It is

respectfully submitted that any determination of the Petition by this Court should therefore also be made applicable to the USG bankruptcy cases.

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**CONCLUSION**

Accordingly, the USG Committee respectfully requests that the Petition be granted and, further, that the Honorable Alfred M. Wolin be recused from the USG bankruptcy cases in addition to the Owens Corning cases.

Dated: November 21, 2003

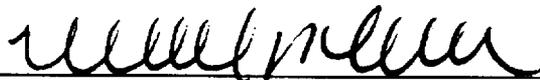
RESPECTFULLY SUBMITTED,

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Co-Counsel for the Official Committee  
of Unsecured Creditors of USG Corporation

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.

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**AFFIDAVIT OF  
MICHAEL R. LASTOWSKI**

I, Michael R. Lastowski, do hereby certify that I am, and at all times during the service of process, have been, an employee of Duane Morris LLP, not less than 18 years of age and not a party to the matter concerning which service of process was made. I certify further that I caused service of the following:

**MOTION BY THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS OF USG CORPORATION, ET AL. FOR LEAVE TO FILE A  
STATEMENT IN SUPPORT OF THE MANDAMUS PETITION FILED BY  
KENSINGTON INTERNATIONAL LIMITED AND SPRINGFIELD  
ASSOCIATES, LLC**

to be made on November 21, 2003 on the parties on the attached list in the manner indicated.

  
\_\_\_\_\_  
Michael R. Lastowski

SWORN AND SUBSCRIBED before me this 21st day of November, 2003

  
\_\_\_\_\_  
NOTARY PUBLIC  
RACHEL DEELY  
NOTARY PUBLIC  
STATE OF DELAWARE  
My Commission Expires August 25, 2004

**Service List**

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**Via Federal Express**

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	<b><u>Via Federal Express</u></b>
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