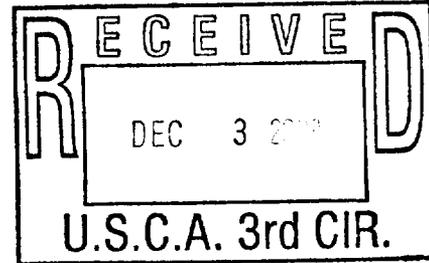


No. 03-4526

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT



IN RE ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P.
AND DEUTSCHE BANK TRUST COMPANIES AMERICAS

PETITIONERS

(RELATED TO U.S. BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE)
(No. 01-01139)

ON PETITION FOR 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

ANSWER OF THE W. R. GRACE, & CO. ET. AL. OFFICIAL COMMITTEE OF
ASBESTOS PERSONAL INJURY CLAIMANTS TO
EMERGENCY PETITION FOR A WRIT OF MANDAMUS

DATED: DECEMBER 3, 2003

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Shannon D. Murray, *Letter from Delaware:*
Judge Names Asbestos Consultants,
THE DAILY DEAL, Jan. 9, 2002 8

Respondent, the Official Committee of Asbestos Personal Injury Claimants of W.R. Grace & Co., *et al.* (the "Asbestos Claimants Committee") in the cases pending before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Cases"), respectfully submits this Answer to the Emergency Petition for a Writ of Mandamus.

INTRODUCTION

The Emergency Petition for a Writ of Mandamus (the "Petition") submitted by Petitioners D.K. Acquisition Partners, L.P., Fernwood Associates, L.P. and Deutsche Bank Trust Company Americas¹ (jointly "Petitioners") should be dismissed. First, it is untimely. The fact that court advisors C. Judson Hamlin ("Hamlin") and David R. Gross ("Gross") (the "Advisors") represent future asbestos claimants in the *G-I Holdings, Inc.* ("G-I") bankruptcy has been on the public record and known for almost two years. The Petitioners are sophisticated parties who have been creditors in this bankruptcy and hold claims arising under a credit facility dated May 14, 1998 and/or a revolving credit facility dated May 5, 1999 ("Credit Facility"). (Pet. 4). Given the widespread availability of information regarding this case, creditors of this magnitude are hard pressed to assert that they do not have knowledge of the

¹ The Petitioners are members of the Unofficial Committee in this case. An entry of appearance for the Unofficial Committee was filed on August 26, 2003. (Docket No. 4331). The fourth member, Bear, Stearns & Co., Inc., is not a party to this Petition.

proceedings and the involvement of the Advisors in *G-I*.² Moreover, the Petitioners do not even attempt to assert that they have only recently learned of the Advisors' role in *G-I*.

Since the time of the appointment of the Advisors, on December 28, 2001, interested parties in this complex bankruptcy case have engaged in time-consuming and at times contentious litigation before the District Court over key issues relating to W.R. Grace & Co.'s ("Grace") reorganization. Only now, after a similar motion to recuse has been filed in *In re Owens Corning, et al.*, Case No. 00-03837, do the Petitioners seek to resurrect old information in an attempt to disqualify the District Court.³ This Court should not allow the Petitioners to delay taking any action regarding the Advisors, only to commence their recusal campaign to serve their strategic interests.

Second, Petitioners fail to demonstrate the "clear and indisputable" grounds that allegedly warrant recusal. Petitioners do not argue that the District Court itself has engaged in improper conduct or even conduct that raises the appearance of impropriety. The District Court filed a response to the Petition for Mandamus filed in

² D.K. Acquisition Partners, L.P. ("DK") entered an appearance in *In re Owens Corning, et al.*, Case No. 00-03837 on November 6, 2002. (Docket No. 279). As the Advisors also serve in the same capacity in that case, DK is familiar with the role of the Advisors in the five cases assigned to Judge Wolin, including this one.

³ On October 10, 2003 Kensington International Limited and Springfield Associates, LLC, creditors of Owens Corning, filed a motion to recuse the Honorable Judge Alfred M. Wolin from further proceedings in the case. (Docket No.9717). A writ of mandamus was filed on October 24, 2003.(No. 03-4212).

Owens Coming. Asbestos Claimants Committee Appendix (“ACC App.”) 1-10. Subsequent to the filing of the Motion of D.K. Acquisition Partners, L.P., et al. to Disqualify the Honorable Alfred M. Wolin, United States District Judge, From Further Participation in These Jointly Administered Cases, Case No. 01-01139 (JKF), Judge Wolin filed a supplemental response in order to address matters raised by the Petitioners herein. ACC App. 11-25. The responses filed by the District Court make clear that no such grounds exist. The affidavits of the District Court’s Advisors, filed in the Owens Coming matter, as well as the time records of the Advisors, likewise demonstrate neither an appearance of impropriety nor actual prejudice to Petitioners’ interest due to Hamlin’s and Gross’s limited involvement in the Grace case. ACC App. 26-84. Consequently, Petitioners’ alleged grounds for recusal are reduced to the contrived and untenable argument that the District Court’s appointment of, and limited contact with, Advisors who have a role as advocates in another bankruptcy case is “clearly and indisputably” enough to compel this Court to grant the Writ of Mandamus.

Third, the Petitioners prematurely filed the Petition seeking mandamus relief even before the District Court had the opportunity to determine whether its recusal, or the recusal of its Advisors, was warranted. If this Court cannot deny the Petition on the record before it, this matter should be remanded to the District Court.

STANDARD OF REVIEW

“[I]t is widely accepted that mandamus is extraordinary relief that is rarely invoked.” *In re United States*, 273 F.3d 380, 385 (3d Cir. 2001). Therefore, “[a] party seeking the writ has the burden of demonstrating that its right to the writ is ‘clear and indisputable.’” *Delgrosso v. Spang and Co.*, 903 F.2d 234, 237 (3d Cir. 1990), *cert. denied*, 498 U.S. 967 (1990). See also *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *reh’g denied*, 869 F.2d 116 (2d Cir. 1989), *cert. denied*, *Milken v. SEC*, 490 U.S. 1102 (1989). This Court has consistently held that it will issue a writ of mandamus only if, in its discretion, it finds that “the party [seeking the writ] ha[s] no other adequate means to attain the desired relief . . . [and] the court below . . . committed a clear error of law [that approaches] the magnitude of . . . a failure to use [judicial] power. . . .” *In re Sharon Steel Corp.*, 918 F.2d 434, 436 (3d Cir. 1990), *quoting Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988).

In the context of a motion to recuse a district judge, the governing standard is “whether a reasonable person, knowing all the acknowledged circumstances, might question the district judge’s continued impartiality.” *In re Sch. Asbestos Litig.*, 977 F.2d 764, 781 (3d Cir. 1992). See also, *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 343 (3d Cir. 1998), *cert. denied sub nom.*, *Krell v. Prudential Ins. Co. of America*, 525 U.S. 1114 (1999).

The court should “ask how [these facts] appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.” *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995). In enacting Section 455, Congress cautioned that tactical motives often lie behind recusal motions:

[I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in the proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to a judge of their own choice.

H.R. Rep. No. 93-1453 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

Importantly, motions seeking recusal must be promptly made once the grounds are known or reasonably knowable to the party seeking disqualification. *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 236-37 (3d Cir. 2001) (emphasis added). *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) (the timeliness requirement “prohibits knowing concealment of an ethical issue for strategic purposes”). *See also* 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3550 (2d ed. Supp. 2003).

FACTUAL BACKGROUND

The Petitioners' recitation of the facts, which is wholly one-sided, fails to place their recusal motion in context of the complex proceedings currently before the District Court.

A. The W.R. Grace Bankruptcy

Grace filed for bankruptcy protection on April 2, 2001 (the "Petition Date") in the United States Bankruptcy Court for the District of Delaware. The massive number of asbestos personal injury claims confronting this manufacturer of asbestos products prompted the Chapter 11 filing. Grace was not alone in this regard. At or around this time, four other large building products manufacturers filed bankruptcy petitions in the District of Delaware as a result of asbestos liabilities.⁴

On November 27, 2001, then-Chief Judge Edward R. Becker assigned these five Delaware asbestos-related bankruptcies to Senior District Judge Alfred M. Wolin.⁵ In making the assignment, Judge Becker stated:

[I]t is my considered judgment 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

⁴ *In re Armstrong World Industries, Inc., et al.*, Case Nos. 00-4471, *et al.* (RJN); *In re Federal Mogul Global, Inc., et al.*, Case Nos. 01-10578, *et al.* (RJN); *In re USG Corp., et al.*, Case Nos. 01-2094, *et al.* (RJN); and *In re Owens Corning, et al.*, Case Nos. 00-03837, *et al.* (JKF).

⁵ *In re Combustion Engineering*, Case Nos. 03-10495, *et al.* (JKF), another asbestos-related bankruptcy, was subsequently assigned to Judge Wolin as well.

implemented . . . As a significant portion of the asbestos cases in this country are proceeding under the aegis of this litigation, I deem this assignment and consolidation critically important to the administration of justice.

See ACC App. 85-86.⁶

On December 20, 2001, the District Court held a conference with participants in all five cases and informed the parties that a number of experienced counsel with asbestos and mass tort litigation backgrounds would be appointed as special advisors to assist with case management.⁷ ACC App. 4. On December 28, 2001, the District Court entered an Order in all five cases stating:

William A. Dreier, Esq., David R. Gross, Esq., C. Judson Hamlin, Esq. John E. Keefe, Esq. and Professor Francis E. McGovern are hereby designated as Court Appointed Consultants 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, . . . and . . . the parties are on notice that the Court may, without further notice, appoint any of the Court Appointed Consultants to act as a

⁶ The *G-I* bankruptcy case is pending before Chief Judge Rosemary Gambardella in the District of New Jersey and is not among the cases assigned to Judge Wolin; however, many of *G-I*'s significant creditors and their counsel are the same as in the five asbestos-related bankruptcy cases pending in Delaware. *See In re G-I Holdings, Inc.*, 295 B.R. 502 (D. N.J. 2003).

⁷ The District Court's inherent authority to appoint extra-judicial advisors is well established in complex proceedings such as this. *See* Fed. R. Civ. P. 53; *In re Peterson*, 253 U.S. 300, 312-13 (1919) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause").

Special Master to hear any disputed matter and to make a report and recommendation to the Court on the disposition of such matter.

ACC App. 87-91.

The Advisors are each a highly regarded and prominent attorney or former judge whose legal or judicial experience involves asbestos or mass tort litigation. In January 2002, MEALEY'S ASBESTOS BANKRUPTCY REPORT reported the appointments by Judge Wolin and the Advisors' relevant experience:

The consultants appointed include William A. Drier, former presiding judge in the appellate division of the Superior Court of New Jersey; John E. Keefe Sr., a former Superior Court judge in New Brunswick, N.J.; David R. Gross, a partner in the law firm of Budd, Lamer, Gross, Rosenbaum, Greenberg & Sade of Short Hills, N.J., and former national [defense] counsel for Johns-Manville; C. Judson Hamlin, the future legal representative of present and future holders of asbestos-related demands in *G-I Holding's* Chapter 11 case and partner of the Purcell, Ries, Shannon, Mulcahy & O'Neill law firm in Bedminster, N.J.; and Francis E. McGovern, a law school professor at Duke University and an expert on alternative dispute resolution.

ACC App. 94. Information regarding the backgrounds and practices of these Advisors was also readily available from other public sources. *See, e.g.*, Shannon D. Murray, *Letter from Delaware: Judge Names Asbestos Consultants*, THE DAILY DEAL, Jan. 9, 2002 (noting, for example, that Gross "has served as a national [defense] counsel for Johns-Manville's asbestos litigation case"). ACC App. 98-99.

B. Petitioners' Interest in the Bankruptcy Case

The Petitioners are creditors in this bankruptcy case. The Petitioners hold claims against Grace arising under a \$250 million credit facility entered into as of May 14, 1998 and/or a \$250 million revolving credit facility dated May 5, 1999. (Pet. at 4). The Petitioners claim that the aggregate liquidated amount owed to the members of the Unofficial Committee as of August 2003 is estimated to be no less than \$150 million.⁸

More broadly, Grace's commercial creditors, including several bank groups, are represented by the Official Committee of Unsecured Creditors (the "Creditors Committee") appointed by the United States Trustee. The Creditors Committee is comprised of representatives of Grace's creditors holding unsecured claims, including bank debt holders issued under the Credit Facility, and is charged with the responsibility of representing their common interests in the bankruptcy proceedings. ACC App. 100. In March of 2003 Petitioner DK, interested in becoming a member of the Creditors Committee, filed a motion seeking that the Bankruptcy Court enter an order confirming that the purchase of Bank Debt by DK from another holder of

⁸ The Petitioners do not provide the amounts claimed to be owed to each individual creditor, but rather provide an aggregate amount outstanding for the Unofficial Committee, of which one member is not a party to this Petition. That member, Bear, Stearns & Co., Inc., filed a Notice of Appearance in this case on September 6, 2001. (Docket No. 933). An affiliate of Bear, Stearns & Co., Inc., Bear Stearns Corp. Lending, Inc. was an active participant in the *G-1* case as a member of the Bank Group.

Bank Debt or from the sale of Bank Debt by DK to another holder of Bank Debt would not be a breach of fiduciary duty by DK to the Committee. (Docket No. 3483).⁹

It is telling that the Creditors Committee, which has been involved in this case from the outset, has never once objected to or raised any concern over the roles played by Messrs. Gross and Hamlin (or any of the other Advisors). Indeed, despite the prior involvement in this case and Owens Coming by DK and despite the easy access to information in the District Court, none of the Petitioners previously objected to the appointment of any of the Advisors, nor the type of services performed by them as reflected in their time records. Indeed, there are entities that were holders of Bank Debt issued by the Credit Facility, that were members of the Committee, and have never objected to the roles of and functions performed by the Advisors.

C. Petitioners' Knowledge of Hamlin's and Gross's Roles in the *G-I* and *Grace* Cases

The Petitioners' do not claim to have just learned of Hamlin's and Gross's appointments in *G-I*. The public record demonstrates that this information was well known.

The appointments of Hamlin and Gross were a matter of public record when made. In *G-I*, Hamlin was appointed Legal Representative of Present and Future

⁹ This motion was subsequently withdrawn. (Docket No. 3895).

Holders of Asbestos-Related Demands (the “Legal Representative”) in October 2001. ACC App. 101-125. Gross was appointed as local counsel to the Legal Representative in January 2002. ACC App. 126-155. In December 2001 Hamlin and Gross were both appointed advisors to Judge Wolin. ACC App. 87-91. In fact, in connection with Gross’s appointment in *G-I* as the Legal Representative’s local counsel, Gross submitted a disclosure statement reporting that he had previously been appointed by Judge Wolin to serve as one of his Advisors. ACC App. 150.

These appointments were immediately reported in the asbestos and bankruptcy trade press that monitors and publicizes the activities in these bankruptcy proceedings. The January 2002 edition of MEALEY’S ASBESTOS BANKRUPTCY REPORT noted Hamlin’s appointment in the *G-I* case. ACC App. 95-96 The same article also noted Hamlin’s recent appointment as Judge Wolin’s advisor in the consolidated bankruptcy cases before him. *Id.* The same edition of MEALEY’S ASBESTOS BANKRUPTCY REPORT, in two additional articles regarding developments in Judge Wolin’s cases, reported that Hamlin and Gross, among others, had been appointed as “consultants.” ACC App. 91-96. Listing each of Judge Wolin’s consultants, MEALEY’S specifically described Hamlin as “the future legal representative of present and future holders of asbestos-related demands in *G-I*’s

Chapter 11 case and partner of Purcell, Reis, Shannon, Mulcahy & O'Neill law firm in Bedminster, New Jersey" *Id.*¹⁰

The Creditors Committee had direct knowledge of the role and activities of the Advisors since the very first day of their appointment. Section 1102 of the Bankruptcy Code authorizes the appointment of creditors' and equity security holders' committees by the United States Trustee. The Committee is mandated to protect all creditors, including those, such as the Petitioners, who hold claims arising under a credit facility. Thus, the Creditors Committee has represented the interests of the Petitioners since the inception of this case. The Creditors Committee was clearly aware of ex parte conversations involving the Advisors, of which the Petitioners only now complain. Notably, the Creditors Committee has never voiced concern regarding such contacts. As the Creditors Committee has not found fault with the role of the Advisors, it cannot seriously be disputed that the Petitioners, the very parties the Creditors Committee represents, do not have a basis for their argument to recuse Judge Wolin.

The roles of both Hamlin and Gross in this case were also well known. Gross's main task in this case was to mediate the settlement in *Official Committee of Asbestos*

¹⁰ Similar articles reporting the Hamlin and Gross appointments in the two cases were published in the January 18, 2002 edition of MEALEY'S LITIGATION REPORT: ASBESTOS. ACC App. 155-158. In June 2003, Andrews Publications' ASBESTOS LITIGATION REPORTER reported Hamlin's and Gross' appointments in *G-I*. ACC App. 159-162.

Personal Injury Claimants, et al v. Sealed Air Corporation and Cryovac, Inc., Adv. No. 02-2210 (“Sealed Air”). ACC App. 164 – 210. With the help of Gross’s efforts, a settlement in the amount of approximately \$1 billion dollars was accomplished.¹¹ This settlement inures to the benefit of all creditors, including the Petitioners herein. Hamlin’s time records, demonstrating a total of approximately 6.6 hours spent in the Grace matter, are a clear indication that he had little involvement in this case. ACC App. 211 – 231. The time records of both, reflecting this, were available in this case to both the Creditors Committee and any interested creditor, such as the Petitioners.

Through each of the above means, Petitioners (or their legal counsel) and the Creditors Committee representing their interests, obtained both general and express knowledge of the Hamlin and Gross appointments in *G-I*.

ARGUMENT

A. The Petition Is Not Timely

The Petitioners do not assert that they were without knowledge as to the facts about which they now complain. The Petitioners have stood silent for nearly two years. Petitioners’ failure to assert their concerns sooner is fatal to a claim that an alleged appearance of impropriety requires recusal now. The law is clear; their Petition is too late.

¹¹ A Motion For An Order Approving, Authorizing, And Implementing Settlement Agreement has been filed with the District Court.

The Third Circuit has recognized that a delay in action may bar relief based on the doctrine of laches. In *Time Sales Finance*, 474 F.2d 1197, 1201 (3^d Cir. 1971), the court, in denying a petition to re-open a bankruptcy case, found that aside from mere passage of time, two additional elements must be shown to establish laches. These are unreasonable delay in light of the equities of the case, and undue prejudice to the opposing party. *See also Matter of National Molding Company*, 230 F.2d 69 (3rd Cir. 1956). In considering whether to apply the laches doctrine, the Court should take into account the prior conduct and the statements of the movant and its attorneys on the question of the movant's good faith and credibility in seeking the relief in question. *See Glover v. Libman*, 578 F.Supp. 748, 767 (N.D.Ga. 1983).

The doctrine of laches is of particular concern when recusal is at issue. Litigants must promptly move for recusal upon learning facts giving rise to a possible appearance of impropriety. *Martin*, 240 F.3d at 236-37; *In re Kansas Pub. Employees Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996) ("even though § 455 has no express timeliness requirements, claims under § 455 will not be considered unless timely made"); *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987) ("It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim"); *Summers v. Singletary*, 119 F.3d 917, 920 (11th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998); *E. & J. Gallo Winery v. Gallo*

Cattle Co., 967 F.2d 1280, 1295 (9th Cir. 1992); *United States v. Int'l Bus. Machines (In re Int'l Bus. Machines)*, 618 F.2d 923, 932 (2d Cir. 1980).

The need for timely filing is obvious. It avoids unnecessary waste of judicial and litigant resources while discouraging the strategic use or timing of recusal motions after a litigant receives or expects an unfavorable ruling. *Cf. Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) (condemning appellant's belated complaint about district judge's appointment of a technical advisor where the district court "advised the parties that it [would] . . . employ a technical advisor" and appellant "did not inquire as to the expert's identity or express any objection to the court's use of an (unknown) expert," failed to "request that any safeguards be set in place," and instead "sat back and knowingly acquiesced in the court's unconditional hiring of an unidentified technical advisor"). For this reason, Petitioners had a duty to inquire promptly when the District Court appointed the Advisors in the large asbestos-related bankruptcy cases assigned to it. *Id.*

For timeliness purposes, Petitioners are "charged with knowledge of all facts known or knowable, if true, with due diligence from the public record or otherwise." *Universal City Studies, Inc. v. Reimerdes*, 104 F. Supp. 2d 334, 349 (S.D.N.Y. 2000) (internal quotation marks and citations omitted and emphasis added). *See also Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 2003-1 Trade Cases (CCH) ¶ 73,966 (S.D.N.Y. Feb. 6, 2003); *Hirschkop v. Virginia State Bar Ass'n*, 406

F. Supp. 721, 724 (E.D. Va. 1975); *Accord United States v. Daley*, 564 F.2d 645, 651 (2d Cir. 1977), (holding application untimely because, *inter alia*, facts upon which it was based “as a matter of public record were at all times discernable by counsel”), *cert. denied*, 435 U.S. 933 (1978).

Petitioners’ delay bars them from making the “clear and indisputable” showing that is required for issuance of a writ of mandamus. *Delgrosso*, 903 F.2d at 237.

B. Petitioners Do Not Allege any Bias by the District Court

Even if it were timely, the Petition contains no allegation of bias in the conduct of the District Court. It does not allege that the District Court engaged in any extra-judicial fact-finding. It does not allege any action or interest of the District Court that raises any appearance of impropriety. *See* 28 U.S.C. § 455(a). The activities of Gross helped produce the infusion of \$1 billion into the estate, which certainly does not bias the Petitioners, but clearly benefits them. The large majority of Gross’ time was spent on the Sealed Air matter. ACC App. 164 - 210. Moreover, Hamlin spent a mere 6.6 hours on this case. ACC App. 211 – 231. Petitioners rely solely on the notion that they can impute to the District Court judge a ground for recusal arising from the well-known fact that two court-appointed advisors are advocates in a separate asbestos-related bankruptcy proceeding, where the Advisors have either spent minimal time in this case, or where their activities have benefited all parties.

The Petition fails to overcome the legal hurdles to recusal. The District Court is presumed to be impartial. *In re Prudential*, 148 F.3d at 343; *Cobell v. Norton*, 237 F. Supp. 2d 71, 78 (D.D.C. 2003) (“The judge to whom a recusal motion is addressed is presumed to be impartial.”) (citations omitted). Second, disqualification by imputation on facts similar to those before this Court is unprecedented - - which is why the Petition relies upon faulty analogies that are not persuasive.

The Petitioners rest their argument in large part on *In re Sch. Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992). In that case, the district judge was alleged to have engaged in inappropriate conduct giving rise to the request for disqualification. There the judge was alleged to have attended an expenses-paid asbestos litigation conference sponsored by the plaintiffs’ counsel and funded by settlement proceeds the judge himself had ordered disbursed. This Court held that those circumstances - - involving direct contact by the court with potential expert witnesses for the plaintiffs in the pending case, and direct receipt by the court of a gratuity in the form of a waiver of conference fees and free hotel accommodations - - raised the appearance of impropriety warranting the judge’s recusal. *Id.* at 781-82. Those circumstances find no parallel here.

The Advisors are court-appointed consultants, not court-appointed experts. The Advisors are a resource that district courts may utilize as a tool of complex litigation management. District courts tasked with managing complex and large-scale

litigation are empowered to make a number of special referrals to various types of consultants, including court-appointed experts, special masters, magistrate judges, and “other referrals.” *MANUAL FOR COMPLEX LITIGATION* (Third) at 118. The “other referrals” include “consultation with a confidential advisor to the court.” *Id.* at 125.

Each type of referral is subject to unique responsibilities and limitations. Thus:

The grasp of [Federal Rule of Evidence] 706 is confined to court-appointed expert witnesses; the rule does not embrace expert advisors or consultants . . . [T]he procedural framework for nomination and selection of an expert witness and for the proper performance of his role after an appointment is accepted (e.g., advising the parties of his findings, submitting to depositions, being called to testify, being cross-examined) [has] marginal, if any, relevance to the functioning of technical advisors.

Reilly, 863 F.2d at 156 (1st Cir. 1988). *See e.g. Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (finding that district court authority to appoint expert advisors or consultants does not derive from Federal Rule of Evidence 706 but from either Federal Rule of Civil Procedure 53 or the inherent power of the court). Accordingly, the Petitioners’ reliance on recusal cases involving court-appointed experts is as equally misplaced as its reliance on cases involving law clerks.

In *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996), a principal case upon which the Petitioners rely, the district judge was disqualified because he met *ex parte* with Federal Rule of Evidence 706 court-appointed neutral experts to discuss the merits of the case -- in contradiction to the appointment order that *could have*, but did not,

provide for *ex parte* communication. 93 F.3d at 257-60 (7th Cir. 1996). The court-appointed experts conducted a factual investigation outside the presence of counsel. Thereafter, the court engaged in extra-judicial fact-finding by consulting *ex parte* with the expert panel about their preliminary findings. The substance of these contacts was apparently not disclosed to the defendants in that case for approximately one year. *Id.* Thus, *Edgar* has no application here.

Curiously, Petitioners have made no request to recuse Gross or Hamlin. Yet, had they done so, that request also would fail. Pure neutrality is not required of court-appointed advisors. Indeed, even court-appointed experts who are subject to the strictures of Federal Rule of Evidence 706 are not expected to be entirely neutral. This is so because “[t]ruly neutral experts are difficult, if not impossible, to find; though they will have no commitment to any party, they do not come to the case free of experience and opinions that will predispose (even if only subconsciously), or may be perceived to predispose, them in some fashion on disputed issues relevant to the case.” MANUAL FOR COMPLEX LITIGATION (Third) at 119. Thus, the MANUAL recognizes the practical value of appointing confidential advisors in complex litigation even where those advisors are not free of predisposition. *Id.* In giving this advice, the authors of the MANUAL clearly did not contemplate that the appointment of a consultant with an alleged predisposition would subject the District Court to recusal.

The Second Circuit, in virtually identical circumstances, found no basis for recusal where an administrator designee (acting as a special master) in an action brought by the EEOC was simultaneously representing a union that was a defendant in an unrelated case also brought by the EEOC. *Rios v. Enter. Ass'n Steamfitters Local Union 638 et al.*, 860 F.2d 1168, 1173-75 (2d Cir. 1988). Recognizing the district court's "need to hire individuals with expertise in particular subject matters," the Second Circuit emphasized that "accommodation is required to the likelihood that special masters will be engaged as advocates in matters other than those in which they serve as masters." *Id.* at 1174 (quoting *Jenkins v. Sterlacci*, 849 F.2d 627, 632 (D.C. Cir. 1988)). See also *In re Joint Eastern and Southern Districts Asbestos Litig.*, 737 F. Supp. 735, 742 (E. & S.D.N.Y. 1990) (denying request to disqualify a mediator in asbestos tort litigation).

The practical implications of the recusal rule Petitioners advocate display its fundamental flaws. Under Petitioners' reasoning, the recusal of a magistrate judge in the midst of a complex case would also require, regardless of the circumstances, the recusal of the supervising district judge because the magistrate judge may have consulted the district court on case management. Likewise, the appointment and subsequent recusal of a special master appointed under Fed. R. Civ. P. 53 would also require the recusal of the federal district judge for similar reasons. Nothing in Rule 53 contemplates such a result. Rather, especially where questions of law and judicial

case management are involved, a district court judge is presumed to be able to discern and reject bad recommendations or advice. *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1380 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 995 (2002). *See also* ACC App 29-30. (Affidavit of C. Judson Hamlin at ¶ 13 noting that Judge Wolin “did not use” a draft ruling prepared by him in the Owens Corning case).

In sum, Petitioners’ reasoning falls flat on the basic tenet of American judicial governance: “The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office.” *Liteky v. United States*, 510 U.S. 540, 562 (1994) (concurring opinion).

C. If This Court Does Not Summarily Deny The Petition. It Should Remand The Matter To The District Court

The Petitioners are asking the Court to view the District Court’s failure to act on their recusal motion filed on November 14, 2003 within seven (7) days as, in effect, a refusal to consider the recusal motion - - an assumption that has no basis in fact or law. As their Petition makes clear (Pet. at 2), Petitioners are simply seeking to by-pass the District Court in order to piggyback on the previous motion filed by the Mandamus Petitioners in the Owens Corning case. However, consideration of the alleged grounds for recusal is properly before the District Court in the first instance. The District Court is intimately familiar with the record, which itself is central to any recusal determination. If this Court cannot deny the Petition on the record before it, it should remand the motion to recuse to the District Court.

The Petition fails to include a single citation that supports the real result it seeks - - a Third Circuit mandate that the District Court disqualify itself *before* it has even had a chance to adjudicate the issue. “Mandamus is a proper means for this court to review a district judge’s *refusal* to recuse from a case pursuant to 28 U.S.C. § 455(a),” *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 (3d Cir. 1993) (emphasis added), but in this case there is no District Court refusal for the Court to review.

Necessarily, the petitioners are asking the Court to peremptorily disavow the settled rule that “[d]iscretion is confided in the district judge in the first instance to determine whether to disqualify himself . . . [because the] judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion.” *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) (internal citation omitted); *see Apple*, 829 F.2d 326, 333 (2d Cir. 1987); *e.g.*, *In re Prudential*, 148 F.3d 283, 343 (3d Cir. 1998) (reviewing disqualification issue “under an abuse of discretion standard”). Nothing in the record substantiates the conclusion that the District Court is incapable of exercising its jurisdictional authority to decide the recusal motion or that it must be stripped, by extraordinary writ, of its adjudicatory power to rule on the issue in the first instance.¹²

¹² Indeed, this Circuit has held that a district judge who either has not yet ruled on a disqualification motion or has refused to disqualify himself does not err in “continuing to consider merits motions while disqualification . . . [is] pending.” *In re*

CONCLUSION

For these and the other reasons stated above, the W.R. Grace, et al., Asbestos Claimants Committee respectfully requests that this Court dismiss the Emergency Petition for a Writ of Mandamus.

Date: December 3, 2003

Respectfully submitted,

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Sch. Asbestos Litig., 977 F.2d at 784 n.26. The district court's authority and presumed impartiality is not cast overboard *sua sponte* simply because a recusal motion surfaces.

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ASBESTOS CLAIMANTS

No. 03-4426

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

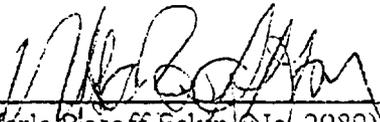
IN RE ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P. AND
DEUTSCHE BANK TRUST COMPANIES AMERICAS

PETITIONERS

(RELATED TO U.S. BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE)
(No. 01-01139)

CERTIFICATE OF SERVICE

I, Marla Rosoff Eskin, of Campbell & Levine, LLC, hereby certify that on December 3, 2003, I caused a copy of the foregoing *Answer Of The W. R. Grace & Co., et. al. Official Committee Of Asbestos Claimants To Emergency Petition For A Writ Of Mandamus* to be served upon the parties on the attached list in the manner indicated.



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