

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4212

In re Kensington International Limited and Springfield Associates, LLC,
Petitioners
(Related to U.S. Bankruptcy Court for the District of Delaware No. 00-3837)

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

**RESPONSE OF OWENS CORNING TO AMICUS BRIEFS
SUBMITTED BY USG CORPORATION, ET AL.**

Respondents Owens Corning and its affiliated debtors and debtors-in-possession (collectively, "Owens Corning") respectfully submit this response to the amicus briefs submitted by USG Corporation ("USG"), the Official Committee of Unsecured Creditors of USG Corporation (the "USG Commercial Creditors"), and the Official Committee of Unsecured Creditors of Armstrong World Industries, Inc. (the "Armstrong Commercial Creditors") (collectively, the "*Amici*").¹

¹ The actual status of these parties is as *amicus curiae*. The Court's November 26, 2003 Order, characterizes the motion submitted by the USG Commercial Creditors for leave to file their statement as a motion to intervene. However, the USG Commercial Creditors have not sought the Court's permission to intervene in this case. Indeed, as acknowledged by

Amici attempt to hijack this proceeding for their own benefit. USG and the USG Commercial Creditors impermissibly seek to expand the alleged grounds for recusal beyond those advanced by Petitioners, raising new issues and submitting voluminous new evidence unrelated to the Owens Corning bankruptcy case. The Armstrong Commercial Creditors purportedly take no position on the merits of Petitioners' request to recuse Judge Wolin in the *Owens Corning* case. Rather, the Armstrong Commercial Creditors and the other *Amici* use the opportunity to urge this Court to disqualify Judge Wolin in their own cases without themselves filing a petition for extraordinary mandamus relief.

Yet, even if this Court were to consider the new claims for relief asserted by the *Amici*, those claims are barred by the same flaws that preclude relief on Kensington's original petition. Moreover, the *Amici* fail to demonstrate any bias by the District Court or any extrajudicial fact-finding that would warrant recusal.

their motion for leave to file a statement, the USG Creditors are not parties to this action and do not seek relief here. Therefore, the USG Commercial Creditors must be treated as *amicus curiae*.

ARGUMENT

I. THIS COURT SHOULD DISREGARD THE AMICUS BRIEFS

The briefs submitted by the *Amici* raise new issues, submit new evidence and seek new relief wholly outside the grounds raised, or relief requested, in the Kensington Petition. This Court has followed the accepted rule that it will “consider only issues argued in the briefs filed by the parties and not those in briefs filed by interested nonparties.”² *DiBiase v.*

² In this regard, Owens Corning notes that while the Washington Legal Foundation (“WLF”) purports to be a neutral advocacy group, *Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners*, at 1, that is not the case. WLF neglects to note that it has a very real, and parochial, interest in this case. WLF is allied with the Commercial Creditors, who contend that claims for compensation asserted on behalf of certain asbestos claimants (those with no present manifestation of lung function impairment) are baseless and extortionate. WLF has advocated this position in the media, courts, and U.S. Congress, where it regularly campaigns for asbestos tort reform and against asbestos claimants. See *WLF Press Release: Michigan Supreme Court Urged to Adopt Asbestos Litigation Reform*, www.wlf.org/upload/8-28-03michigan.pdf (visited December 4, 2003); *WLF Public Interest Partners*, www.wlf.org/Resources/Partners/links.asp (“WLF strives to defend free enterprise principles by working with public policy professionals who share our goals”; including lobby group, the *Asbestos Alliance*) (visited December 4, 2003). Further, two of the members of the WLF Board of Directors are partners at the law firm that represents *amicus* USG Commercial Creditors. See www.wlf.org/Resources/Partners/legalpolicy.asp (listing members of WLF Legal Policy Advisory Board) (visited December 4, 2003). Principles of fairness and the Rules of Appellate Procedure require *amicus curiae* to disclose all their interests in a matter. See e.g. Fed. R. App. P. 29(c)(2) (“an amicus brief . . . must include . . . a concise statement of [the amicus curiae’s] interest in the case”). WLF has failed to do so here.

SmithKline Beecham Corp., 48 F.3d 719, 731 (3d Cir. 1995). *See also* *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (refusing to consider an “argument [submitted in an *amicus brief* that] has never been advanced” by the parties); *Resident Council of Allen Parkway Village v. United States Dep’t of Housing & Urban Dev.*, 980 F.2d 1043, 1049 (5th Cir. 1993) (“*amicus curiae* generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal”); *Christopher v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1284, 1291 (5th Cir. 1991) (an *amicus curiae* cannot raise an issue raised by neither of the parties absent exceptional circumstances).

USG and its Commercial Creditors attempt to introduce a new issue: whether the District Court should be recused simply because it conducted *ex parte* communications with parties and its Advisors. They assert that these consultations – which appear on the record to have concerned case administration and settlement issues – raise an appearance of impropriety. USG Brief at 5-10; USG Commercial Creditors Brief at 3-4. Petitioners did not raise this issue in their Petition and this Court should not consider it based on the submissions by the *Amici*. The purpose of an *amicus* brief is to assist the Court in deciding the dispute in the case before it – not to raise

additional issues from another controversy for adjudication. *Neonatology Assoc., P.A. v. Comm'r*, 293 F.3d 128, 132-133 (3d Cir. 2002).

The assumption by the *Amici* that all the asbestos-related bankruptcy proceedings before Judge Wolin must be treated monolithically is wrong. See USG Brief at 1; USG Commercial Creditors Brief at 2; Armstrong Commercial Creditors Brief at 5. While asbestos-related bankruptcy cases involve certain common legal and procedural issues, the factual issues underlying the different debtor/creditor relationships are unique to each proceeding. Each case involves separate negotiation, formulation, and confirmation of a plan of reorganization. Any alleged ground for recusal must be examined in light of the unique facts and circumstances pertaining to both the party asserting the allegation and the case in which that allegation is made.³

³ Significantly, no request for recusal has been raised in two of the major asbestos-related bankruptcies pending before Judge Wolin, despite the fact that those bankruptcy proceedings have also been contentious. See *In re Federal Mogul-Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), *cert. denied sub nom. DaimlerChrysler Corp. v. Official Comm. of Asbestos Creditors*, 537 U.S. 1148 (2003) (dismissing appeal from an order denying motion to transfer asbestos-related claims asserted against automobile manufacturers to the bankruptcy court); *In re Combustion Eng'g, Inc.*, 2003 Bankr. LEXIS 1044 (D. Del. July 2, 2003) (setting case management order for consideration of objections to proposed plan of reorganization). Both the *Federal Mogul* and *Combustion Engineering* cases have made substantial progress towards confirmation of a plan of reorganization under Judge Wolin's administration without a claim by any debtor or commercial

Laid bare, the *Amici*'s position is to obtain recusal in their cases – namely *In re Armstrong World Industries, Inc., et al.*, Case Nos. 00-4471 (RJN) and *In re USG Corp., et al.*, Case Nos. 01-2094 (RJN) -- despite not having filed mandamus petitions in those cases. Federal Rule of Appellate Procedure 29 does not allow an *amicus* to request that an appellate court adjudicate a justiciable controversy in one case and enter separate relief in an entirely different judicial proceeding. Indeed, absent the appropriate procedural vehicle, it is doubtful this Court has jurisdiction to disqualify the District Court in the USG or Armstrong bankruptcy cases. *See* Fed. R. App. P. 29(b)(2) (requiring an *amicus* to state “why the matters asserted are relevant to the disposition of the case”). In addition, basic notions of notice and due process counsel that any request for relief relating to another case must be the subject of separate proceedings in which all of the parties in those cases are invited to participate. *See* Fed. R. App. P. 21(b)(2) (requiring clerk to serve an order inviting responses to a mandamus petition on all parties in a case). For these reasons, the issues raised and relief requested by the *Amici* should be disregarded by this Court.

creditor that Judge Wolin or any of his advisors are biased and despite the fact that the parties in those cases may have had *ex parte* communications with Judge Wolin. Nevertheless, *Amici* remarkably seek Judge Wolin's recusal in these cases as well. In addition, it is notable that the debtors in the *Grace* and *Armstrong* cases do not support mandamus.

II. AMICI'S CLAIMS FOR RELIEF ARE UNTIMELY AND BARRED BY UNCLEAN HANDS

Amici's feigned cries of shock at the existence of *ex parte* communications are quite simply not credible. The *ex parte* communications about which the *Amici* belatedly complain were not secretly held. As Judge Wolin stated in his Supplemental Response, each of the parties has known since December 2001, when these cases were first assigned to the District Court, that the District Court intended to meet individually – *ex parte* – with representatives of all constituencies. The District Court informed all the parties that, given the size and complexity of the cases, these *ex parte* communications were necessary to the orderly management (and hoped-for settlement) of the cases. Despite this knowledge, neither the *Amici* nor any of the parties to any of the six bankruptcy cases complained about the Judge's approach until Kensington filed its first motion nearly two years later. Indeed, it is undisputed that the *Amici* and their representatives, like representatives of all the parties, actively participated in these *ex parte* conferences with the Advisors and the District Court from the outset. At the same time, the court record demonstrated to the *Amici* (and for that matter Kensington) that representatives of all other constituencies filing fee applications were also meeting *ex parte* with the District Court. Thus, the *Amici's* cry of outrage is

not only hollow, it is too late. *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978).

Owens Corning submits that the District Court's conduct of the *Owens Corning* case has been entirely appropriate. *Amici*'s knowledge of and entirely voluntary participation in the *ex parte* communications about which they complain equitably estops them from requesting recusal here. It is well established that writs of mandamus are subject to equitable principles. *Greathouse v. Dern*, 289 U.S. 352, 359 (1933) ("mandamus . . . is controlled by equitable principles"); *Pennsylvania v. Newcomer*, 618 F.2d 246, 248 (3d Cir. 1980) ("the writ of mandamus has been analogized to equitable remedies, to be granted or withheld in the discretion of the issuing court"). Thus, requests for mandamus relief are subject to the equitable defenses of unclean hands and laches. *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 209 (1911) ("mandamus is not a writ of right . . . and will not be granted in aid of those who do not come into the court with clean hands"); *United States v. Carter*, 270 F.2d 521, 524 (9th Cir. 1959) (doctrine of laches applied to bar claim for mandamus).

Amici cannot be heard to complain of conduct in which they have themselves engaged.

III. AMICI'S EXPANDED BASES FOR RECUSAL ARE WITHOUT MERIT.

Even considered on the merits, the *ex parte* communication claims raised by USG and its Commercial Creditors do not warrant recusal. The size and complexity of the judicial tasks assigned by this Court to Judge Wolin in six asbestos-related bankruptcy cases are extraordinary. For this reason, Judge Wolin took an activist role in administering these cases. Left to the normal litigation process, these large and complex cases – and the hundreds of thousands of asbestos claims they represent – could take decades to resolve. The District Court made clear from the outset that it would conduct *ex parte* consultations with all interested parties in order to determine the avenues available to move toward resolution. The *Federal Mogul*, *Combustion Engineering* and *Armstrong* cases have made substantial progress towards confirmation of a plan of reorganization. Owens Corning recently received conditional approval from the Bankruptcy Court of its Disclosure Statement and Voting Procedures and is poised to begin plan confirmation proceedings.

The District Court's open use of *ex parte* communications to facilitate the administration and possible settlement of the Owens Corning bankruptcy case – without any party's objections – distinguishes this matter from those cases upon which the *Amici* rely in support of their claim that *ex parte*

communications require recusal. Judge Wolin and Advisors Hamlin and Gross have attested that discussions were for administrative and settlement purposes only and, thus, are expressly sanctioned by the Judicial Canon of Ethics. Gross Aff. ¶ 6, 9-10; Hamlin Aff. ¶ 13; ABA Code of Judicial Conduct Canon 3(B)(7). Even were that not the case, the mere fact of otherwise *ex parte* communications prohibited by the Judicial Canons does not automatically constitute a basis for recusal under 28 U.S.C. §455(a). See *Andrade v. Chojnacki*, 338 F.3d 448, 459 (5th Cir. 2003). In the cases upon which the *Amici* rely, the *ex parte* communications were neither openly held nor mutually available to all. Compare *Wisconsin Steel Co. v. Int'l Harvester Co.*, 48 B.R. 753 (N.D. Ill. 1985); *Hall v. Small Bus. Admin.*, 695 F.2d 175 (5th Cir. 1983). Here, because the communications were held with all the parties and with the common knowledge of all, they do not present an appearance of impropriety. See *Bilello v. Abbott Laboratories*, 825 F. Supp. 475 (E.D.N.Y. 1993) (denying motion to disqualify the trial judge where the judge met with counsel for both sides several times both together and separately regarding prospective evidence in the case).

While USG and its Commercial Creditors urge that the *ex parte* communications conducted by the Court with parties and Advisors were improper, *Amici* do not show that the District Court either received

extrajudicial evidence or that it is biased against them or any party. See *Liteky v. United States*, 510 U.S. 540, 556 (1994) (requiring proof of bias or receipt of extra-judicial evidence). Moreover, the *Amici* do not submit any evidence to support their speculation that Judge Wolin has received extra-judicial evidence or behaved in a manner warranting recusal under 28 U.S.C. § 455(b)(1), or that the *ex parte* communications in the circumstances of this case indicate the appearance of bias warranting recusal under 28 U.S.C. § 455(a). Instead, the *Amici* merely aggregate the total time spent by the District Court’s Advisors on consultations with the District Court over a two-year period with regard to the five complex asbestos-related bankruptcies and surmise from this total that Judge Wolin must have heard some sort of extra-judicial evidence. Such conjecture is inappropriate in a request for recusal. *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987) (“[a] judge should not recuse himself on unsupported, irrational or highly tenuous speculation”). Moreover, rank speculation cannot satisfy the “clear and indisputable” standard required for mandamus relief.⁴ *Delgrosso v.*

⁴ Even if this Court considers USG’s speculation, it is insufficient to warrant recusal. As made clear by Justice Scalia in *Liteky*, the proscriptions set forth in 28 U.S.C. §§ 455(a) and (b)(1) converge to a substantial degree when dealing with information allegedly gleaned from extra-judicial sources. 510 U.S. at 554-556. The acquisition of such knowledge alone is insufficient to demonstrate either bias or the appearance of bias. Some additional conduct by the court must occur demonstrating actual bias against a party on the

Spang and Co., 903 F.2d 234, 237 (3d Cir. 1990), *cert. denied*, 498 U.S. 967 (1990).

Taken on the record presented, the alleged *ex parte* communications cited by the *Amici* only indicate that Judge Wolin has endeavored to handle an extraordinary set of complex cases through extraordinary means. Judge Wolin not only openly disclosed the appointment of the Advisors, Owens Coming Answer at 6-7, he granted each and every party an equal opportunity to meet with him *ex parte* to explore means to resolve each asbestos-related bankruptcy case. As the voluminous evidence submitted attests, the process was transparent. Counsel for the various parties and the Advisors publicly filed timesheets that disclosed their activities. The fact that the *Amici* belatedly claim that they do not agree with the District Court's approach after two years of proceedings is not enough. *See In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991) (an alleged violation of the Code of Judicial Conduct "does not necessarily create an appearance of personal bias or partiality such as to require recusal under 28 U.S.C. § 455"). The District Court's efforts in these cases do not demonstrate that it "(1) relied upon any

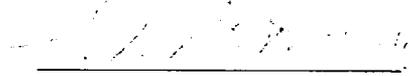
basis of the disputed evidence or suggesting the appearance of bias based on that knowledge. 510 U.S. at 554. Here no such bias as been alleged and, given the fact that representatives of the parties had open access to the District Court, none exists.

information acquired outside [any of the asbestos-related bankruptcy cases before him] or (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.” *Liteky*, 510 U.S. at 556. The evidence regarding *ex parte* communications submitted by the *Amici* simply does not support recusal in this case.

CONCLUSION

The motion to recuse and the Petition in this case were initiated for strategic purposes by large, sophisticated post-petition purchasers of distressed debt and have been joined by *Amici* for similar reasons. The strategic attempt to recuse the District Court at this stage of this case will cause real damage to Owens Corning, its employees and the great majority of its creditors. For the reasons discussed above, Owens Corning respectfully requests that this Court disregard the new grounds for relief asserted by the *Amici*.

Respectfully submitted,



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