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No.

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

EMERGENCY PETITION FOR A WRIT OF MANDAMUS

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EMERGENCY PETITION FOR A WRIT OF MANDAMUS

I. INTRODUCTION

Petitioners Kensington International Limited and Springfield Associates, LLC, respectfully request, pursuant to 28 U.S.C. § 1651, that this Court order a writ of mandamus to the Honorable Alfred M. Wolin, United States District Judge for the District of New Jersey (sitting by designation in the District of Delaware), directing Judge Wolin either (a) to recuse himself from further participation in these jointly administered bankruptcy cases, or (b) to expedite consideration of (including discovery on) the recusal motion pending before him.

The matter arises as an emergency because Judge Wolin *sua sponte*, on October 23, 2003, suspended all briefing and discovery on the pending recusal motion, thus delaying resolution of this matter indefinitely. He also indicated that he will rule on other – substantive – matters in the bankruptcy case before resolving the recusal motion. If, as petitioners contend, Judge Wolin must be disqualified under 28 U.S.C. § 455 from continuing to act in these matters, then his substantive rulings are nullities, see *McCuin* v. *Texas Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir. 1983), yet they will be entered with the apparent authority of a United States District Judge. Petitioners seek this Court's intervention to avoid further delay, and to restore confidence in a judicial proceeding that is being tainted by a highly disturbing appearance of impropriety.

This Court assigned Judge Wolin to the bankruptcy cases of Owens Corning and of four other companies to develop and implement a "coordinated plan of management" for thousands of asbestos-related claims. Separate Appendix ("App.") 40. There are, however, a multitude of other creditors in these cases that also must receive fair and equitable treatment under the Bankruptcy Code. Petitioners alone hold more than $275 million in indebtedness of Owens Corning and certain of its subsidiaries (the "Debtors") under a bank credit agreement. Distributions to creditors in these bankruptcy cases will depend largely on the relative treatment of commercial creditors such as petitioners, on the one hand, and of present and future asbestos claimants, on the other.

Petitioners have recently learned – and promptly called to Judge Wolin's attention by motion dated October 10, 2003 (App. 1-34) – that Judge Wolin has allowed partisan advocates of the future asbestos claimants to participate actively and materially in the judicial administration of the Debtors' bankruptcy cases as court-appointed "Consultants." By appointment of Judge Wolin, David R. Gross and C. Judson Hamlin (the "Conflicted Advisors") and their law firms have spent hundreds of hours during the last 22 months advising Judge Wolin on critical issues in these cases. During this entire time, however, the Conflicted Advisors also have been actively representing the interests of future asbestos claimants in

another major and highly contested asbestos bankruptcy case pending in this Circuit – that of G-I Holdings Inc., f/k/a GAF Corporation, and its affiliates (collectively "G-I"). It appears that many of the future asbestos claimants whom the Conflicted Advisors represent in G-I are also asbestos claimants in the Debtors' cases.

The Conflicted Advisors are not "neutral advisors" of Judge Wolin – they are partisan advocates who have a material interest in the outcome of the cases before Judge Wolin. The holders of approximately $1.6 billion in claims against Owens Corning agree and have joined petitioners in seeking Judge Wolin's immediate recusal, as has a non-party *amicus curiae*.

In indistinguishable circumstances, the Seventh Circuit has held that the judge *himself*, not just his advisors, must be disqualified under 28 U.S.C. § 455(a) and (b)(1) because his private meetings with "partisan" advocates demonstrated that "a reasonable observer [would] be seriously concerned about the court's ability to conduct the trial impartially." *Edgar* v. *K.L.*, 93 F.3d 256, 260 (7th Cir. 1996) (granting writ of mandamus). That view is in accord with this Court's statement – in its leading judicial disqualification case, which involved the issuance of a writ of mandamus to remove a judge who had been presiding over complex asbestos litigation for six years – that "Section 455 * * * clearly requires that

judges shall disqualify themselves where such a taint appears, rather than attempt creative, alternative remedies." *In re School Asbestos Litigation*, 977 F.2d 764, 783 (3d Cir. 1992). No court that we are aware of has disagreed.

Judge Wolin's response to the serious information presented to him on October 10, however, was not to disqualify the Conflicted Advisors; it was not to disqualify himself; it was not to expedite the process of getting to the bottom of the matter. Instead, on October 23, apparently after receiving additional non-public communications from the Conflicted Advisors, he *sua sponte* "ORDERED that all further proceedings related to the Motion are hereby stayed" and further "ORDERED that, without limitation of the foregoing paragraph, any subpoena, request for the production of documents, or other discovery now outstanding related to the Motion shall be stayed." Addendum to Petition ("Add.") 6.

The factual material *already* before Judge Wolin mandates his immediate recusal as a matter of law. For Judge Wolin to announce instead that he will *delay* getting to the bottom of the matters underlying the recusal motion – that he will suspend not only discovery, but also briefing, on the motion, so that the public record will not even *show* what the arguments, if any, against recusal are – is intolerable. This Court should either order Judge Wolin to resolve the recusal mo-

tion in an orderly but expeditious fashion, or itself (after receiving a response pursuant to Fed. R. App. P. 21(b)(1)) resolve the recusal motion in petitioners' favor.

II. STATEMENT

A. The Debtors, Their Chapter 11 Cases, and The Conflicted Advisors' Role

The Debtors commenced their Chapter 11 cases on October 5, 2000, in response to thousands of asbestos-related claims that had been asserted against them. On November 27, 2001, then-Chief Judge Becker of this Court ordered that the Debtors' cases and four other asbestos-related Chapter 11 cases pending in the District of Delaware (together, the "Five Asbestos Cases")[1] be transferred from the Bankruptcy Court and assigned to Judge Wolin. Judge Becker directed that "these bankruptcy cases, which carry with them tens of thousands of asbestos claims, need to be consolidated before a single judge so that a coordinated plan for management can be developed and implemented." Judge Wolin then re-referred portions of this case back to the Bankruptcy Court, but retained jurisdiction "with respect to asbestos-related claims and issues."

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[1] In addition to the Debtors' cases, the Five Asbestos Cases are *In re Armstrong World Industries, Inc., et al.*, Nos. 00-4471, 00-4469, 00-4470; *In re W.R. Grace & Co., et al.*, Nos. 01-1139 through 01-1200; *In re Federal-Mogul Global, Inc., T&N Limited, et al.*, Nos. 01-10578, et al.; and *In re USG Corporation, et al.*, Nos. 01-2094 through 01-2104. This Court subsequently assigned to Judge Wolin a sixth asbestos-related bankruptcy case, *In re Combustion Engineering*, No. 03-10495.

Judge Wolin *sua sponte*, and without pre-notifying the parties of the names of the appointees he was considering, appointed the Conflicted Advisors and three other "Consultants" in the Five Asbestos Cases on December 28, 2001. App. 49-51. The grant of authority was sweeping. As stated by Judge Wolin, the purpose of the "Court Appointed Consultants [was] to advise the Court and to undertake such responsibilities, including by way of example and not limitation, mediation of disputes, holding case management conferences, and consultation with counsel, as the Court may delegate to them individually." App. 50. The Consultants also would be delegated "certain authority to hear matters and to advise the Court on issues that may arise in these five large Chapter 11 cases." *Ibid.* The Appointment Order provided that Judge Wolin could, "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 this disposition of such matter." *Ibid.* Finally, the Appointment Order provided that the Consultants would be compensated by the Debtors' bankruptcy estates. App. 51.

During the nearly 22 months since the Appointment Order, the Consultants have actively participated in the judicial administration of the Five Asbestos Cases. Mr. Gross and his law firms have devoted hundreds of hours to these cases, and

had billed the debtors in the Five Asbestos Cases nearly $600,000 through the spring of 2003 (the last date for which time records have been made available to petitioners). They have performed substantial additional services since then.

Mr. Gross's time records show that he and his associates participated in numerous, often lengthy meetings with Judge Wolin, his staff, and the other Consultants. A number of those meetings have preceded status conferences and major hearings in the Debtors' cases, after which Mr. Gross personally attended the proceedings in open court. Mr. Gross and his colleagues also participated in numerous teleconferences and in-person meetings with representatives of the asbestos plaintiffs, defendants, and third-party insurers. And Mr. Gross met on at least a dozen occasions with undisclosed persons, his time records identifying the meeting participants only as "Name[s] Withheld." App. 91-137, 138-64, 196-234, 235-63.

Mr. Gross's services also have included legal research and the preparation of memoranda for Judge Wolin. Although it is not possible for petitioners to know the substance of this work at this time, since it is not disclosed in the time records and discovery has been blocked, it appears that Mr. Gross has assisted Judge Wolin in analyzing various legal issues before him. Petitioners do know from their own experience that Mr. Gross participated, along with Consultant McGovern, in mediations in this case in the late spring and early summer of 2003.

Mr. Hamlin too has participated materially in these cases as an advisor to Judge Wolin. Through the spring of 2003 (the last date for which records are available), Mr. Hamlin had billed in excess of $30,000 in fees for meetings and research in the Five Asbestos Cases. Mr. Hamlin's time records show that he has advised Judge Wolin on substantive legal issues relating to, among other things, (i) proofs of claims filed on behalf of various asbestos claimants, (ii) the establishing of a claims bar date, and (iii) the appointment of an examiner. App. 69-90, 165-89, 264-92.

Mr. Gross and Mr. Hamlin thus have been actively involved in the Debtors' cases for nearly 22 months, during which they have materially assisted Judge Wolin in performing his judicial functions. Judge Wolin has described the Conflicted Advisors as "necessary for the efficient administration of these very large mass-tort chapter 11 cases," and as "occupying a unique position in the [asbestos] cases not shared by other persons employed in these cases." App. 55. Judge Wolin also has described the Conflicted Advisors and other Consultants as "functioning in a manner in all respects similar to examiners as provided for in the Bankruptcy Code." *Ibid.*

B. The Conflicted Advisors' Role In The G-I Bankruptcy Cases

During the entire time that the Conflicted Advisors have been involved in the judicial administration of these cases, they have also been active as advocates of the future asbestos claimants in the G-I bankruptcy cases. Like the Debtors, G-I is the subject of thousands of asbestos-related claims based on exposure to asbestos building products it manufactured. It is common for asbestos claimants to name multiple co-defendants. Because G-I and the Debtors manufactured similar products, G-I has been named as a co-defendant with the Debtors in various proceedings. Therefore, a significant number of the future asbestos claimants in the G-I cases are certain to be future claimants in these cases as well.

G-I filed for reorganization under Chapter 11 on January 5, 2001, and its case is currently pending before Judge Gambardella in the United States Bankruptcy Court for the District of New Jersey. On October 11, 2001, the G-I court appointed Mr. Hamlin to serve as the "Legal Representative of Present and Future Holders of Asbestos-Related Demands." Mr. Hamlin promptly hired Mr. Gross to represent the interests of the asbestos claimants in that case.

Although Messrs. Hamlin and Gross were already serving in their capacities as advocates for asbestos claimants in the G-I case when Judge Wolin appointed them to be Consultants, to the best of petitioners' knowledge that fact was not dis-

closed to creditors in any of the Five Asbestos Cases. Had Judge Wolin not stayed discovery, petitioners would have sought to learn (among other things) whether Hamlin and Gross disclosed their conflicts to Judge Wolin, and if so when. Messrs. Hamlin and Gross, however, did make clear to the G-I court their special role in the Debtors' cases. App. 301-05, 306-10.

The G-I and Debtors' cases are among the largest and most contentious asbestos-related Chapter 11 cases in the United States. Both involve thousands of asbestos claimants whose claims arise from exposure to asbestos-based products. Mr. Gross himself described the G-I cases and the Debtors' cases as "similar asbestos-related bankruptcies." App. 309. The similarities between the cases include issues regarding (i) the manner in which asbestos claims are estimated, (ii) whether and to what extent future asbestos claims constitute "claims" for purposes of bankruptcy, including with respect to notice, establishing a bar date, application of the discharge, and application of the 11 U.S.C. § 524(g) injunction, (iii) the effect of bankruptcy on third-party insurance coverage, and the proper role of the insurers in the bankruptcy case, (iv) whether substantive consolidation of related entities is appropriate, (v) successor liability, and (vi) the proper role of the future claims representative. Judge Wolin has recognized that certain of these issues "may lie at

the heart of all asbestos bankruptcies." *In re USG Corp.*, 290 B.R. 223, 224 (D. Del. 2003) (emphasis added).

Disturbingly, the Conflicted Advisors have drawn on the factual and legal relationships between the G-I case and the Five Asbestos Cases to advocate their positions in G-I. For example, on July 28, 2003, Mr. Gross filed on behalf of Mr. Hamlin an opposition to the extension of exclusivity in G-I (the "G-I Exclusivity Opposition"). App. 350-68. The G-I Exclusivity Opposition relies extensively on Judge Wolin's decision in *In re USG Corp.*, 290 B.R. 223 (D. Del. 2003), which was rendered more than a year *after* the Conflicted Advisors began assisting Judge Wolin. Among other things, the Conflicted Advisors advocated on behalf of the future claimants in G-I that Judge Gambardella "follow the precedent that Judge Wolin has set in the USG bankruptcy" with respect to valuing present and future claims, App. 364, contending that "Judge Wolin's reasoning applies with equal force here," App. 365.

The Conflicted Advisors similarly invoked Judge Wolin's precedent in opposing G-I's application for an order establishing a method to liquidate claims and to fix a final bar date (the "G-I Claims Liquidation Sur-Reply"). App. 316-49. The Conflicted Advisors there argued that Judge Wolin's controversial decision in another case in which they are advising him, *Official Committee of Asbestos*

Personal Injury Claimants v. *Sealed Air Corp.* (*In re W.R. Grace & Co.*), 281 B.R. 852 (D. Del. 2002), did not stand for the proposition that future asbestos claims were "claims" that could be discharged in bankruptcy. To the contrary, the Conflicted Advisors argued this issue was not before Judge Wolin in that case. The Conflicted Advisors added that, "if this issue had been before him, *it is certain that Judge Wolin would not have held* that future claimants hold dischargeable bankruptcy claims under the Bankruptcy Code based upon the significant authorities." App. 328 (emphasis added).

The Conflicted Advisors also have taken positions in the G-I case with respect to the most important expert likely to testify for the Official Creditors' Committee in the Owens Corning case. Among other things, the Conflicted Advisors challenged the testimony, qualifications, methodology, and conclusions of Dr. Letitia Chambers, G-I's expert on valuing asbestos claims. App. 346-49. The Conflicted Advisors described Dr. Chambers's testimony as "without logic or expertise to support her," and dismissed her views as, among other things, "unfounded," "unpersuasive," "confusing," "def[ying] logic," "based on an inappropriate analysis," and "entirely inadequate." App. 346-48.

Dr. Chambers is also playing a critical role in the Debtors' cases as the claims expert and consultant to the Official Committee of Unsecured Creditors,

which represent the commercial creditors such as banks and bnodholders. The Conflicted Advisors already have come to the conclusion in G-I that Dr. Chambers's testimony was without merit. At the same time, the Conflicted Advisors have been working with their own experts in G-I, advocating factual positions and expert opinions that are hotly contested in the Debtors' cases.

There is no pretense that the Conflicted Advisors are "neutrals" in the G-I cases, yet they have been entrusted in the Debtors' cases with "a unique position in the [asbestos] cases not shared by other persons employed in these cases." App. 55. Nor can there be any question that the interests of the future asbestos claimants whom the Conflicted Advisors represent in G-I are adverse to the interests of other creditors in the Debtors' cases. Thus, the appearance (if not reality) is that Judge Wolin and his advisors have prejudged the evidence and issues in this case based on the Conflicted Advisors' activities in the G-I case.

C. The Recusal Motion and the Responses of Other Parties, Amici, and Judge Wolin

Petitioners filed a recusal motion on October 10, 2003, reciting essentially the same facts set forth above. App. 1-34. Had Judge Wolin done nothing, responses to the motion would have been due October 27, 2003.

On Monday, October 13, the debtors in the *W.R. Grace* bankruptcy (see pages 11-12, *supra*) applied to the bankruptcy court for the appointment of a repre-

sentative for future claimants. App. 402-20. Their nominee for the appointment was Mr. Hamlin. The application and Mr. Hamlin's supporting affidavit mentioned matter-of-factly that Mr. Hamlin was a "consultant" in other asbestos bankruptcy proceedings. The appointment of Mr. Hamlin to be a partisan in yet another asbestos-related bankruptcy case – *in which he already serves as an advisor to Judge Wolin* – just one business day after petitioners filed their recusal motion naturally gives rise to factual questions that might appropriately be explored through discovery from W.R. Grace & Co.

Petitioners served subpoenas *duces tecum* on Messrs. Gross and Hamlin (and their law firms) and on W.R. Grace & Co. Petitioners understand the seriousness of their allegations, and they propounded this very limited discovery to ascertain more facts about the degree to which these obviously tainted advisors' role has influenced Judge Wolin, and to understand better how Mr. Hamlin came to be appointed as a partisan in the *W.R. Grace* proceeding, to which petitioners are not parties. No one has filed any objection to the subpoenas, and Grace had advised petitioners of its intent to comply (subject to certain agreeable narrowing stipulations) before Judge Wolin stayed all subpoenas *sua sponte*. The staying of subpoenas not only protected Messrs. Gross and Hamlin from having to allow explora-

tion of their conflicts, but also censored W.R. Grace, which had not sought protection from a subpoena and was not likely to do so.

Judge Wolin on October 15 partially withdrew the reference of this case to the Bankruptcy Court with respect to the motion, and suspended all deadlines for opposition briefs and a hearing. App. 369-70. Judge Wolin's action was troubling to petitioners, but was not necessarily inconsistent with the notion that Judge Wolin would proceed on a different but prompt schedule, and so provided no immediate basis for seeking mandamus from this Court.

Neither Judge Wolin nor anyone else filed anything in court pertaining to the motion between October 16 and October 21. On October 22, however, Credit Suisse First Boston ("CSFB"), as Agent for the pre-petition bank lenders to the Debtors, formally filed its support of the motion for recusal and "requested that this Court [Judge Wolin] set this matter for hearing as soon as possible." App. 371. The creditors on whose behalf CSFB filed hold approximately $1.6 billion in prepetition claims against the Debtors.

On October 23, there were two important filings related to the motion, and Judge Wolin's order. The Washington Legal Foundation ("WLF") filed a motion for leave to file an amicus brief in support of the recusal motion, and tendered its brief. App. 381-401. WLF has no interest in this case other than the public

interest. And petitioners filed a three-page "request" that Judge Wolin set a prompt briefing schedule and hearing on the motion. App. 421-24. As petitioners advised Judge Wolin, this Circuit in *School Asbestos* urged courts faced with recusal motions to "rule on the disqualification motion first," 977 F.2d at 784 n.26, and any substantive ruling the court might make while a disqualification motion is pending is in serious jeopardy of being overturned (indeed, should be overturned automatically) if the motion is ultimately granted.

Judge Wolin's order, entered *sua sponte*, took a radically different tack:

> This Court intends to treat the Motion *in the same manner as it treats all applications before it* – fairly, on the merits, and with ample opportunity for all sides to air their positions. However, it is a commonplace observation that motions to recuse a court are susceptible to abuse and "are sometimes driven more by litigation strategies than by ethical concerns." In re Cargill, Inc., 66 F.3d 1256, 1262-63 (1st Cir. 1995), cert. denied, 517 U.S. 1156 (1996); see also FDC v. Sweeney, 136 F.3d 216, 220 (1st Cir. 1992); Thomas v. Trustees for Columbia Univ, 30 F. Supp. 2d 430, 431 (S.D.N.Y. 1998). The courts have always been careful to confine recusal to those grounds specified by Congress. E.g. New York City Housing Dev. Corp. v. Hart, 796 F.2d 976, 981 (7th Cir. 1986).
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> * * * * *
>
> The Court intends to set forth a case management order or orders governing further proceedings on the Motion in the near future. *Until then, and until the prima facie merits of the Motion have been tested by the adversarial process, the Court cannot permit discovery or other related proceedings to go forward.* The risk of disruption to the business of the Court and the case as a whole is palpable. That a recusal motion may be brought for an improper purpose has been too widely recognized to be ignored.

Add. 2-3 (emphasis added).

And how did Judge Wolin know of the discovery petitioners have requested, when no party has filed anything with the Court pertaining to those subpoenas? "*It has been reported to the Court* that requests for the production of documents and deposition subpoenas have already been served." Add. 2 (emphasis added). Assuming that no improper *ex parte* contacts occurred, the only possible source of that information is the Conflicted Advisors, who – precisely because they are supposed to be neutral – may communicate with the court other than by making filings on the record.

Judge Wolin's October 23 order contains no analysis of the merits of the October 10 recusal motion. Instead, relying on generalities from other cases about the motives of some litigants who move to disqualify judges, it questioned petitioners' motives. Although Judge Wolin observed that "the prima facie merits of the Motion" must be "tested by the adversarial process," he suspended all proceedings by which such a test might take place. The adversarial testing, petitioners respectfully submit, must now take place in this Court pursuant to Fed. R. App. P. 21.

III. ISSUE PRESENTED

Under the standards of *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), and 28 U.S.C. § 455, should Judge Wolin either (a) be disqualified, or

(b) withdraw his October 23 order and instead allow expedited discovery and an expedited briefing and hearing schedule on the motion?

IV. RELIEF SOUGHT

Petitioners respectfully request the issuance of a writ of mandamus directing Judge Wolin either (a) to disqualify himself under 28 U.S.C. § 455, or (b) to withdraw his October 23 order suspending briefing and discovery on the recusal motion, and instead allow expedited discovery and an expedited briefing and hearing schedule on the motion.

V. REASONS WHY THE WRIT SHOULD ISSUE

This Court has thoroughly canvassed the considerations that bear on the use of mandamus to correct a district judge's failure to comply with 28 U.S.C. § 455. First, review after final judgment is *not* an adequate remedy for a Section 455 violation. *School Asbestos*, 977 F.2d at 776. "While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that section 455 was designed to prevent." *Ibid.* Second, "section 455 reflects Congress's view that the adjudication of a case by a judge with an actual *or* apparent bias is an 'abuse of judicial power,' because it is a threat to the integrity of the judicial system. Interlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate * * *." *Id.*

at 778 (citation omitted; emphasis in original); accord *Alexander* v. *Primerica Holdings, Inc.*, 10 F.3d 155, 167 (3d Cir. 1993).

Third, this Court in deciding whether to issue mandamus examines the facts "so as to determine whether section 455 'clearly and indisputably' required the district judge to disqualify himself and hence requires [this Court] to issue a writ of mandamus directing him to do so." *School Asbestos*, 977 F.3d at 778. Likewise, this Court, "irrespective of the requirements of § 455(a), [has] supervisory authority to order this case reassigned to another district court judge" even without the clear and indisputable showing ordinarily required for mandamus. *Alexander*, 10 F.3d at 167; see 28 U.S.C. § 2106, *cited in Alexander*, 10 F.3d at 167 & n.15.

Petitioners respectfully submit that their right to both requested forms of relief (disqualification and, alternatively, an expedited scheduling order) is clear and indisputable. Congress and the courts recognize the critical need "to promote confidence in the integrity of the judicial process." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 859 (1988); see also *School Asbestos*, 977 F.2d at 777; *Alexander*, 10 F.3d at 167 ("impartiality and the appearance of impartiality in a judicial officer are the sine qu[a] non of the American legal system").

It is not necessary, therefore, that the judge "actually harbors any illegitimate pro-plaintiff bias." *School Asbestos*, 977 F.2d at 782. Nor does it matter "whether

or not the judge actually knew of the facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg*, 486 U.S. at 860. Rather, all that matters is whether, "regardless of [the judge's] actual impartiality, a reasonable person might perceive bias to exist, and this cannot be permitted." *School Asbestos*, 977 F.2d at 782; see also *United States* v. *Nobel*, 696 F.2d 231, 235 (3d Cir. 1982).

Congress codified this broad, prophylactic recusal rule in Section 455(a), which provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." 28 U.S.C. § 455(a) (emphasis added); see also Judicial Conduct Code Canon 3C ("Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned * * *."). By its terms, Section 455 requires disqualification ("***shall***") whenever a judge's impartiality "***might***" be reasonably questioned. Thus, even the *prospect* of a reasonable question triggers the mandatory duties of Section 455. As the October 23 WLF amicus brief practically proves by itself, disinterested members of the public *do* believe that it is reasonable to question Judge Wolin's impartiality in light of his reliance on advice from Messrs. Gross and Hamlin. Cf. *School Asbestos*, 977 F.2d at 777 n.10 (noting

filing in that case by same entity, WLF, in the course of granting a writ of mandamus to disqualify the district judge).

"Congress designed this general standard 'to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case.'" *United States* v. *Nobel*, 696 F.2d at 235 (quoting H.R. Rep. No. 1453, 93d Cong., 2d Sess. at 5 (1974)).

> The goal of * * * the disqualification statute is to exact the appearance of impartiality. It focuses on what is revealed to the parties and the public, as opposed to the existence in fact of any bias or prejudice. A judge should exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case.

Hall v. *Small Business Admin.*, 695 F.2d 175, 178-179 (5th Cir. 1983) (citations omitted); see also Judicial Conduct Code Canon 2A; *id.* Canon 2A, Official Commentary ("A judge must avoid all impropriety and appearance of impropriety.").

In addition to the broad disqualification rule under Section 455(a), Section 455(b)(1) provides that a judge "shall disqualify himself" when, among other things, he or she has "personal knowledge of disputed evidentiary facts concerning the proceeding" (28 U.S.C. § 455(b)(1)), which includes knowledge imputed to the judge from close advisors (*K.L.*, 93 F.3d at 259). This disqualification rule is not another required element of disqualification for appearance of partiality under Sec-

tion 455(a), but rather an independent basis for disqualification. A "finder of fact must be 'free from external causes tending to disturb the exercise of deliberate and unbiased judgment.'" *Price Bros. Co.* v. *Philadelphia Gear Co.*, 629 F.2d 444, 446 (6th Cir. 1980) (quoting *Mattox* v. *United States*, 146 U.S. 140, 149 (1892)).

The requirements that a judge "command impeccable appearance" in his ethics extend to those who assist the judge in carrying out his judicial functions. *Hall*, 695 F.2d at 176. To ensure the appearance of impartiality, it is incumbent upon judges to ensure that their advisors' "fairness and expertise in the field cannot reasonably be questioned." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION 111 (1995). Judges may "obtain the advice of a *disinterested* expert on the law," Judicial Conduct Code Canon 3A(4) (emphasis added), but the expert must be a "neutral third party." *Techsearch L.L.C.* v. *Intel Corp.*, 286 F.3d 1360, 1380 (Fed. Cir. 2002).

The impartiality of judges' closest advisors must be above question. As the Fifth Circuit has observed:

> Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researches who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.

Hall, 695 F.2d at 179; see also *First Interstate Bank* v. *Murphy, Weir & Butler*, 210 F.3d 983, 985 (9th Cir. 2000) ("judges and law clerks are required to preserve the court's impartiality and the appearance of impartiality").

"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." Code of Conduct for Judicial Employees n.2. Although the Conflicted Advisors in these cases may not be called "law clerks" or "staff attorneys" in name, they perform similar (if not *more* delicate) functions for Judge Wolin.

The Conflicted Advisors cannot objectively advise Judge Wolin while acting as advocates for the future asbestos claimants in the G-I cases. In G-I the Conflicted Advisors are duty bound to see that the future asbestos claimants whom they represent receive the greatest consideration possible, even if such consideration comes at the expense of other creditor classes.

It is not credible that the Conflicted Advisors' desire and duty to assist their constituents in G-I could be turned off like a light switch when they turn to Judge Wolin's work. Numerous legal issues and disputed facts in G-I are virtually identical to those in the Debtors' cases, including issues and evidence that "may lie at the heart of all asbestos bankruptcies." *USG*, 290 B.R. at 224.

The Conflicted Advisors' statement to the G-I court that "*it is certain that* Judge Wolin would not have held" a particular way might ordinarily be regarded as an advocate's bravado. See App. 328 (emphasis added). Given the Conflicted Advisors' role in advising Judge Wolin, however, the statement gives the appearance that the Conflicted Advisors have special access to Judge Wolin (which, in fact, they do) and can speak authoritatively about what Judge Wolin has done, will do, and would do.

In essence, through their dual roles of advising Judge Wolin and advocating for future claimants in G-I, the Conflicted Advisors have taken the law into their own hands: They assist Judge Wolin in establishing precedents that they then cite as authority to another federal judge. They even go so far as to predict *with certainty* what decisions Judge Wolin will make in the future, long before the Debtors' creditors have even had their opportunity to be heard on the issue.

Moreover, the Conflicted Advisors have already reached extra-judicial conclusions about the expertise and testimony of a key expert for the commercial creditors in the Debtors' cases – Dr. Chambers. The Conflicted Advisors have dismissed her in G-I as unqualified, and her testimony as flawed. Meanwhile, the Conflicted Advisors have embraced the testimony of experts who are favorable to the future asbestos claimants' positions. In these circumstances, it is not possible

that the Conflicted Advisors could objectively assist Judge Wolin in evaluating the evidence and issues that have been and will be presented to him. The appearance of impartiality is totally absent.

When the impartiality of a close advisor of the court is questioned at the start of a case, the advisor sometimes may be screened off from the proceeding. See, *e.g.*, *First Interstate Bank*, 210 F.3d at 985. Once the advisor has materially participated in the proceedings, however, the questions about the advisor's impartiality necessarily affect the judge as well. *Ibid.* ("fail[ure] to screen off the law clerk completely * * * would amount to an appearance of impropriety such as to require recusal"). Thus, the proper remedy in such situations (as is the case with the Conflicted Advisors here) is the immediate disqualification of the judge and reassignment of the case to another jurist. See *Hall*, 695 F.2d at 179; *Miller Indus.* v. *Caterpillar Tractor Co.*, 516 F. Supp. 84, 89 (S.D. Ala. 1980); *In re Asbestos School Litigation*, 1989 U.S. Dist. LEXIS 2521 (E.D. Pa. 1989). What is *already* known to Judge Wolin about his advisors' conflict makes the need for disqualification of the judge clear and indisputable. At the very least, it is clear and indisputable that the correct response to petitioners' recusal motion is not to question petitioners' motives and for that reason suspend briefing and discovery on the motion.

Indeed, in this case, as in the Seventh Circuit's *K.L.* case, Judge Wolin's handling of the recusal motion should *itself* persuade this Court that the appearance of impropriety is clear and indisputable. The appellate court "cannot know [critical facts], because the district judge has blocked discovery." 93 F.3d at 258. Facts about Messrs. Gross and Hamlin that would concern most judges – that they are partisans in another case on the same issues on which they advise Judge Wolin, and are trading on Judge Wolin's name – have so far led Judge Wolin to do nothing to express public concern about them, but instead to question *petitioners'* motives in calling these disturbing facts to light and seeking the remedy that Section 455 requires. Judge Wolin has even blocked the depositions of Messrs. Gross and Hamlin (and W.R. Grace), even though no party sought such an order on the record, because "it has been reported to the Court" that such discovery has been sought. Add. 2. Irregularity is the order of the day, and those who question the irregularity find themselves judicially impugned.

A judge cannot gather facts outside of the record. *School Asbestos*, 977 F.2d at 784-785. Nor may the judge's advisors do so, particularly when the judge's advisors are in a position to communicate their extra-judicial knowledge and opinions of the facts to the judge *ex parte*. "[A] judge may not direct his law clerk to do that which is prohibited to the judge." *Price Bros.*, 629 F.2d at 447.

The situation presented here is legally indistinguishable from that the Seventh Circuit faced in *K.L.* There, the trial judge had appointed a panel of three "experts" to advise him in connection with litigation regarding the quality of the State's mental health system. The panel was authorized to meet with patients and state employees in connection with preparing a report for the court. Subsequently, two of the panel's members began acting as "partisans" outside of the court, "denouncing" the State's mental health system. 93 F.3d at 260. In addition, it became clear that the panel was meeting privately with the judge to discuss its view of the facts, and that the panel had significant influence over the court's views.

In granting a writ of mandamus to disqualify the trial judge, the court held unanimously that the information the judge received *ex parte* from the panel was "'personal' knowledge no less than if the judge had decided to take an undercover tour of mental institutions" himself. 93 F.3d at 259. "Instead of going himself, this judge appointed agents, who made a private report of how they investigated and what they had learned. Mandatory disqualification under § 455(b)(1) follows." *Ibid.* The fact that the judge continued his private meetings after two of the panel members had become "partisan" advocates of the plaintiffs' side further demonstrated that "a reasonable observer [would] be seriously concerned about the court's ability to conduct the trial impartially." *Id.* at 260.

That Judge Wolin has been presiding over these cases for two years does not alter the rules requiring that he do so no longer. In the *School Asbestos* case, Judge Kelly had been presiding over the litigation for more than *six* years before he attended a plaintiff-oriented conference on asbestos issues. 977 F.2d at 778-780. Nonetheless, Judge Becker's opinion for a unanimous panel made clear that recusal, however unfortunate, was clearly and indisputably the only option:

> We suspect that Judge Kelly chose not to disqualify himself because he felt duty-bound to shepherd this extraordinarily complicated and protracted litigation to its conclusion and out of concern about creating additional delay. These are both laudable sentiments, and we must acknowledge that the newly assigned district judge will face a gargantuan task in becoming familiar with the case. * * * Nevertheless, a district judge * * * may not sit where his or her partiality may reasonably be questioned and the parties refuse to waive that objection. Indeed, we believe that this episode is precisely the kind that Congress contemplated in broadening section 455. If Judge Kelly were to continue presiding, the outcome of this massive, important, and widely followed case would be shrouded with suspicion. Accordingly, we are compelled to order Judge Kelly to disqualify himself.

977 F.2d at 784-785 (citation omitted); see also *Alexander*, 10 F.3d at 166 (granting mandamus to disqualify judge who had presided over case for four years).

Nor does the fact that this case is large and complex alter the mandatory recusal rule. "Large, multidistrict class actions, for example, often present judges with unique difficulties in monitoring any potential interest they may have in the litigation." *Liljeberg*, 486 U.S. at 862 n.9. However, "notwithstanding the size and complexity of litigation, judges remain under a duty" to comply with Section

455. *Ibid.* Far from cutting against petitioners' request for relief, "the extraordinary size and complexity of a case may assist in creating the extraordinary circumstances necessary to invoke mandamus." *School Asbestos*, 977 F.2d at 778 n.14.

The egregious conflict under which Messrs. Gross and Hamlin labor creates extraordinary circumstances calling for immediate judicial intervention. Judge Wolin has been called on to correct the situation, and has responded not by questioning the propriety of the behavior of his advisors or disclosing his own knowledge of their conflicts, but instead by impugning the motives of the movants and by acting *sua sponte* to block all discovery and briefing. This Court should not tolerate either such a response or the underlying conflicts themselves. *At the very least*, Judge Wolin should be ordered to resolve this motion promptly (after appropriate exploration of the facts by the parties through expedited discovery), and his suggestion that other matters will be resolved in advance of the disqualification motion should be disapproved, just as the practice was disapproved in *School Asbestos*, 977 F.2d at 784 n.26. More than that, this Court should allow responses to this mandamus petition under Fed. R. App. P. 21, and then should conclude that *already* it is clear and indisputable that an appearance of impropriety will remain as long as Judge Wolin presides over these cases.[2] Mandamus should be ordered.

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[2] Petitioners hesitate to predict how Judge Wolin would ultimately rule on their recusal motion if ordered by this Court to resolve it promptly, but they

VI. CONCLUSION

For the foregoing reasons, petitioners respectfully request that their Petition for a Writ of Mandamus be granted, and that the Court order Judge Wolin to recuse himself or to withdraw his October 23 order suspending briefing and discovery on the recusal motion, and instead allow expedited discovery and an expedited briefing and hearing schedule on the motion.

Respectfully submitted,

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Counsel for Petitioners

October 24, 2003

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cannot help but fear that his reaction to date – questioning petitioners' motives – suggests that pursuing the motion before him would be futile, and that a second mandamus petition will regrettably be necessary if this Court does no more now than order a hearing.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ALFRED M. WOLIN
JUDGE

MARTIN LUTHER KING JR. FEDERAL BUILDING
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P.O. BOX 999
NEWARK, NJ 07101-0999
(973)645-2580

October 23, 2003

LETTER OPINION - NOT FOR PUBLICATION
ORIGINAL FILED WITH THE CLERK OF THE COURT

To all Counsel

Re: In re: Owens Corning, et al.

Dear Counsel:

This matter has been opened before the Court upon its own motion. By motion dated October 10, 2003, titled "Motion to Recuse the Honorable Alfred M. Wolin, United States District Judge, from Further Participation in These Jointly Administered Cases" (the "Motion"), certain creditors in the above-referenced chapter 11 case seek the recusal of this Court. By its Order dated October 15, 2003, this Court partially withdrew the reference of this case to the Bankruptcy Court with respect to the Motion, and suspended all deadlines for opposition briefs and a hearing. For the reasons set forth below, the Court will stay all further proceedings concerning the Motion including discovery

by document request, deposition or otherwise, pending further Order of the Court.

This Court intends to treat the Motion in the same manner as it treats all applications before it - fairly, on the merits, and with ample opportunity for all sides to air their positions. However, it is a commonplace observation that motions to recuse a court are susceptible to abuse and "are sometimes driven more by litigation strategies than by ethical concerns." In re Cargill, Inc., 66 F.3d 1256, 1262-63 (1st Cir. 1995), cert. denied, 517 U.S. 1156 (1996); see also FDC v. Sweeney, 136 F.3d 216, 220 (1st Cir. 1992); Thomas v. Trustees for Columbia Univ, 30 F. Supp. 2d 430, 431 (S.D.N.Y. 1998). The courts have always been careful to confine recusal to those grounds specified by Congress. E.g. New York City Housing Dev. Corp. v. Hart, 796 F.2d 976, 981 (7th Cir. 1986).

At present, this Court has no information one way or the other regarding the motives behind the Motion, besides those set forth in the papers themselves. However, the movants state their intention to seek discovery of several parties, including persons acting pursuant to the appointment of this Court. It has been reported to the Court that requests for the production of documents and deposition subpoenas have already been served.

The Court's deference to the movants' right to have their application thoroughly explored and impartially judged need not

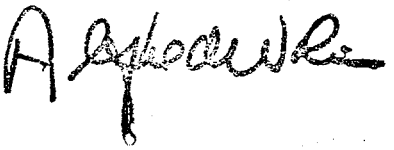
cause the Court to abdicate its duty to manage the proceedings before it. See Landis v. North Am. Co., 299 U.S. 248, 254 (1936) (court has inherent power "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). Moreover, as the Bankruptcy Appellate Panel found in Goodwin v. Durkin, 194 B.R. 214, 226 (B.A.P. 9th Cir. 1996), the mere filing of a motion to recuse does not preclude at least a preliminary review of the merits of the motion before discovery is permitted to proceed. In Goodwin, the panel found that, in the absence of a showing of a "reasonable suspicion that the judge was biased or prejudiced," such discovery would amount to no more than a "fishing expedition." Id.

The Court intends to set forth a case management order or orders governing further proceedings on the Motion in the near future. Until then, and until the prima facie merits of the Motion have been tested by the adversarial process, the Court cannot permit discovery or other related proceedings to go forward. The risk of disruption to the business of the Court and the case as a whole is palpable. That a recusal motion may be brought for an improper purpose has been too widely recognized to be ignored.

Therefore, pending the case management order(s) mentioned above, and for the reasons expressed in this Letter Opinion, the

Court will Order that all proceedings, including discovery proceedings, relative to the Motion be stayed. An appropriate Order is attached.

Very truly yours,



ALFRED M. WOLIN
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	:	Chapter 11
	:	Delaware Bankruptcy
OWENS CORNING, et al.	:	Case Nos. 00-3837 to 3854 (JKF)
	:	Jointly Administered
Debtors.	:	
	:	**ORDER**

This matter having been opened before the Court on its own motion; and this Court having partially withdrawn the reference to the Bankruptcy Court of the above-captioned chapter 11 case with respect to the motion titled "Motion to Recuse the Honorable Alfred M. Wolin, United States District Judge, from Further Participation in These Jointly Administered Cases" (the "Motion"); and for the reasons set forth in the Letter Opinion filed herewith and other good cause appearing

IT IS this 23 day of October, 2003

ORDERED that all further proceedings related to the Motion are hereby stayed, and it is further

ORDERED that, without limitation of the foregoing paragraph, any subpoena, request for the production of documents, or other discovery now outstanding related to the Motion shall be stayed, and it is further

ORDERED that the stay shall continue until further Order of the Court.

ALFRED M. WOLIN, U.S.D.J.