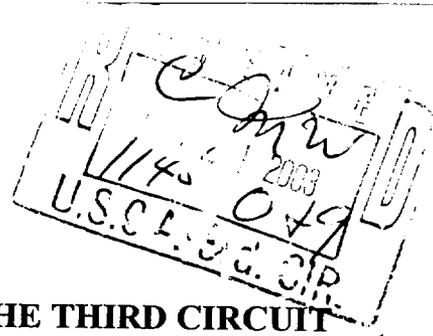


No. 03-4212



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

**BRIEF OF *AMICUS CURIAE* USG CORPORATION IN SUPPORT OF
KENSINGTON INTERNATIONAL LIMITED AND SPRINGFIELD
ASSOCIATES, LLC'S EMERGENCY PETITION FOR A WRIT OF
MANDAMUS**

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**CORPORATE DISCLOSURE STATEMENT
FOR USG CORPORATION**

In compliance with Federal Rules of Appellate Procedure 26.1 and 29(c), USG Corporation certifies that it has no parent corporation and that the only publicly traded company owning 10% or more of its stock is Berkshire Hathaway, Inc.

STATEMENT OF *AMICUS* INTEREST AND IDENTITY

Amicus USG Corporation (“USG”) is a Delaware corporation and is the parent company of U.S. Gypsum Corporation, a corporation that manufactures a variety of building materials and other products used in the construction industry. USG and its affiliated entities¹ filed a petition for protection under Chapter 11 of the Bankruptcy Code in June 2001. In November 2001, the Honorable Alfred M. Wolin was appointed to preside over USG’s bankruptcy, as well as the Owens-Corning, W.R. Grace, Federal-Mogul, and Armstrong World Industries bankruptcies (collectively referred to as the “Five Asbestos Cases”). Because all of these bankruptcies were brought about by each companies’ asbestos-related liability, Judge Wolin has, to a great extent, managed these cases as a unit, consulting the same team of advisors, including Mr. Gross and retired Judge Hamlin, on a range of topics germane to all the bankruptcies. Therefore, if this Court finds that Judge Wolin must be disqualified from further participation in the above-entitled action, he should be disqualified from USG’s bankruptcy on the same basis.

A motion for leave to file this brief was concurrently submitted.

¹ The affiliated entities are: USG Corporation, United States Gypsum Company, USG Interiors, Inc., USG Interiors International, Inc., L&W Supply Corporation, Beadex Manufacturing, LLC, B-R Pipeline Company, La Mirada Products Co., Inc., USG Industries, Inc., USG Pipeline Company and Stocking Specialists, Inc.

I. INTRODUCTION

The emergency petition filed by Kensington International Limited and Springfield Associates, LLC (the “Owens-Corning Creditors”) ably demonstrates that the conflicts of Mr. David R. Gross and retired Judge C. Judson Hamlin² require Judge Wolin’s disqualification. However, additional facts not fully discussed in that motion also establish that disqualification is required. These facts show that the Five Asbestos Cases have been dominated by *ex parte* communications between or among Judge Wolin, his Advisors, the parties, and other persons whose names have been withheld from court records.³ Disqualification is therefore necessary to restore the parties’ and the public’s confidence that these cases are being adjudicated upon what appears in the public record.

² In addition to Gross and Hamlin, Judge Wolin also appointed Professor Francis E. McGovern, John E. Keefe, Esq., and retired Judge William A. Dreier as advisors in the Five Asbestos Cases. In the interests of brevity, each of the advisors will be referred to by their last names, or collectively as the “Advisors.”

³ As is expected from *amicus curiae*, this brief elaborates upon issues already raised in the underlying motion and calls the Court’s attention to controlling legal authority. Moreover, to the extent this brief raises additional bases for Judge Wolin’s recusal, it is appropriate for the Court to consider such arguments raised by *amici* when they implicate a “substantial public interest.” See *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 731 (3d Cir. 1995); *Continental Ins. Co. v. Northeastern Pharm. and Chem. Co., Inc.*, 842 F.2d 977, 984 (8th Cir. 1988). The outcome of this motion will affect the public interest in the judicial process, and dramatically impact the future of five massive groups of affiliated companies and their thousands of employees, their creditors, and their shareholders. The amount in dispute well exceeds ten billion dollars.

These *ex parte* contacts not only provide an independent, mandatory basis for Judge Wolin's disqualification, they also amplify the impact of Gross and Hamlin's conflicts in two important ways. First, the extent of Judge Wolin's reliance upon his Advisors and the volume of private interactions he had with them increased the need for their absolute neutrality. By placing so much trust in his Advisors that he was willing to routinely hear their counsel in the absence of the parties, Judge Wolin created a situation where even the slightest bias was likely to markedly impact the outcome of these cases. Second, because there are no records of these secret discussions, all concerned constituencies -- the parties, the public, and this Court -- have been deprived of the ability to assess the taint that the conflicted advisors' input may have injected into these proceedings.

Simultaneous with the filing of this *amicus* brief, USG and its affiliated entities have filed their own motion for Judge Wolin's disqualification with the Bankruptcy Court (a copy of which is attached as Exhibit A). Below is a brief summary of the facts and arguments that USG believes support the relief sought by the Owens-Corning Creditors' petition. Each of these arguments and their factual bases are more fully set forth in the attached brief. USG respectfully urges this Court to grant the immediate disqualification of Judge Wolin from the Five Asbestos Cases.

II. ARGUMENT

A. *Ex Parte* Contacts Touching On The Merits Of A Pending Case Are Strictly Forbidden And Will Trigger Disqualification

It is well established that judges may not participate in *ex parte* communications concerning pending matters. The boundaries of appropriate judicial conduct are set out in the Code of Conduct for United States Judges, 175 F.R.D. 363 (1998) (the “Code of Conduct”), and closely mirrored in the American Bar Association’s 2000 Model Code of Judicial Conduct (the “Model Code”). Code of Conduct Canon 3(A)(4) provides that “[a] judge should accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.” *See also* Model Code Canon 3(B)(7). The importance of this provision cannot be overstated.

[O]ne of the fundamental premises inherent in the concept of an adversary hearing, particularly if it is of the evidentiary type, is that neither adversary be permitted to engage in an *ex parte* communication concerning the merits of the case with those responsible for the decision. It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it.

Camero v. U.S., 375 F.2d 777, 780-81 (Ct. Cl. 1967) (citations omitted).

Ex parte communications are strictly forbidden for numerous reasons. First, statements made in the absence of opposing counsel are not tested by the adversarial process and are therefore unreliable. *See, e.g., U.S. v. Craven*, 239 F.3d 91, 103 (1st Cir. 2001); *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996). Second, because *ex parte* communications are typically not memorialized in an official record, reviewing courts questioning their propriety or impact have no basis on which to gauge either. *See, e.g., Craven*, 239 F.3d. at 103; *Edgar*, 93 F.3d. at 259.

Generally, *ex parte* communications are permissible only if they pertain to purely administrative matters or are conducted, with the consent of the parties, to foster settlement. *See* Code of Conduct Canon 3(A)(4); Model Code Canon 3(B)(7)(a, d). Therefore, the operative question in determining whether any instance of *ex parte* communication is improper, is whether or not the substance of that communication touched on the merits of the case.

Breaches of these rules can trigger disqualification on two bases. First, a judge must be disqualified where he or she has “a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b)(1) (“Section 455(b)(1)”). *Ex parte* contacts can lead to disqualification on this basis. *See Edgar*, 93 F.3d 256; *see also Craven*, 239 F.3d 91; *Wisconsin Steel Co.*

v. International Harvester Co., 48 B.R. 753 (N.D. Ill. 1985). Second, a judge must be disqualified from “any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (“Section 455(a”). Extra-record contacts with partisan advocates, such as Gross and Hamlin, can lead to disqualification on this basis as well. *See In Re School Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992).

As set forth in greater detail in the attached motion, Judge Wolin’s conduct in the Five Asbestos Cases requires his disqualification on both bases.

B. Judge Wolin and His Advisors Engaged In Hundreds Of Hours Of Impermissible *Ex Parte* Communications

Upon his appointment to the Five Asbestos Cases, Judge Wolin held a conference for all parties on December 20, 2001. (Declaration of Stanley L. Ferguson (“Ferguson Decl.”) ¶ 2.) At that conference, Judge Wolin revealed his plan to appoint special masters to help him administer the cases. (*Id.*) Judge Wolin also announced his intention to hold *ex parte* discussions as he deemed necessary and further stated that any objections to this procedure were preemptively overruled. (*Id.* ¶ 3.) Since that initial conference, Judge Wolin has held only one in-court, on-the-record hearing in USG’s case. (Declaration of Scott D. Devereaux (“Devereaux Decl.”) ¶ 2.)

Instead of on-the-record hearings, this case has been managed, in off-the-record meetings and by *ex parte* communications. As more fully set out in USG's concurrently-filed motion for disqualification, the time sheet records submitted by the Advisors and by counsel for the parties reveal a disturbing practice.

Based on the partial set of available fee applications of the Advisors, the Advisors had *ex parte* telephone calls or meetings with counsel in the Five Asbestos Cases totaling over 325 hours of discussions. (Declaration of Kathleen Goodhart ("Goodhart Decl.") ¶ 2, Ex. 1, p. 9.)⁴ Of this total, the Advisors spent more than 60 hours in consultation with counsel to the Asbestos Personal Injury Creditor's Committee's ("ACC"). (*Id.* ¶ 7, Ex. 6, p. 13.) Judge Wolin has engaged in more than 300 hours of private conversations with the Advisors, 57 hours of which included an unidentified person. (*Id.* ¶ 2, Ex. 1 and ¶ 5, Ex. 4.) He also has engaged in more than 300 hours of private conversation with the Advisors, 57 hours of which included an unidentified person. (*Id.* ¶ 2, Ex. 1 and ¶ 5, Ex. 4.) The Advisors spent an additional 138 hours in consultation with people whose names were "redacted" or "withheld." (*Id.* ¶ 4, Ex. 3.)

⁴ Because the fee applications and other exhibits to USG's concurrently filed motion are voluminous, a single copy of those exhibits is attached hereto as exhibits 1-42. All references in both this *amicus* brief and the attached motion for disqualification, Exhibit A, refer to that single set of numbered exhibits.

These *ex parte* communications were billed by the Advisors *pro rata* among the Five Asbestos Cases. (Goodhart Decl. ¶ 3, Ex. 2, pp. 1-17.) To the extent that the time entries reflect the substance of the *ex parte* communication, they appear to demonstrate that substantive, disputed issues were discussed, not settlement. To USG's knowledge, none of the Advisors have participated in the few settlement discussions that have occurred in USG's case. Indeed, while USG does not know whether any portion of these *ex parte* contacts dealt with settlement activities in the other cases, these communications were not referred to in the billing statements by the Advisors as relating to settlement or mediation discussions.

Further, any suggestion that all of this time was spent discussing administrative matters would stretch the bounds of credulity. Indeed, given the posture of USG's case, nothing but substantive, disputed matters could have been discussed. There are no motion schedules to be arranged, there are no hearing dates to confirm, and there is no outstanding discovery. The central issue in dispute is the parties' fundamental disagreements as to the validity and impact of the debtors' defenses to asbestos personal injury claims and whether those defenses will be presented in a process of substantive estimation.

Bearing an abundance of extra-record knowledge, the Advisors have improperly met *ex parte* with Judge Wolin. Among the Five Asbestos

Cases, Judge Wolin's time spent in *ex parte*, unrecorded meetings with the Advisors totals a remarkable 329 hours – equivalent to meeting with the Advisors *five days a week, for eight full hours per day, for over two months*.⁵ (*Id.* ¶ 2, Ex. 1, p. 9.) The notion that the Court could have spent more than 300 hours talking with highly compensated Advisors about administrative matters is unthinkable. Moreover, it would have been highly improper for the Advisors to have *ex parte* communications with Judge Wolin about the substance of any settlement mediation activities, to the extent there were any.

The only logical conclusion is that these *ex parte* communications dealt with the substantive, disputed issues. The reasonable inference from the time entries is that Judge Wolin had *ex parte* consultations with the Advisors in connection with nearly every substantive decision he has made in this case. Because Judge Wolin knew that the Advisors were in frequent *ex parte* contact with the parties and, therefore, possessed extensive extrajudicial knowledge, substantive *ex parte* contact with the Advisors should have been avoided. Instead, it appears that Judge Wolin sought out that contact.

⁵ Time entries for a few examples of the Court's meetings with his Advisors include: a ten-hour meeting with multiple Advisors on January 4, 2002; a ten-hour meeting with all Advisors on January 18, 2002; and a seven and a half-hour meeting with McGovern and Gross on January 30, 2003. (Goodhart Decl. at ¶ 2, Ex. 1, pp. 1, 3.)

Judge Wolin also has engaged in impermissible *ex parte* conversations directly with counsel, including more than 25 hours of *ex parte* communications with counsel for the ACC. (Goodhart Decl. ¶ 6, Ex. 5, p. 6.) For example, when counsel for USG arrived for a pre-scheduled April 23, 2003 chambers conference, Judge Wolin and Elihu Inselbuch, counsel for ACC, apparently, had commenced that meeting ahead of time. (Devereaux Decl. ¶ 3-4.) A review of ACC's counsel's fee applications reveals that this was not their first *ex parte* audience with the Court. For example, on March 14, 2002 counsel for the ACC met with Judge Wolin for over five hours, likely also with Gross in light of entries on Gross's fee statements. (Goodhart Decl. ¶ 6, Ex. 5, p. 1.) The substance of some of the ACC's counsel's conversations with the Court has been described as regarding "case management" (4/17/02 entry) and "order language" (7/18/03 entry). (*Id.* ¶ 6, Ex. 5, pp. 2, 5.)

Ex parte contacts have become the predominant mode of discourse in the Five Asbestos Cases, almost entirely supplanting the process of adversarial presentation on the record, in open court. There is no record of what the parties said to the Advisors or what the Advisors said to Judge Wolin. Because there is no record, the parties and the public are left with suspicions that cannot be disproven by conclusory statements about what allegedly transpired. The compelling inference is that Judge Wolin has

gained substantive extrajudicial knowledge in violation of Section 455(b)(1) and there is an appearance of impropriety in violation of Section 455(a). Disqualification is the only solution.

C. Judge Wolin's Reliance on His Advisors Dramatically Increased The Danger Posed By Gross's And Hamlin's Conflicts Of Interest.

These improper *ex parte* contacts in the Five Asbestos Cases significantly enhanced the likelihood that Gross's and Hamlin's patent conflicts of interest would prejudice these proceedings. The Advisors had more than 325 hours of *ex parte* communications with the parties, and an additional 240 hours of *ex parte* communications with unidentified persons. (*Id.* ¶¶ 3-5, Exs. 2-4.) As mentioned above, Judge Wolin had more than 300 hours of *ex parte* communications with his Advisors, 57 of which included the presence of an unidentified person. (Goodhart Decl. ¶ 2, Ex. 1, p. 9 and ¶ 5, Ex. 4, p. 2.) Where a conflicted judicial advisor has materially participated in a proceeding, the law requires that both the advisor *and the judge* be disqualified. *See Hall v. Small Bus. Admin.*, 695 F.2d 175 (5th Cir. 1983).

It is plain that Hamlin and Gross are conflicted here. Indeed, Gross and Hamlin have been unable to separate their role as advocates in *G-I Holdings* from their role as neutral advisors to Judge Wolin. For example, their fee statements establish that they have billed more than 930 hours developing their arguments for claimants in *G-I Holdings*. (Goodhart Decl.

¶ 11, Ex. 10) As part of that effort, Gross and Hamlin have spent at least 70 hours in conversation with future representatives from other bankruptcy cases, including the future representatives in these Five Asbestos Cases. (*Id.* ¶ 9, Ex. 8, pp. 1-6; ¶ 10, Ex. 9, pp. 1-3) Counsel for the ACC in the Five Asbestos Cases also were present at a number of these strategic meetings. The following time entries from Hamlin, which are just an excerpt, show that these meetings addressed strategic issues that will affect USG's case:

- “Meeting in NYC with all other Future Reps re: status of [Asbestos Trust Distribution Procedures] and ongoing discussions with various ACC's.” (03/25/03 for three hours) (*Id.* ¶ 24, Ex. 23, p. 189);
- “Telephone conference with future representatives in 5 other asbestos bankruptcy matters regarding possible settlement structure and status of pending legislation.” (5/12/03 for 1.3 hours) (*Id.* 212);
- “Meeting with all other future representatives at Weiss' office regarding status of negotiation and possible resolution of [Trust Distribution Procedures] and other pending asbestos bankruptcy and analysis of impact on possible G-I negotiations.” (8/27/03 for 3.0 hours) (*Id.* 248);
- “Attendance at conference at Caplin Drysdale in NYC with asbestos claimants committee on respective positions on outstanding issues.” (3/11/02 for 3.20 hours) (*Id.* p. 35).

Further, Gross and Hamlin have advocated legal positions in *G-I Holdings* that directly conflict with the positions of USG and other stakeholders. For example, Gross and Hamlin have taken adverse positions on a number of key issues, including: (a) the effect of a Bankruptcy Code

section 105 channeling injunction on future claims; (b) whether future claimants can be enjoined over the objection of the legal representative (c) whether pleural claims are compensable; (d) whether medically unimpaired claimants are entitled to any recovery; and (e) the contents of an appropriate proof-of-claim form. (*See, e.g.*, Goodhart Decl. ¶ 38, Ex. 36, pp. 18-32.)

Remarkably, the conflicted Advisors also have cited Judge Wolin's decisions in the Five Asbestos Cases to support the position of their claimant-clients in *G-I Holdings* and made arguments about how Judge Wolin *would rule* about various issues. On July 28, 2003, Gross filed a brief that opposes a request for extending exclusivity in *G-I Holdings*. (*Id.* ¶ 39, Ex. 37, p. 2.) This brief repeatedly cites Judge Wolin's February 19, 2003 Case Management Order and urged the court in *G-I Holdings* to "follow the precedent that Judge Wolin has set in the USG bankruptcy" regarding the method for valuing present and future claims, arguing that "Judge Wolin's reasoning applies with equal force here." (*Id.* 15-16.) Thus, at the same time that Gross and Hamlin were advising Judge Wolin, they were using his decisions to advance their clients' interests in *G-I Holdings*.

This pattern was repeated in connection with the September 30, 2003 in-chambers, off-the-record meeting that Judge Wolin held with USG's counsel and other committee counsel, in which Gross participated. At the

September 30 conference, Judge Wolin orally made certain rulings regarding a lung cancer and mesothelioma estimation process. (Devereaux Decl. ¶ 5.) Later that same day, Chief Judge Gambardella held a hearing in *G-I Holdings*. At that hearing, counsel for the ACC⁶ argued to Chief Judge Gambardella:

"I can report to you as can Mr. Gross, that today Judge Wolin has had a session on the estimation process in the U.S.G. case and what has emerged is a cancers only estimation where only claimants who had claims already on file at the time of the bankruptcy petition will be required to respond to a fairly simplified claim form where because that number is limited, the time necessary for responding to the claim form and gathering the information and because those claimants are already represented by counsel, unlike the many thousands of claims that have accrued since early 2001, the response time can be fairly short, and when those claim forms come in, the notion is that the Debtor will be given the opportunity to frame whatever defenses to categories of those claims it wants"

(Goodhart Decl. ¶ 41, Ex. 39, pp. 13,14.) It is indefensible for Gross to advise Judge Wolin on rulings he should make in the debtors' cases and then, having participated in crafting those rulings, use them as favorable precedent as an advocate for his clients in *G-I Holdings*. See e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (ordering recusal where an

⁶ Counsel for the ACC in *G-I Holdings*, as in USG's cases, is the law firm of Caplin & Drysdale. The ACC and Futures Representative are commonly aligned in these cases as is evident from the portion of the transcript quoted above.

Alabama Supreme Court justice had a pending case that was directly impacted by a decision he authored).

Again, perhaps the most insidious element of this troublesome picture is that there are no records of the advice given or information provided by Gross and Hamlin, or the other Advisors. Hundreds of hours of *ex parte* communications cannot be sanitized by conclusory allegations that nothing of substance really happened. The inability of the public and the parties to know what was said is one of the primary reasons *ex parte* communications are universally condemned.

The vice of *ex parte* communication is well illustrated by this case. It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations. This is why the prohibition is not against "prejudicial" *ex parte* communications, but against *ex parte* communications.

Wisconsin Steel Co. v. International Harvester Co., 48 B.R. 753, 760 (N.D. Ill. 1985).

The evidence is overwhelming. Judge Wolin conducted substantive *ex parte* sessions with his Advisors, including two Advisors who had a palpable conflict of interest. Both the appearance of impropriety (Section 455(a)) and the compelling inference that extrajudicial knowledge was obtained from the *ex parte* contacts (Section 455(b)(1)) require Judge Wolin's disqualification from these proceedings.

III. CONCLUSION

For these reasons, USG respectfully submits that the Owens-Corning Creditors' emergency petition for a writ of mandamus ordering the disqualification of Judge Wolin should be granted.

Dated: November 21, 2003

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CERTIFICATE OF COMPLIANCE

I certify in compliance with Federal Rules of Appellate Procedure 29(c)(5), 29(d), and 32(a)(7) that the attached *Amicus Curiae* brief contains 3,156 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(b)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word (2000 version) with the 14 point, Times New Roman font.

November 21, 2003

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CERTIFICATE OF SERVICE

I, Daniel J. DeFranceschi, do hereby certify that on November 21, 2003 I caused copies of the foregoing **Brief of Amicus Curiae USG Corporation in Support of Kensington International Limited and Springfield Associates, LLC's Emergency Petition for a Writ of Mandamus** to be served upon the parties in the manner indicated on the attached list.



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