

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

**REPLY TO ANSWERS TO
EMERGENCY PETITION FOR A WRIT OF MANDAMUS**

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**REPLY TO ANSWERS TO
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There are nine filings that oppose the grant of mandamus requested in this case: five advisors' affidavits, Judge Wolin's two responses to the mandamus petition, and two answers formally opposing the requested relief. Taken as a whole, these oppositions are extraordinary as much for what they *fail* to say as for what they actually argue.

The oppositions *fail* to dispute the following:

- for nearly two years, Messrs. Gross and Hamlin have been acting as partisans for the future asbestos claimants in *G-I Holdings* while also serving as Judge Wolin's advisors in *Owens Corning*;
- as representatives of the future asbestos claimants, Messrs. Gross and Hamlin have "an obligation and a fiduciary duty to the future claimants" (12/13/02 *G-I Holdings* Tr. 67 (docket entry 1980) (oral argument of Mr. Gross));
- *G-I Holdings* and *Owens Corning* are "similarly situated" in their bankruptcy proceedings (*id.* at 60), and many of the future asbestos claimants in *G-I Holdings* whose interests Messrs. Gross and Hamlin represent are also future claimants in *Owens Corning*;
- Messrs. Gross and Hamlin devoted more than 600 hours to their work as advisors to Judge Wolin through March 31, 2003, in addition to (i) work after that date, (ii) more than 300 hours of billable time spent by colleagues at their firms; and (iii) substantial additional time Mr. Gross billed in his capacity as mediator;
- the role of Messrs. Gross and Hamlin in *G-I Holdings* was never disclosed to the parties in *Owens Corning*;

- the proposed appointment of Messrs. Gross and Hamlin as the future asbestos claimants' representatives in *W.R. Grace* (a case also pending before Judge Wolin) was never disclosed to the parties in *Owens Corning* until *after* petitioners filed their motion for recusal, and Judge Wolin's own participation in that process has *never* been disclosed; and
- Messrs. Gross and Hamlin have repeatedly used their positions as advisors to Judge Wolin to advocate their clients' partisan interests in *G-I Holdings* – asserting among other things that they had “substantial experience” in asbestos bankruptcy matters “as a result of [their] appointment in another court in this building with respect to some of the bankruptcies that are presently before Judge Wolin,”¹ and purporting to offer insight into what Judge Wolin's rulings meant and as to how Judge Wolin might rule *in the future*.

At the same time, the oppositions confirm the following:

- Judge Wolin knew, from the moment he appointed Messrs. Gross and Hamlin, that they were already serving as partisans on behalf of the future claimants in *G-I Holdings*; and
- on the basis of one or more *ex parte* contacts, Judge Wolin elected to suspend all discovery in connection with the recusal motion.

In light of these concessions, how exactly do the opponents propose to avoid Judge Wolin's recusal? With three arguments, none of them persuasive. *First*, the

¹ 12/13/02 *G-I Holdings* Tr. 58 (docket entry 1980) (oral argument of Mr. Gross); see also *Code of Conduct for Judicial Employees* Canon 2, available at <http://www.uscourts.gov/guide/vol2/ch2a.html> (“A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office. * * * A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. A judicial employee should not use public office for private gain.”).

Debtors and others argue that petitioners' recusal motion was untimely because, contrary to petitioners' statements to Judge Wolin and this Court, petitioners have known all along of the roles of Messrs. Gross and Hamlin in *G-I Holdings*. As the accompanying Declaration of Mark D. Brodsky reaffirms, however, petitioners had no knowledge of Gross and Hamlin's conflicting role in *G-I Holdings* until September 24, 2003, about two weeks before petitioners moved to recuse Judge Wolin. Respondents' suggestion that petitioners *could have known* the facts kept off the *Owens Corning* record if they had monitored the docket in *G-I Holdings* – a case in which petitioners are not involved – does not meet the governing legal standard for untimeliness and is contrary to this Circuit's holding as to what constitutes adequate notice. In any event, in a case like this one with thousands of creditors, there are unquestionably many creditors who knew nothing of the conflicting roles of Messrs. Gross and Hamlin. It cannot possibly be that all creditors have forfeited their right to demand a proceeding free of the appearance of impropriety.

Second, respondents make the disturbing assertion that a judge's advisors need not be neutral. That assertion cannot be correct. It is one thing to observe that an advisor to a federal judge may have relevant experience in his field of expertise. But it is quite another matter to contend, as respondents do, that an advisor may simultaneously act as a partisan in a substantially identical proceeding and

may, while still advising the judge, cite as precedential authority the decisions of the judge in the very matter on which he is advising the judge.

Third, respondents suggest that, even if Judge Wolin’s advisors must be removed, the taint does not extend to the judge himself. For reasons stated in the Fifth Circuit’s *Hall* decision, the Seventh Circuit’s *K.L.* decision, and the Ninth Circuit’s *First Interstate* decision, however, an appearance of judicial impropriety exists as a matter of law when a conflicted advisor – be he a law clerk or a court-appointed advisor – has not been screened from the outset of the case but has instead had substantial advice-giving contact with the judge. Any doubt about this point would be overcome by the conduct of Judge Wolin himself – appointing advisors he knew from the outset to be conflicted, not disclosing the conflict, and playing some role in the effort to create an even more troubling conflict, involving the same advisors, in *W.R. Grace*. This Court disapproved “creative, alternative remedies” to avoid a judge’s recusal in *In re School Asbestos Litigation*, 977 F.2d 764, 783 (1992), and such creativity should not be countenanced here.

In light of the extensive filings in this Court – and in view of Judge Wolin’s own submission challenging “the legitimacy of the Motion for Recusal of the District Court” (11/20/03 District Court Judge Response 4) – we no longer believe that a remand to Judge Wolin for factfinding is an appropriate option. This Court

should order recusal once and for all, or failing that should remand the motion for resolution by a different judge.

I. THE RECUSAL MOTION WAS TIMELY

We acknowledge that “[t]he judicial process can hardly tolerate the practice of a litigant *with knowledge* of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming.” *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978) (Gibbons, J.) (emphasis added). “But especially when the circumstances giving rise to the charge of bias occur or are discovered after the case has commenced, timeliness should be measured not in some absolute and arbitrary manner from the date of discovery, but with respect to the future stages of the case.” *Ibid.* And, as *Smith v. Danyo* and every other appellate case that respondents have cited suggest, the standard for untimeliness is whether a movant with *actual knowledge* has failed to act on that knowledge, not a standard of constructive or imputed knowledge or what a litigant should or could have known. See *United States v. Daley*, 564 F.2d 645, 651 (2d Cir. 1977) (“Appellant’s position is also undermined by Daley’s protracted delay before moving for recusal in the district court, despite his *actual knowledge* of a prior judicial encounter with Judge Lasker.”) (emphasis added).

In most cases finding untimeliness, the information on which the litigant failed to act was available in the record of the very case in which the recusal motion was brought. *E.g.*, *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353, 1359-1360 (8th Cir. 1996); *Apple v. Jewish Hosp. & Medical Center*, 829 F.3d 326, 334 (2d Cir. 1987); cf. *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 236 (3d Cir. 2001) (disclosures judge made in case involving company with no employees that acted through a single individual are known to company owned and controlled by that same individual). Here, by contrast, the pertinent disclosures were *not* made in the *Owens Corning* case itself. Rather, respondents rest their entire argument on what they say petitioners could or should have learned from the record of the *G-I Holdings* case.

Petitioners are creditors of Owens Corning (and certain of its subsidiaries). They are not creditors of G-I Holdings, Inc., or participants in its bankruptcy case.² *Their* actual knowledge – not someone else’s – bears on whether their recusal motion was timely.

² Surely creditors of one case cannot be expected to monitor the dockets of all other cases, or even all other asbestos bankruptcy cases, in the country just in case an unfathomable conflict would thereby be discovered. To the contrary, creditors are entitled to assume that a federal judge would never allow such a profound conflict to exist in the first instance, and that normal practices of disclosure would be followed to bring any potential conflict to the attention of the parties in the immediate case.

Respondents have much to say (much of it wrong) about the state of others' knowledge, but nothing to say about the state of petitioners' knowledge except suggestions such as “[p]resumably, the Creditors Committee’s counsel shared *all* this information with its client, the members of the Creditor’s Committee, *including Petitioners*, and Kramer Levin.” OC Answer 13 (emphasis added). But petitioners were never members of the Creditor’s Committee. In addition, whatever respondents may presume, the facts are otherwise.

Petitioners accurately represented to this Court that they “recently learned” of and “promptly called to Judge Wolin’s attention” the partisan activities of Messrs. Gross and Hamlin in *G-I Holdings*. Mandamus Pet. 2. They accurately represented to the district court on the first page of their October 10 recusal motion (App. 3) that they “recently have obtained” the pertinent information and that it “was never disclosed in these cases.” Now that the veracity of those solemn representations has been contested, petitioners submit the sworn Declaration of Mark D. Brodsky as an attachment to this reply.

As Mr. Brodsky declares under penalty of perjury, he has at all relevant times been responsible for any investment made by petitioners in the securities or debt obligations of Owens Corning, with all employees contributing to this effort reporting directly to him; and it was on September 24, 2003, that Mr. Brodsky first

learned of the role of Messrs. Gross and Hamlin in *G-I Holdings*. Brodsky Decl. ¶¶ 5, 11. Nothing that respondents have said contradicts – or even tends to contradict – these sworn representations; rather, respondents *attribute* to petitioners, without factual or legal basis, purported knowledge of others.

Even if the knowledge of others were relevant, respondents’ arguments would fall far short of showing actual knowledge on the part of *any* relevant actor. Respondents refer to two large law firms, Kramer Levin Naftalis & Frankel LLP and Davis, Polk & Wardwell.³ It is apparently respondents’ position (i) that Kramer Levin and Davis Polk represent petitioners (which they do not); (ii) that every fact known to any lawyer at Kramer Levin or Davis Polk working on the *Owens Corning* case is known to those lawyers’ clients; and (iii) most critically, that every fact known to any person at Kramer Levin or Davis Polk, whether or not that person is a lawyer and whether or not that person is working on the *Owens*

³ The Debtors also suggest (at 8-9 n.6, 13 n.11) that petitioners should be deemed to be aware of facts that might have been known by certain other members of the Owens Corning banking syndicate. But the Debtors cite no legal authority for that proposition, and it defies common sense for one lender’s knowledge to be attributed to all other members of the syndicate. In addition, most of the other lenders so identified by the Debtors left the syndicate before Judge Wolin appointed his five advisors. Furthermore, Credit Suisse First Boston (CSFB) advised this Court on November 21, 2003, that “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 Response 27.

Corning case, is known to the lawyers working on the *Owens Corning* case and to their clients. We will not dwell on the fallacies in propositions (i) and (ii), because proposition (iii) is so plainly wrong.

Attached to this reply is the Declaration of Kenneth H. Eckstein, a Kramer Levin partner with responsibility for that firm's representation of CSFB, as Agent, in the *Owens Corning* case. Mr. Eckstein swears unequivocally, under penalty of perjury, that "I have consulted all persons working on the Owens Corning chapter 11 case at Kramer Levin and can confirm that none of them was aware until late September 2003 of Messrs. Gross and Hamlin's dual roles in G-I Holdings and Owens Corning." Eckstein Decl. ¶ 13. Though it is true that a lawyer at Kramer Levin filed a notice of appearance in the *G-I Holdings* case on behalf of Bear, Stearns & Co., "[t]here was no attorney time billed to this matter" after August 2001. *Id.* ¶ 8. The appointment of Mr. Hamlin as futures representative and Mr. Gross as his counsel occurred on October 10, 2001. App. 293-295. Thus, no lawyer at Kramer Levin – and certainly no Kramer Levin lawyer working on the *Owens Corning* case – had actual knowledge of the dual roles of Messrs. Gross and Hamlin in *G-I Holdings* and *Owens Corning*. It is not plausible – not even possible – that any Kramer Levin lawyer notified any creditor in the *Owens Corning* case of the facts that no lawyer at Kramer Levin knew.

As for Davis Polk, it bears repeating that petitioners were never that firm's clients, nor were they, as the Debtors claim, members of the Creditors Committee. See Brodsky Decl. ¶ 7. Thus, petitioners cannot be charged with knowing anything that Davis Polk knew. Even if it were otherwise, Davis Polk was hardly "actively monitoring *G-I*" (OC Answer 12): suffice it to say that the time records attached to the Debtors' answer do not show that a single *lawyer* billed time to monitoring the case. The Debtors attach numerous time entries from "Jones RL," each of which reflects on its face that Mr. Jones (a clerical employee in the Davis Polk managing attorney's office) merely engaged in an activity he described as "Docket update; log." The debtors also attach (OC App. 293) a single time entry from "Hobaczewski SA" in January 2002. Ms. Hobaczewski was a Davis Polk paralegal, and her time entry makes no reference to *G-I Holdings*. There is no basis in these records to infer actual knowledge on the part of anyone – and certainly not on petitioners' part – of Messrs. Gross and Hamlin's roles in *G-I Holdings*.

Respondents are left to rely on the proposition that "Kensington and CSFB are charged with their lawyers' knowledge – including all lawyers within their lawyers' law firm." OC Answer 20. Even if that surprising statement of law were true, it would not avail respondents, who have failed to show that any *lawyer* within even Kramer Levin or Davis Polk – let alone any lawyer who actually repre-

sents petitioners – knew before September 2003 that Messrs. Gross and Hamlin were advocates in *G-I Holdings* and at the same time supposed neutrals in *Owens Corning*. But that surprising statement of law is not, in any event, correct.

The sole appellate authority cited for that proposition is *Jenkins v. Sterlacci*, 849 F.2d 627, modified on denial of rehearing, 856 F.2d 274 (D.C. Cir. 1988). *Jenkins* holds that a law firm may not *create* a conflict of interest for a special master by becoming his opposing counsel in an otherwise unrelated case and then obtain his recusal because the same law firm is appearing (through a different member of the firm) before him in his capacity as special master. Petrowitz had been a special master in the *Sterlacci* matter for some time and had concluded evidentiary proceedings on April 7, 1986. Battocchi, a member of Cole and Groner, P.C., had represented Sterlacci before Special Master Petrowitz. Petrowitz then “filed an unrelated administrative appeal” with a federal agency on May 2, 1986. 849 F.2d at 629. The cases ceased to be unrelated on May 9, 1986, when Fleischer, who like Battocchi was a member of Cole and Groner, P.C., notified the agency that he would participate in the appeal Petrowitz had initiated.

The D.C. Circuit emphatically stated that “Petrowitz was ethically required” to disclose the potential problem with both judging and opposing Cole and Groner at the same time “if, as we may fairly assume, his impartiality might otherwise

have been questioned.” 849 F.2d at 633. “[T]he special master’s failing in this regard is not excusable.” *Id.* at 634. Because the problem was *created* by Cole and Groner, however, “[t]he firm could not reasonably suggest that * * * Petrowitz withdraw from either proceeding because of an appearance of impropriety that” the law firm “created by its own actions.” *Id.* at 633. In those narrow circumstances, and especially in light of a District of Columbia *statute* imputing the knowledge of a *member* of a partnership to all other *members* (*id.* at 632 (citing D.C. Code Ann. § 41-111)), the special master’s unexcused failing was not “decisive in view of the *statutory* imputation of knowledge to Cole and Groner.” 849 F.2d at 634 (emphasis added). Here, of course, the problem – that Messrs. Gross and Hamlin are partisans for asbestos futures claimants in *G-I Holdings* and advisors to Judge Wolin in *Owens Corning* at the same time – was not created by petitioners, Kramer Levin, or Davis Polk; no statute imputes knowledge from one partner of those law firms to every other partner, let alone to their clients, let alone to petitioners, who are not their clients; and no *partner* of those law firms – indeed, no *lawyer* in those law firms – had actual knowledge of Gross and Hamlin’s dual roles in *G-I Holdings* and *Owens Corning*.

Far more applicable for present purposes is this Court’s decision in *Maldo-*
nado v. Ramirez, 757 F.2d 48 (1985). “[A]n attorney given notice of the bankrupt-

cy on behalf of a particular client is not called upon to review all of his or her files to ascertain whether any other client may also have a claim against the bankrupt. Notice sent to an authorized attorney or agent must at least signify the client for whom it is intended so that the attorney can know whom to advise to assert a claim in the bankruptcy.” *Id.* at 51. Therefore, even though a *single attorney* was on notice of a particular bankruptcy in his capacity as counsel for one client, and later asserted a claim for a different client against the debtor, the latter client could not “be deemed to have received notice within the meaning of 11 U.S.C. § 523(a)(3)(A), and the district court erred in so holding.” *Ibid.*

Under *Maldonado*, it is clear that notice sent to Kramer Levin on behalf of Bear Stearns does *not* constitute notice to Kramer Levin’s other clients, let alone to petitioners, who are not Kramer Levin’s clients in the *Owens Corning* matter. There is neither actual knowledge on petitioners’ part before September 24, 2003, nor any legal doctrine that imputes knowledge to them. Their recusal motion filed 16 days after they learned of Messrs. Gross and Hamlin’s roles in *G-I Holdings* was timely.⁴

⁴ Waiver, as well as untimeliness, can be a basis to defeat a recusal motion. See 28 U.S.C. § 455(e). No respondent has actually argued that petitioners (or anyone else) waived the right to bring a recusal motion, however, and CSFB has shown at pages 26-27 of its November 21 response that there is no waiver in this case.

There is no need for further proceedings before a factfinder to determine the truthfulness of petitioners' consistent statements that they learned of Messrs. Gross and Hamlin's *G-I* roles shortly before they filed their recusal motions. First, despite the intemperate language respondents have used, respondents have provided no factual basis to doubt petitioners' veracity – rather, they have relied on what they “[p]resum[e]” about who said what to whom, on incorrect legal theories about imputed knowledge, and on time records that on their face contradict respondents' extravagant (and irrelevant) claims about how closely two firms that do not represent petitioners in this case – Kramer Levin and Davis Polk – were monitoring *G-I Holdings*. Second, there is another reason why recusal of Judge Wolin would be inevitable *even if* petitioners were somehow deemed untimely in their challenge to the appearance of impropriety in this case.

There have now been not one, but four, recusal motions filed in three of the asbestos-related bankruptcy cases assigned to Judge Wolin (petitioners' motion in *Owens Corning*, certain creditors' motion in *W.R. Grace*, certain creditors' motion in *USG*, and a recusal motion by the debtor itself in *USG*). The issues raised by petitioners' motion and the other motions adversely affect many, not just a few, of the thousands of participants in these massive cases. Even if petitioners had actual knowledge of Messrs. Gross and Hamlin's *G-I* roles, it is inconceivable that *all*

parties adversely affected by those advisors' conflicts of interest and Judge Wolin's 22-month reliance on the advisors – including all the banks in the syndicate led by CSFB – have waived their right to complain by knowingly failing to do so. See CSFB Response 27 n.5. A Kensington-specific rejection of the mandamus petition would only delay the inevitable day when some other party validly brings the pervasive conflict before this Court, would only delay Judge Wolin's recusal, and therefore would only delay the day Owens Corning implements an approved plan of reorganization and its creditors – commercial and tort alike – begin to receive payment.⁵

⁵ Respondents, including Judge Wolin himself, resort to impugning petitioners' motives. Petitioners' motives are irrelevant, but petitioners must observe that the Debtors' characterization of the recusal motion and other recent actions as having been taken "with the obvious purpose of derailing the Owens Corning bankruptcy" (OC Answer 16) is not accurate, for reasons well stated at pages 24-26 of CSFB's response filed in this Court November 21, 2003. The fallacy of this attack on petitioners' motives is further shown by the filing of recusal motions in the *W.R. Grace* and *USG* cases – cases in which plans have not yet been filed and substantive consolidation is not at issue. It is also farfetched for the Debtors to credit petitioners with having "orchestrated the filing of" recent motions by the Creditors Committee (OC Answer 16-17) – the membership of which (i) does not include petitioners and (ii) is evenly split between those who favor and those who oppose substantive consolidation. Furthermore, there is no ground for blaming any delay in this case on petitioners. Petitioners sought resolution of the recusal issue extremely expeditiously from the district court after they learned of the conflict on September 24, 2003; sought this Court's intervention in the matter immediately after Judge Wolin, on October 23, 2003, indicated that he planned to delay resolution of the issue; did not seek a stay from this Court, although the Court granted a stay *sua sponte*; opposed the extension of time for responses to the mandamus petition from November 6 to November 21; and have made every filing in this Court

II. COURT-APPOINTED ADVISORS MUST BE NEUTRAL

The petition for a writ of mandamus itself demonstrated that Messrs. Gross and Hamlin cannot be treated as neutral advisors to Judge Wolin when they are partisans representing future asbestos claimants in *G-I Holdings* with respect to the very same issues that have come and likely will come before Judge Wolin. The affidavits of those advisors and the responses and answers to the mandamus petition – unsurprisingly – make little effort to show that Messrs. Gross and Hamlin *are* neutral.⁶ They do make a slight effort to argue that the issues in *G-I Holdings* either do not overlap at all with the issues in *Owens Corning*, or do not overlap with the issues Messrs. Gross and Hamlin have *actually* discussed with Judge Wolin, but those efforts are adequately answered at pages 7-19 of the CSFB response filed November 21, 2003, pages 6-11 and footnote 3 of the Washington Legal Foundation *amicus* brief, and pages 11-14 of the USG debtor's *amicus* brief. The simple fact is – however respondents may try to recharacterize Gross and

except for the present reply one business day after the event that triggered the filing.

⁶ The occasional suggestion (*e.g.*, McMonagle Answer 5) that Mr. Gross cannot be biased in favor of future asbestos claimants because years ago he represented an asbestos debtor is obviously wrong. Any good lawyer will zealously represent the interests of his *current* clients, as Mr. Gross appears to be doing in *G-I*. An ongoing conflict of interest is not lessened just because the conflicted lawyer *previously* represented someone with different interests.

Hamlin’s roles – Gross and Hamlin’s own time records demonstrate their pervasive involvement in Judge Wolin’s administration of the asbestos bankruptcy cases, involvement that Judge Wolin himself has described as “necessary for the efficient administration of these very large mass-tort chapter 11 cases”; as “occupying a unique position in the [asbestos] cases not shared by other persons employed in these cases”; and as “functioning in a manner in all respects similar to examiners as provided for in the Bankruptcy Code.” App. 55.

The sole remaining argument that requires response is the surprising suggestion that it does not matter whether a court-appointed advisor is neutral. See OC Answer 25. To the contrary, case after case has emphasized the importance of neutrality in court-appointed technical advisors.⁷

Both proponents and opponents of recusal in this case, for example, agree that *Techsearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360 (Fed. Cir. 2002), sets forth appropriate guidelines for the appointment of a technical advisor (as opposed to a

⁷ The Debtors’ assertion (OC Answer 25 n.14) that the Manual for Complex Litigation requires “fairness and expertise” only of court-appointed *experts*, and that court-appointed *advisors* need not be fair or expert, is beside the point in light of the consistent view of the courts that neutrality is required of court-appointed advisors. See also Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 954 (1997) (“The bias-reduction rationale applies *more strongly* with respect to advisors than to expert witnesses: because technical advisors are not subject to deposition or cross-examination, parties have less knowledge of the advisor’s influence on the judge and less ability to rebut the advisor’s statements.”) (emphasis added).

Fed. R. Evid. 706 expert). See OC Answer 27 (citing *Techsearch*); Mandamus Pet. 22 (same); WLF *Amicus* Br. 20 n.7 (same). That case says that “the district court in appointing a technical advisor must: use a ‘*fair and open procedure* for appointing a *neutral* technical advisor ... *addressing any allegations of bias, partiality, or lack of qualifications*’ in the candidates.” 286 F.3d at 1379 (emphasis added) (quoting *Association of Mexican-American Educators v. California*, 231 F.3d 572, 611 (9th Cir. 2000) (Tashima, J., dissenting)). Likewise, the Debtors cite with approval (OC Answer 19) *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988), which is indeed a leading case on the use of court-appointed advisors, but the court in that case – after setting out the overwhelming case for finding waiver on the government’s part of its right to object to the appointment of a technical advisor – indicated that it still might be possible to reverse for “plain error” were there any “suggestion of bias or any other disqualifying characteristic on the expert’s part.” *Id.* at 161; see also *id.* at 159 (“We think it advisable in future cases that the parties be notified of the expert’s identity before the court makes the appointment, and be given an opportunity to object on grounds such as bias * * *.”).⁸

⁸ The issue in *Reilly* was whether the government could complain, after losing in the trial court, that a technical advisor was appointed *at all*. The case did not involve questions of conflict of interest or bias.

The Debtors cite authorities for the proposition that an extreme form of neutrality is not required of court-appointed advisors. Whatever the merits of that proposition, petitioners are not complaining about a slight, technical departure from strict neutrality. They are complaining that two advisors of the federal judge hearing their case are simultaneously litigating the same issues in a different case on behalf of future asbestos claimants – clients who have substantially the same interests in *Owens Corning* that they do in *G-I Holdings* and indeed are largely the same people.⁹ The difference between neutrality and the conflicts affecting Messrs. Gross and Hamlin is not the difference between dawn and morning, but the difference between night and day.

III. JUDGE WOLIN’S KNOWING APPOINTMENT OF CONFLICTED ADVISORS, AND HIS RECEIPT OF ADVICE FROM THEM FOR 22 MONTHS, REQUIRE HIS RECUSAL

One important new fact emerged from the affidavits the court-appointed advisors filed on November 14, 2003. Although Judge Wolin has conspicuously avoided disclosing whether he knew of Messrs. Gross and Hamlin’s *G-I* roles

⁹ It is thus untrue that *Rios v. Enterprise Ass’n Steamfitters Local Union 638*, 860 F.2d 1168, 1173-1175 (2d Cir. 1988), is “virtually identical” (OC Answer 26) to this case. In that case, “[t]here was no significant claim of particularized conflict between the two roles fulfilled by the Administrator Designee, other than his representation of a union client defending an EEOC action in *unrelated litigation* while acting as a special master in the instant litigation where the EEOC is a party plaintiff.” *Id.* at 1175 (emphasis added).

when he appointed them to be his advisors, Mr. Gross now swears under oath that, “[a]t all relevant times, Judge Wolin was aware of my representation of Mr. Hamlin in *G-I Holdings*.” Gross Aff. ¶ 8, OC App. 24. Thus, Judge Wolin knew full well of the conflict but failed to disclose it. That Judge Wolin deliberately chose to appoint advisors who he knew were seriously conflicted, then chose not to disclose the conflict to Owens Corning’s creditors, and then chose not to disclose even to this Court that he knew about the conflict all along, should put an end to the matter. “[A] reasonable person might perceive bias to exist, and this cannot be permitted.” *School Asbestos*, 977 F.2d at 782. “Protecting important institutional values against the appearance of partiality does not require us to affix blame. Rather, the appropriate – and the only – inquiry to which we must respond is whether a reasonable person, knowing all the acknowledged circumstances, might question the district court judge’s continued impartiality.” *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 164 (3d Cir. 1993).

In light of Judge Wolin’s knowledge, any reasonable observer would have all the more reason to question Judge Wolin’s impartiality considering the very broad authority he gave the advisors. On December 28, 2001, Judge Wolin “ORDERED that the parties are on notice that the Court may, *without further notice*, appoint *any* of the Court-Appointed Consultants to act as a Special Master

to hear *any disputed matter* and to make a report and recommendation to the Court on the disposition of such matter.” OC App. 12 (emphasis added). Knowing full well that Messrs. Gross and Hamlin were partisans for future claimants in *G-I Holdings* – but without disclosing that fact to the parties – Judge Wolin announced to the parties to all Five Asbestos Cases (see Pet. 5 n.1) that he could without any further procedural protections assign Mr. Gross or Mr. Hamlin to be the initial finder of fact with respect to, for example, the credibility of expert Letitia Chambers and the *Owens Corning* future claimants’ competing expert (see Pet. 12-13).

This is not a close judicial call; it is the kind of thing that not only might, but certainly would, cause a reasonable observer to question the judge’s impartiality. One is left to wonder – and perhaps Judge Wolin will say in the Sur-Reply this Court has invited him to file by December 8 – not just why Judge Wolin thought such an appointment proper, but also how he could have believed that non-disclosure to the parties before him was acceptable.

It only makes matters worse that Judge Wolin appears to have played a role in creating what would have been an even more troubling conflict – the proposed appointment of first Mr. Gross and ultimately Mr. Hamlin as the future claimants’ representative in *W.R. Grace*, one of Judge Wolin’s five cases. As set forth in

CSFB's response (at 21-23), W.R. Grace began preparing an application to appoint initially Mr. Gross, then Mr. Hamlin, following *ex parte* telephone calls among asbestos claimants' counsel, Judge Wolin, and Messrs. Gross and Hamlin. It stands to reason that Judge Wolin was consulted in advance about this appointment, since the proposed appointee was already working for him. This behind-the-scenes process extended over four months, during which no disclosure of the conflict was made in the *Owens Corning* case. Even now, the extent of Judge Wolin's participation in that process remains obscured. Judge Wolin unilaterally blocked petitioners' discovery into this question at the outset of the recusal process, and he has declined to address it in his two responses to date.

It is unfathomable how Judge Wolin could have thought that Mr. Hamlin or Mr. Gross could serve as a partisan for the tort interests in a case before the judge while at the same time serving as the judge's advisor in the same and other, similar cases – all without any disclosure to the creditors in those other cases during the months that the conflicting appointment was under active pursuit. The application to appoint Mr. Hamlin was filed three days after the filing of petitioners' recusal motion. W.R. Grace withdrew the application when Bankruptcy Judge Fitzgerald made clear that Mr. Hamlin's appointment as a futures representative would create an irreconcilable conflict.

Now that it is settled by Mr. Gross's sworn testimony that Judge Wolin acted knowingly in *Owens Corning* – so that the actions of Judge Wolin *himself*, and not just the fact that he has been counseled for 22 months by advisors with a severe conflict of interest, would lead a reasonable observer to question Judge Wolin's impartiality – it is no longer necessary to rely on the cases involving law clerks and other conflicted advisors. But those cases continue to provide extraordinarily strong support for the proposition that the receipt of advice from tainted advisors requires that the judge, not just the advisors, step down. See WLF *Amicus* Br. 11 & n.3 (citing *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983)); Pet. 25 (citing, in addition, *First Interstate Bank v. Murphy, Weir & Butler*, 210 F.3d 983, 985 (9th Cir. 2000)); Pet. 27 (citing, in addition, *Edgar v. K.L.*, 93 F.3d 256, 259-260 (7th Cir. 1996)); *In re Nazi Era Cases Against German Defendants Litigation*, MDL Docket No. 1337, Civil Action No. 02-3890, slip op. 10-13 (D.N.J. Nov. 19, 2003).

Respondents seek to distinguish these cases on the ground that Messrs. Gross and Hamlin are not law clerks, and that the experts in *K.L.* were appointed under Fed. R. Evid. 706. Those purported distinctions miss the point. It is the giving of advice by one with a conflict, not the title of the advice giver, that creates the reasonable apprehension of a lack of impartiality. See *Code of Conduct for*

Judicial Employees n.2, available at <http://www.uscourts.gov/guide/vol2/ch2a.html> (“Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs.”).

To say that “[t]he Advisors in this case do not share the same close and unregulated contact with [Judge Wolin] that concerned the courts in *First Interstate and Hall*” (OC Answer 23) is simply untrue. As the CSFB response and the USG *amicus* brief document thoroughly, the advisors as well as the parties in interest have had liberal access to Judge Wolin. Indeed, Judge Wolin’s November 20 response emphasizes – as if it mitigated rather than exacerbated the appearance of impropriety – that “it was necessary for the District Court, on innumerable occasions, to meet with interested parties on an ex parte basis” (11/20/03 District Court Judge Response 2) and that Judge Wolin had ordered, back on December 20, 2001, that “[a]ny objection to such ex parte communication is *deemed waived*.” *Id.*, Attachment, at 5 (¶ 5) (emphasis added). The only consolation was that Judge Wolin intended to “use sparingly” the power he had arrogated unto himself in violation of a bedrock principle of American jurisprudence. *Id.* at 6 (¶ 5). As CSFB and USG have demonstrated, however, Judge Wolin did *not* use the power sparingly. The fact that Judge Wolin imposed this extensive (not sparing) regime

of *ex parte* contacts does nothing to mitigate the conflicts – and, indeed, only adds to the appearance of pervasive irregularity.¹⁰

We do not ask this Court to question Judge Wolin’s motivations. See *Alexander v. Primerica Holdings, Inc.*, 10 F.3d at 164. What matters is that the process Judge Wolin has employed in this case has resulted in the appearance, if not the reality, of a conflict at the very core of the judicial administration of the case. Given the critical importance of this case (and indeed of all Five Asbestos Cases) to thousands of claimants, it is essential that this Court intervene to ensure the prompt and fair administration of justice, untainted – as Section 455 requires – by even the appearance of impropriety.

¹⁰ This is not the first time that this Court has considered the possibility of improper *ex parte* communications between Judge Wolin and Mr. Gross. In *In re Prudential Ins. Co. of America Sales Litig.*, 148 F.3d 283 (3d Cir. 1998), Judge Wolin revealed at a hearing information that a party asserted he had learned *ex parte* from Mr. Gross, who was counsel for a former Prudential employee. That single alleged *ex parte* communication with Gross, together with other allegations of improprieties, led to a recusal motion, which Judge Wolin denied. This Court let Judge Wolin’s ruling stand, observing that the information he had been alleged to have obtained *ex parte* from Mr. Gross was in the public record, and that there was “no other evidence to support [the] contention that the district judge had an improper, *ex parte* meeting” with Mr. Gross. *Id.* at 343-344. Here, in contrast, there is overwhelming evidence of hundreds of hours of *ex parte* communications involving Judge Wolin and Messrs. Gross and Hamlin, as well as others.

CONCLUSION

In his recent opinion denying a motion calling for his recusal based on alleged bias of his law clerks, Judge William G. Bassler of the U.S. District Court for the District of New Jersey wrote that “the Court’s swift acknowledgment of the conflict issue, its communication of such to the parties, and the willingness of the Court to isolate both law clerks” negated any inference that the judge’s hiring of the law clerks created an appearance of impropriety. *In re Nazi Era Cases Against German Defendants Litigation*, MDL Docket No. 1337, Civil Action No. 02-3890, slip op. 17 (D.N.J. Nov. 19, 2003). It is instructive to contrast Judge Bassler’s approach with that of Judge Wolin. Judge Wolin did not swiftly acknowledge the conflict issue raised by appointing advisors he knew to be partisans for future asbestos claimants in a similar case before another judge – not when he appointed them as advisors in December 2001, not for the 22 months they served as his advisors before the recusal motion was filed, and certainly not in his orders responding to the October 10 recusal motion or his invited responses to the mandamus petition in this case. Judge Wolin did not communicate the conflicts to the parties – rather, he takes the position that the parties had the burden of finding out about the conflicts by monitoring the *G-I Holdings* docket and the trade press. Judge Wolin is not willing to isolate the advisors from the *Owens Corning* case – to the

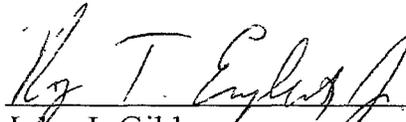
contrary, he has relied on them heavily and touted the importance of their roles. App. 55. That is why it is clear and indisputable that he must be recused, and why, regardless of the mandamus standard, this Court should use its supervisory authority under 28 U.S.C. § 2106 to correct the situation. See *Alexander*, 10 F.3d at 167 & nn.14-15.

For the foregoing reasons, as well as those stated in the petition; in the response of CSFB, as Agent; in the *amicus* brief of the Washington Legal Foundation; in the *amicus* brief of USG Corporation *et al.*; in the statement of the Official Committee of Unsecured Creditors of USG Corporation *et al.*; and in the separate mandamus petition that creditors of W.R. Grace have filed and that this Court on November 26 ordered consolidated with the present mandamus petition, petitioners respectfully request that their Petition for a Writ of Mandamus be granted, and that the Court order Judge Wolin to recuse himself. In light of the extensive briefing that has occurred (and oral argument that will occur) in this Court, we respectfully submit that there is no need to remand this case for further factfinding; this Court can and should enter a recusal order on the present record. If the Court nevertheless concludes that additional factual development is required, then – in light of Judge Wolin’s responses, including his assertion that the timing of the motion by creditors of W.R. Grace & Co. to recuse him “speaks volumes as to the legitimacy

of the Motion for Recusal of the District Court” (11/20/03 District Court Judge Response 4)¹¹ – petitioners respectfully request that such further factfinding take place before a judicial officer other than Judge Wolin.

Respectfully submitted,

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Counsel for Petitioners

December 2, 2003

¹¹ Curiously, Judge Wolin’s November 20 response was filed in *Owens Corning* (in the bankruptcy court) and *In re Kensington* (in this Court) but responds entirely to arguments made by creditors of W.R. Grace & Co. in the *Grace* case. It appears to attribute to petitioners in *this* case the motives of the creditors in *that* case, but nowhere in the response does Judge Wolin mention that the motion to which he was responding was made in the *Grace* – not *Owens Corning* – case.

DECLARATION OF MARK D. BRODSKY

**DECLARATION OF MARK D. BRODSKY
IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS**

1. I am Mark D. Brodsky, a Senior Portfolio Manager and member of the Management Committee at Elliott Management Corporation (“Elliott Management”). I make this declaration in support of the Petition for a Writ of Mandamus. All statements in this declaration are based on my personal knowledge.

2. I have been employed by Elliott Management since February 1996, initially as a Portfolio Manager. For approximately two years prior to joining Elliott Management, I was a Vice President and Partner of Dickstein Partners, a manager of two private investment funds. My responsibilities at Elliott Management and Dickstein Partners have included the evaluation and management of investments. For approximately 16 ½ years before joining Dickstein Partners, I practiced corporate and bankruptcy law, primarily at what is now known as Kramer Levin Naftalis & Frankel (“Kramer Levin”), the firm that represents Credit Suisse First Boston (“CSFB”) as agent bank in the present proceedings. At the time I left Kramer Levin I was a partner and co-head of the Bankruptcy Department. I received my J.D. from Harvard Law School in 1977 and bachelor’s and master’s degrees from the University of Pennsylvania in 1974.

3. A large portion of my work as a practicing attorney and thereafter as an investment professional has involved financially troubled companies. This work has included active participation in all facets of the reorganization process, both in and out

of bankruptcy. Since 1977 I have participated in many bankruptcies and restructurings, including some of the largest and most complex in the country, and including many in the District of Delaware. On behalf of my clients and employers, I have also monitored or participated in many civil litigations outside the bankruptcy context.

4. Elliott Management provides services for the benefit of Elliott Associates, L.P. and Elliott International, L.P. and related entities that make investments, including the Petitioners (collectively, the “Elliott Funds”). The Elliott Funds are private investment funds. The first of these funds was established 27 years ago. The Elliott Funds have approximately \$3.5 billion of capital. Elliott Management and the Elliott Funds are referred to herein as the “Elliott Entities.”

5. At all relevant times I have been responsible for any investment made by the Elliott Funds in the securities or debt obligations of Owens Corning. Any employees contributing to this effort have reported directly to me, and I have been intimately involved throughout. It was part of the ordinary practice of employees reporting to me to apprise me of all facts material to the Owens Corning matter that came to their attention. My work is supervised by only the President of Elliott Management.

6. Shortly after the commencement of the Owens Corning Chapter 11 proceeding in October 2000, the Petitioners started acquiring debt issued under a credit agreement dated June 26, 1997, as amended (the “Credit Agreement”), among Owens Corning, certain guarantor subsidiaries, CSFB as agent, and a syndicate of lenders. The Credit Agreement originally provided a lending commitment of \$2 billion. The principal amount of the loans and letters of credit currently outstanding under the Credit Agreement is approximately \$1.6 billion. The Petitioners own more than \$275 million of this amount.

7. Although CSFB is the lone agent for the lenders under the Credit Agreement, it is customary to form a steering committee (in essence, a small working group) of lenders to take an active role when a corporate borrower becomes financially distressed. Such a steering committee was formed in the present context (the “Bank Steering Committee”). Elliott Management on behalf of the Petitioners has been a member of the Bank Steering Committee since the spring of 2001. Contrary to the statement made at page 13 of Owens Corning’s Answer to the Mandamus Petition, none of the Elliott Entities has ever been a member of the Official Committee of Unsecured Creditors in the Owens Corning case.

8. The Elliott Entities have not been monitoring the G-I bankruptcy proceedings and have not, since the commencement of the G-I bankruptcy case, been

creditors or security holders of G-I or its subsidiaries. To the best of my knowledge, no Elliott Entity or representative thereof has ever filed a notice of appearance in the G-I case or attended a court session in that case. To the best of my knowledge, no Elliott Entity has authorized counsel to act on its behalf in the G-I case, and no Elliott Entity had retained counsel to monitor the G-I case, except that counsel working on the Motion to Recuse Judge Wolin (the "Recusal Motion") and the Petition for a Writ of Mandamus have – starting no earlier than September 24, 2003 – familiarized themselves with such portions of the record of the G-I case as bear on the recusal issues.

9. To the best of my knowledge, Kramer Levin has not been asked to file a notice of appearance or attend any court session in the G-I case on behalf of CSFB or the bank group, nor had the G-I case been discussed by the Bank Steering Committee at any time before September 24, 2003.

10. Since June 2003, Elliott Management has been investigating whether Professor Francis McGovern, the principal mediator in the Owens Corning case and one of Judge Wolin's five advisors, might have a conflict of interest in favor of personal injury asbestos claimants. The Elliott Entities did not then have this concern with regard to Judge Wolin's other advisors and accordingly did not include them in this investigation prior to September 24, 2003.

11. On September 24, 2003, another Owens Corning creditor, who was aware of our investigation of Professor McGovern, brought to my attention an opinion in the G-I case. Among the counsel listed in the opinion was one David R. Gross, who was identified as counsel to the Legal Representative of Present & Future Holders of Asbestos-Related Demands. I knew that a man named David Gross was a close advisor to Judge Wolin in the Owens Corning case, and I had dealt with Mr. Gross on several occasions during 2003 when he attempted to mediate a resolution of disputed issues in that case; but I did not know whether that David Gross was the same David R. Gross who had made an appearance in the G-I case. My colleagues and I immediately researched the matter and discovered that (a) the David Gross I had dealt with was in fact the David R. Gross referred to in the G-I opinion, and (b) David Gross's client in the G-I matter was another of Judge Wolin's advisors, C. Judson Hamlin. This was the Elliott Entities' first knowledge of the conflicted roles of Messrs. Gross and Hamlin.

12. After consulting with the Petitioners' counsel, I directed them to prepare as expeditiously as possible the appropriate recusal motion. For several reasons, I believed that the Petitioners needed to be prepared to act on their own. First, it would be some period of time before I would know whether other creditors were prepared to join in the recusal motion. Second, I was concerned that any delay in moving for

recusal might lend support to the arguments that in fact have been raised in this proceeding – waiver, untimeliness, and intent to delay. Third, while I knew that the Elliott Entities had no idea or even suspicion of the conflict concerning Messrs. Gross and Hamlin, I did not know whether the same could be said of other creditors, and hence I could not evaluate whether any of them would face obstacles in seeking recusal that the Petitioners did not face. (That said, I did not presume then, and I have no basis to believe now, that any other commercial creditors of Owens Corning or its debtor subsidiaries have waived their separate rights to seek Judge Wolin’s recusal.)

13. Over the ensuing 16 days my colleagues and I worked exceedingly hard in conjunction with counsel to complete our legal and factual research and to prepare the Recusal Motion. We filed the Recusal Motion on October 10, 2003.

14. I categorically state that until September 24, 2003, neither I nor any of the other people at Elliott Management responsible for Petitioners’ investment in Owens Corning had any idea that Messrs. Hamlin and Gross had any involvement in G-I.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2003, in New York, New York.

A handwritten signature in black ink, appearing to read 'Mark D. Brodsky', written over a horizontal line.

Mark D. Brodsky

DECLARATION OF KENNETH H. ECKSTEIN

**DECLARATION OF KENNETH H. ECKSTEIN IN
SUPPORT OF EMERGENCY PETITION
FOR A WRIT OF MANDAMUS**

1. I am a partner in the law firm of Kramer Levin Naftalis & Frankel LLP (“Kramer Levin”), located at 919 Third Avenue, New York, N.Y. 10022. I make the statements contained herein on the basis of my own personal knowledge, reports from my partners, associates, and staff, and an examination of the books and records of my firm.

2. My firm represents 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, in the Owens Corning chapter 11 case.

3. I submit this declaration to correct and clarify the record with respect to the allegation contained in the Answer of Owens Corning to Emergency Petition for a Writ of Mandamus dated November 21, 2003 (the “OC Response”) that Kramer Levin had actual knowledge of the appointments of Messrs. Hamlin and Gross in the G-I Holdings chapter 11 case long before the filing of the recusal motion. OC Response at 11-12, 19.

4. Owens Corning’s allegation is incorrect. Kramer Levin had no knowledge of these appointments until late September 2003, shortly before the recusal motion was filed. Our earlier connection with G-I Holdings was minimal, narrow, and short lived, as I explain below.

5. In early 2001, Bear, Stearns & Co. Inc., an existing firm client, indicated that it was interested in possibly trading in certain debt securities of Building Materials Corporation of America (“BMCA”), a non-debtor subsidiary of G-I Holdings, and therefore wished to monitor developments in the G-I Holdings bankruptcy case.

6. As a result, Kramer Levin prepared an appearance for Bear Stearns to sign and, on January 26, 2001, filed and served that appearance for Bear Stearns. A copy of the Bear Stearns appearance is attached as Exhibit A. Subsequently, on March 19, 2001, Kramer Levin filed an appearance in its own name in G-I Holdings, a copy of which is attached as Exhibit B. This appearance was filed to permit Kramer Levin to receive documents directly to review for Bear Stearns and was not intended to be on behalf of Kramer Levin itself. Because the appearance did not specify a client, it was apparently docketed, incorrectly, as being on behalf of the firm as a creditor. See OC App. 129. Kramer Levin is not, in fact, a creditor in the G-I Holdings case.

7. These appearances were prepared under the supervision of associate Catherine Finnerty, and the Kramer Levin appearance was executed by her. Ms. Finnerty is no longer employed by Kramer Levin, having left the firm in May 2002. Ms. Finnerty was never involved in the Owens Corning case.

8. Firm time records indicate that Ms. Finnerty recorded time for monitoring the G-I Holdings case with respect to issues affecting the BMCA debt

— principally substantive consolidation and successor liability — during the period from February to June of 2001, plus one unspecified time entry for .2 hours on August 9, 2001 that may relate to the matter. After that time period, any pleadings that continued to come in were reviewed only by a paralegal and sent to files. There was no attorney time billed to this matter thereafter.

9. Other than the notices of appearance, Kramer Levin did not file any pleadings in the G-I Holdings case, did not appear at any hearings, and did not participate in the case in any way. Our Managing Attorney's office was never asked to monitor the docket in the case and has no record of any requests relating to it.

10. The only other activity undertaken by Kramer Levin lawyers that relates in any way to the G-I Holdings case was to review the opinion rendered by Judge Gambardella on March 12, 2001 and related pleadings in connection with an adversary proceeding seeking to substantively consolidate G-I Holdings and BMCA. This was undertaken in connection with legal research on substantive consolidation and did not involve monitoring the G-I Holdings docket.

11. In early 2003, in an effort to clean up dormant cases, it was discovered that the firm was still receiving pleadings in the G-I Holdings case and it was determined that there was no need to continue. Accordingly, the decision was made to file a withdrawal of the appearances in the case. Kramer Levin contacted Bear Stearns, which concurred in the decision.

12. A withdrawal of appearance was therefore prepared, signed, and sent to the Court for filing in or about March 2003, as well as a new appearance to redirect filings to a different person at Bear Stearns. Copies of these documents are attached as Exhibits C and D. The Court's electronic docket, however, does not reflect the entry of these documents.

13. I have consulted all persons working on the Owens Corning chapter 11 case at Kramer Levin and can confirm that none of them was aware until late September 2003 of Messrs. Gross and Hamlin's dual roles in G-I Holdings and Owens Corning. Nor, to the best of my knowledge, was any other person working at Kramer Levin so aware prior to that time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2003
in New York, New York



Kenneth H. Eckstein

EXHIBIT A

ORIGINAL

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:

Chapter 11

G-I HOLDINGS, INC.

Case No. 01-30135

Debtor.

AS BANKRUPTCY COURT
RECEIVED
01 JAN 29 AM 11:17
JAMES J. MURPHY
CLERK

NOTICE OF APPEARANCE AND
DEMAND FOR SERVICE OF PAPERS

PLEASE TAKE NOTICE that the undersigned Bear, Stearns & Co. Inc. hereby appears in the above-captioned case under chapter 11 of title 11, United States Code (the "Bankruptcy Code") and pursuant to Federal Rules of Bankruptcy Procedure 2002 and section 1109(b) of the Bankruptcy Code requests that any and all notices given or required to be given in this case and all papers served or required to be served in this case, be delivered to and served upon:

Bear, Stearns & Co. Inc.
245 Park Avenue
New York, New York 10167
Attention: Jcoffrey Smith

Tel.: (212) 272-6425
Fax.: (212) 272-8102

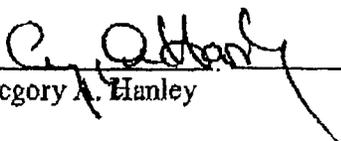
PLEASE TAKE FURTHER NOTICE that the foregoing demand includes not only the notices and papers referred to in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure provisions specified above but also includes, without limitation, all orders, notices, hearing dates, applications, motions, petitions, requests, complaints,

78

demands, replies, answers, schedules of assets and liabilities and statements of affairs, operating reports, plans of reorganization and liquidation, and disclosure statements, whether transmitted or conveyed by mail, courier service, telegraph, telex, telefax or otherwise, that affect the above captioned debtor or the debtor's estate.

Dated: New York, New York
January 26, 2001

BEAR, STEARNS & CO. INC.

By: 
Gregory A. Hanley

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

ORIGINAL

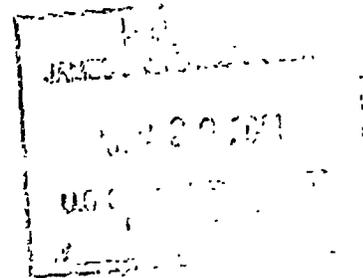
In re:

Chapter 11

G-I HOLDINGS, INC.

Case No. 01-30135

Debtor.



AFFIDAVIT OF SERVICE

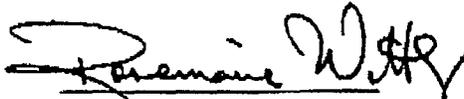
STATE OF NEW YORK)
) s.s.:

COUNTY OF NEW YORK)

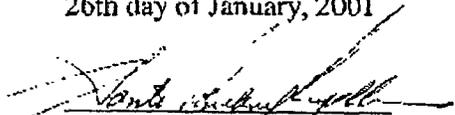
Rosemarie Witter, being duly sworn deposes and says:

1. I am not a party to this action, am over 18 years of age and reside in Bronx, New York.
2. I am employed by the law firm of Kramer, Levin, Naftalis & Frankel LLP.
3. On January 26, 2001, I served a true copy of Notice of Appearance and Demand for Service of Papers by U.S. First class mail upon the following party:

Dennis J. O'Grady
Riker, Danzig, Scherer, Hyland
One Speedwell Ave, IIQ Plaza
PO Box 1981
Morristown, NJ 07962-1981


Rosemarie Witter

Sworn to before me this
26th day of January, 2001


Notary Public

SANTO ANTHONY CIPOLLA
Notary Public, State of New York
No. 01C14898756
Qualified in Nassau County
Commission Expires July 6, 2001

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EXHIBIT B

Catherine Finnerty (CF 3958)
KRAMER LEVIN NAFTALIS & FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

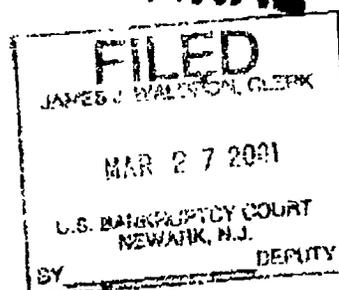
UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:

G-I HOLDINGS INC. f/k/a GAF
CORPORATION,

Debtor.

ORIGINAL



Chapter 11

Case No. 01-30135(RG)

NOTICE OF APPEARANCE AND
REQUEST FOR SERVICE OF PAPERS

PLEASE TAKE NOTICE that the undersigned hereby appears in the above-captioned case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") and pursuant to Federal Rules of Bankruptcy Procedure 2002 and 9010(b) and section 1109(b) of the Bankruptcy Code requests that any and all notices given or required to be given in this case and all papers served or required to be served in this case, be delivered to and served upon:

Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, New York 10022
Attn: Catherine Finnerty, Esq.
Tel: (212) 715-9100
Fax: (212) 715-8000

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PLEASE TAKE FURTHER NOTICE THAT the foregoing demand includes not only the notices and papers referred to in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure provisions specified above, but also includes, without limitation, all orders, notices, hearing dates, applications, motions, petitions, requests, complaints, demands, replies, answers, schedules of assets and liabilities and statements of affairs, operating reports, plans of reorganization and liquidation, and disclosure statements, whether formal or informal, whether written or oral and whether transmitted or conveyed by mail, courier service, telegraph, telex, telefax or otherwise.

Dated: New York, New York
March 19, 2001

KRAMER LEVIN NAFTALIS & FRANKEL LLP

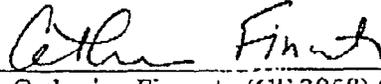
By 
Catherine Finnerty (CF 3958)
919 Third Avenue
New York, New York 10022
(212) 715-9100

EXHIBIT C

KRAMER LEVIN NAFTALIS & FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:

G -I HOLDINGS, INC. f/k/a GAF CORPORATION,

Debtor.

Chapter 11

Case No. 01-30135(RG)

**WITHDRAWAL OF NOTICE OF APPEARANCE AND
REQUEST FOR SERVICE OF PAPERS**

We hereby withdraw the Notice of Appearance and Request for Service of Papers on behalf of G-I Holding, Inc. dated March 27, 2001 and filed with the Court in this matter, and request that the Clerk of the Court remove Kramer Levin Naftalis & Frankel LLP from the list of parties and representatives to be served with pleadings, notices and motions related to this matter.

Removal of:

Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, New York 10022
Attn: Catherine Finnerty

Dated: New York, New York
March , 2003

KRAMER LEVIN NAFTALIS & FRANKEL LLP

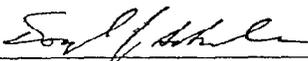
By 
Douglas Schneller
919 Third Avenue
New York, New York 10022
(212) 715-9100

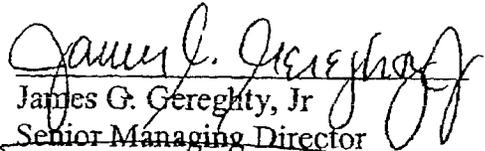
EXHIBIT D

PLEASE TAKE FURTHER NOTICE THAT the foregoing demand includes not only the notices and papers referred to in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure provisions specified above, but also includes, without limitation, all orders, notices, hearing dates, applications, motions, petitions, requests, complaints, demands, replies, answers, schedules of assets and liabilities and statements of affairs, operating reports, plans of reorganization and liquidation, and disclosure statements, whether formal or informal, whether written or oral and whether transmitted or conveyed by mail, courier service, telegraph, telex, telefax or otherwise.

Dated: New York, New York
February 12, 2003

BEAR, STEARNS & CO. INC.

By:


James G. Geregthy, Jr.
Senior Managing Director
Associate Director