

No. 03-4526

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

In re D.K. ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P.
AND DEUTSCHE BANK TRUST COMPANY AMERICAS,
Petitioners.

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

**MOTION FOR LEAVE TO FILE REPLY TO RESPONSES
TO EMERGENCY PETITION FOR A WRIT OF MANDAMUS
AND TO ENLARGE THE RECORD**

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D.K. Acquisition Partners, L.P., Fernwood Associates, L.P. and Deutsche Bank Trust Company Americas (“Petitioners”) respectfully move this Court, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, for leave to file their Reply To Responses To Emergency Petition For A Writ Of Mandamus and a Supplemental Appendix. The Reply is attached as Exhibit A. The Supplemental Appendix is attached as Exhibit B.

On December 3, 2003, three documents were filed in response to the Petitioners’ Emergency Petition for a Writ of Mandamus (the “Petition”): the Response Of W.R. Grace To Emergency Petition For Writ Of Mandamus, the Answer Of W.R. Grace & Co., et al. Official Committee Of Asbestos Personal Injury Claimants To Emergency Petition For Writ Of Mandamus, and the Answer Of The Unofficial Committee Of Select Asbestos Claimants To Emergency Petition For Writ Of Mandamus (collectively, the “Responses”).

The Responses raise various factual and legal assertions concerning the Emergency Petition and create a false impression about the allegations in the Petition. To properly and fully respond to those allegations, and to allow the Court to have a full and fair record before it when deciding the Emergency Petition, Petitioners respectfully seek leave to reply to the

categorizations of fact and law contained in the Responses in a brief of not more than 15 pages or 7,000 word or 650 lines. It further is requested that Petitioners be permitted to file a Supplemental Appendix to include affidavits from representatives from each of the Petitioners, which directly address unsubstantiated allegations raised in each of the Reponses.

Wherefore, Petitioners respectfully request that this Court grant leave to filed the attached Reply and the attached supplement to the Record.

Dated: December 8, 2003

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EXHIBIT A

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

Petitioners D.K. Acquisition Partners, L.P., Fernwood Associates, L.P. and Deutsche Bank Trust Company Americas submit this reply to the Response Of W.R. Grace To Emergency Petition For Writ Of Mandamus (“Grace Response”), Answer Of W.R. Grace & Co., et al. Official Committee Of Asbestos Personal Injury Claimants To Emergency Petition For Writ Of Mandamus (“Asbestos Committee Response”), and Answer Of The Unofficial Committee Of Select Asbestos Claimants To Emergency Petition For Writ Of Mandamus (the “Select Asbestos Claimants’ Response”).¹

I. INTRODUCTION.

As laid out in the Emergency Petition, David R. Gross and C. Judson Hamlin, two of the Consultants appointed by Judge Wolin, have participated materially in the District Court’s administration of the Five Asbestos Cases. Whether or not they have devoted attention specifically to the W.R. Grace case is immaterial. The Five Asbestos Cases are being administered together by the same Judge in recognition of the common and overlapping legal and factual issues they raise. The appearance of impropriety created by the Consultants acting as

¹ These submissions collectively will be referred to as the “Responses” and the parties submitting them as the “Respondents.” All other capitalized terms not otherwise defined herein shall have the same meaning as in the Emergency Petition For Writ of Mandamus.

Consultants in the Five Asbestos Cases at the same time they are partisan advocates for asbestos claimants in the *G-I* case, together with the astounding number of *ex parte* communications revealed by the record, extends not just to the *Owens Corning* case but to all of the Five Asbestos Cases, including *Grace*. Thus, disqualification of the District Court under section 455(a), of Title 28 of the United States Code, is both necessary and required.

Ignoring the self-evident appearance of partiality and bias created by these facts, Respondents instead raise several collateral attacks against the Petition. Specifically, Respondents argue that (1) Hamlin's and Gross's dual roles as advisors to the District Court and partisan advocates in *G-I* have not been shown to have resulted in any actual bias or prejudice; (2) while recusal may be warranted in *Owens Corning*, it is not warranted in *Grace* because, of the more than 500 hours spent by Hamlin and Gross as advisors to the District Court, only a small portion related directly to matters at issue in *Grace*; (3) as Court-appointed Consultants, rather than experts, Messrs. Hamlin and Gross need not be neutral; (4) Petitioners acquiesced in the Consultants' significant *ex parte* contact with the District Court, and such conduct is, in any event, necessitated by the complex nature of these cases; and (5) the Petition is at once both too late and too early.

Each of these arguments is without merit. Since Petitioners seek disqualification under section 455(a), actual bias or prejudice need not be shown;

instead, the relevant inquiry is whether a reasonable person might perceive bias to exist. Here, a reasonable person would perceive the potential for bias or partiality to exist, and certainly the revealed facts lend no comfort that actual bias or partiality do not exist. And this appearance of impropriety exists regardless of whether a majority of the Consultants' time has been spent dealing specifically with issues in cases other than *Grace*, or more generally with issues pertaining to all Five Asbestos Cases more generally. Further, contrary to Respondents' arguments, there is no authority to suggest that these court-appointed Consultants, whose role was likened by the District Court to those of examiners, are not duty bound to remain neutral.

Finally, Petitioners have not acquiesced in the District Court's *ex parte* contact with non-neutral advisors, or with any other party for that matter, and Petitioners brought this motion promptly after first learning about, and having an opportunity to consider, the matters at issue herein. Indeed, it appears that the only reason a motion for disqualification was not brought earlier by any party is because Judge Wolin apparently deemed it unnecessary when he *sua sponte* appointed Hamlin and Gross to disclose their role as partisan advocates for asbestos claimants in the related *G-I* case. In short, none of the arguments raised by Respondents warrants denial of the Petition herein.

II. ACTUAL BIAS OR PREJUDICE RESULTING FROM HAMLIN'S AND GROSS'S DUAL AND CONFLICTING ROLES NEED NOT BE SHOWN UNDER SECTION 455(a)(1)(c).

Respondents' primary argument seems to be "no harm, no foul." The Official Committee of Asbestos Personal Injury Claimants argues that the Petition should be denied because it contains "no allegations of bias in the conduct of the District Court." (Asbestos Committee Response at 16.) Similarly, the Unofficial Committee of Select Asbestos Claimants asserts that Judge Wolin need not be disqualified because there has been no showing that Grace or Petitioners were prejudiced or injured by any action of Hamlin or Gross. (Select Asbestos Committee Response at 7-8.)

These arguments miss the mark. Disqualification under 455(a) does not require a showing of actual bias or prejudice. See 28 U.S.C. §455(a) ("[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (emphasis added)). As this Court has noted, "public confidence in the judicial system mandates, at a minimum, the appearance of neutrality and impartiality in the administration of justice." Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 157 (3d Cir. 1993). Indeed, "[f]or purposes of section 455(a) disqualification, it does not matter whether the district court judge actually harbors any bias against a party or the party's counsel. This is so because section 455(a) concerns not only fairness to individual litigants,

but, equally important, it concerns ‘the public’s confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears tainted.’” Id. at 167 (quoting In re School Asbestos Litig., 977 F.2d 764, 776 (3d Cir. 1992)).

Thus, the focus of the disqualification inquiry “is on the objective appearance of bias, rather than bias-in-fact.” United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982). And, “whether the district court judge actually harbors any bias against a party” is irrelevant; if a reasonable person might perceive bias to exist, disqualification is mandated. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988).

The appearance of bias or partiality created by the District Court's reliance on conflicted Consultants and a case management regime driven almost exclusively by *ex parte* communications is palpable. There is no need for Petitioners to point to a specific ruling proximately related to the advice or influence of Gross or Hamlin, nor is it necessary to point to an overt display of bias on the part of the District Court.

Where, as here, a District Court eschews on-the-record hearings or conferences in favor of case management premised on private discussions with select parties or their counsel, as well as with Court-appointed Consultants who carry with them a conflict of interest, that Court has made unavoidable an

appearance of bias or partiality. And the suspicions that such case management decisions create in the mind of a reasonable, objective observer cannot be dissipated by conclusory assurances from the participants, delivered long after the fact, that nothing untoward occurred in those secret conferences. There is no record of those discussions, and the very volume of *ex parte* communications undercuts the Consultants', and Respondents', attempts to downplay their significance.

In sum, the improper appearances that the record before this Court reflects warrants disqualification of the District Court under section 455(a) even in the absence of any showing of actual bias or prejudice to Petitioners.

III. GRACE'S ATTEMPT TO AVOID RECUSAL BY MINIMIZING MESSRS. HAMLIN'S AND GROSS'S ROLE IN THE GRACE CASE ALSO FAILS.

In its response, Grace tries to make a virtue out of the fact that there has been no real progress on any of what it identifies as the core issues in its bankruptcy proceeding. (Grace Response at 2.) Thus, Grace intimates that since the Consultants may not have had occasion to advise the District Court specifically in the *Grace* case, there may be no reason to disqualify Judge Wolin in that case, irrespective of what happens in *Owens Corning*.² (See *id.* (noting “substantial

² Grace's response is a remarkable piece of equivocation. As much as it professes not to want to take sides, Grace nevertheless contends that disqualification is not warranted on

differences in the quantity and quality of work performed by those advisors in the various bankruptcies” as a factor that may be relevant in denying recusal in *Grace*.) These arguments are without merit.

The very fact that after more than two years there has not been progress itself raises questions as to why that is the case. Has no bar date been set for asbestos claims because those who represent such claimants, in *Grace* or *G-I*, have influenced the case management decisions relating to such issues? Given the Consultants’ advocacy on behalf of asbestos claimants in *G-I*, it is not unreasonable to ask whether the Consultants have had direct and indirect contact with the *Grace* case. For example, Mr. Hamlin reviewed briefs submitted by the Official Committee of Asbestos Property Damage Claimants regarding their appeal from a decision of the Bankruptcy Court and drafted a memo regarding the same. (A-96.)³ In addition, Mr. Gross devoted substantive attention to the *Sealed Air* case, and his client in the *G-I* case argued to Judge Gambardella that Judge Wolin's

the presently developed record in its case, notwithstanding the evidence presented concerning the Consultants' roles in general. Here, *Grace* seems to straddle the fence as to whether the Consultants' role in the Five Asbestos Cases as a group, or in *Owens Corning* specifically, bear upon whether the District Court's disqualification in *Grace* is warranted.

³ “A- __” refers to the Appendix to the Petitioners Emergency Petition for Writ of Mandamus.

decision in *Sealed Air* should not be read to suggest that the claims of Mr. Hamlin's clients are dischargeable in bankruptcy. (See A-85-87, A-114.)

And Gross and Hamlin's indirect contact with the *Grace* case cannot be ignored. These Five Asbestos cases are closely interrelated. Indeed, this was the very reason why Judge Becker appointed Judge Wolin to supervise all of the cases. (A-10.) It was -- and is -- the substantive overlap among the Five Asbestos Cases that ties them together, as well as the fact, which no one disputes, that asbestos claimants in one case are often claimants in the others, as well as in the *G-I* case. Thus, what happens in the *Owens Corning* case or in the *USG* case, is directly relevant to the *Grace* case, W.R. Grace's equivocation on that point notwithstanding.⁴

Hamlin and Gross and their law firms have billed hundreds of hours as Consultants, and have done so while acting as advocates of asbestos claimants in

⁴ Grace's view of the Consultants' roles in these cases, including *Grace*, is so skewed that Grace actually asserts that having Mr. Hamlin fill the clearly conflicting roles of future representative and Consultant in the same case would be a positive. Grace argues that Hamlin's "relationship with Judge Wolin as an advisor held out the promise that his actions as a representative would reflect not only advocacy for the interests of future claimants but also consideration of the interests of the bankruptcy case as a whole." (Grace Response at 7.) If true, Grace was hoping that the inherent conflict between Hamlin's role as an advocate for asbestos claimants and his role as a Court-appointed Consultant would temper his advocacy for his future asbestos claimant constituents who, by definition, remain unidentified. As Grace admits, Judge Fitzgerald did not agree with this remarkable rationale, as she made clear to Grace that Grace's application had no chance of being granted. (See Grace Response at 9.)

the *G-I* case. The fact that the Consultants' time was spent focusing on issues relating to *Owens Corning* or to the Five Asbestos Cases generally, rather than specifically to *Grace*, or that they chose to allocate the costs of their services to other debtors, simply is irrelevant. The related nature of the Five Asbestos Cases makes the Consultants' conflicts, and the *ex parte* meetings and communications they have had with the District Court, undeniably relevant to all of the Five Asbestos Cases. If the dual and conflicting roles played by Hamlin and Gross have tainted the proceedings in *Owens Corning*, which they have, there is little question that "a reasonable person might suspect bias to exist" in the other Five Asbestos Cases. See United States v. Nobel, 696 F.2d at 235.

IV. GROSS AND HAMLIN, AS COURT-APPOINTED CONSULTANTS, MUST BE NEUTRAL.

Respondents next take the rather surprising position that recusal is not mandated because the Consultants are not "duty bound to remain neutral." (Select Asbestos Committee Response at 5; Asbestos Committee Response at 19 ("Pure neutrality is not required of court-appointed advisors.")) Respondents assert that, because Hamlin and Gross are court-appointed advisors, and not court-appointed experts, they need not be held to the strict standards laid out in Federal Rule of Evidence 706. In other words, according to Respondents, the District Court has

every right to appoint as its closest advisors individuals who have a vested interest in the outcome of the case.

This argument should be rejected out of hand. That court-appointed experts may be subject to separate guidelines under Rule 706 does not mean that court-appointed consultants are not “duty bound to remain neutral,” as Respondents suggest. To the contrary, advisors appointed by the court must also be true neutrals. For example, in Techsearch, L.L.C. v. Intel Corp., the Federal Circuit noted that courts, in appointing consultants or advisors, must employ “fair and open procedure[s]” so as to ensure that appointed advisors are “neutral.” 286 F.3d 1360, 1378 (Fed. Cir. 2002) (emphasis added). See also Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1129 (5th Cir. 1991) (“Judges with concerns about scientific evidence have at their disposal many mechanisms that do not distort the Federal Rules of Evidence, such as appointing (or allowing the parties to negotiate for) neutral experts to assist in comprehending complex issues”). Indeed, such concerns might be even more pressing in the appointment of a consultant, rather than an expert, because courts are “ill-equipped to filter out bad advice from technical advisors,” Techsearch, 286 F.3d at 1378, and such advisors, unlike court-appointed experts, are not subject to cross-examination by the parties whose interests are at stake.

Moreover, Petitioners have not sought recusal based on a perception that the Consultants have a slight leaning one way or the other, or may have, in the past, represented individuals with interests different from Petitioners or other creditors. No one suggests that the Court's advisors must "come to the case free of experience and opinions." (Asbestos Committee Response at 19).⁵ Here, it is not the Consultants' past representations that make them unsuitable as court-appointed consultants. Rather, what is relevant is that they have had the opportunity outside the scrutiny of the adversarial process to advise the District Court on matters relevant to the Five Asbestos Cases, while they have been serving as advocates for and the virtual representatives of a group of claimants in the *G-I* case whose interests are adverse to other parties in these cases. The District Court likened these Consultants to "examiners" under the Bankruptcy Code. (A-19 ("the Advisors are functioning in a manner in all respects similar to examiners").) As

⁵ Rios v. Enterprise Ass'n Steamfitters Local 638, 860 F.2d 1168 (2d Cir. 1987), cited by Respondents, is inapposite. In Rios, the Second Circuit considered whether a court-appointed Special Master should be disqualified because of his prior "representation of a union in an unrelated Title VII case where he was in an adversary posture to the EEOC," which also was a party plaintiff to the case. Id., at 1773. In denying the request, the Second Circuit explained that what movants were seeking was "an almost generic bar" against having any lawyer ever adverse to the EEOC from acting as a special master in any case involving allegations of discrimination. Id. Here, Petitioners do not seek disqualification of a special master because of a prior representation in an unrelated matter. Instead, what is at issue here is the Consultants' current role as partisan advocates in a related bankruptcy to asbestos claimants whose fortunes can be positively affected depending upon rulings made in this case. Thus, unlike in Rios, the conflict here is current and direct, and not remote and based on past representation. Rios has no relevance here.

such, they were obliged to be free of conflicts and completely disinterested. They were not. The appearance of partiality and bias thus created warrants disqualification.

V. PETITIONERS HAVE NOT WAIVED THE CONFLICTS CREATED BY THE DISTRICT COURT'S SUBSTANTIAL *EX PARTE* CONTACT WITH HAMLIN AND GROSS, NOR IS THE IMPACT OF THOSE CONFLICTS MITIGATED BY THE COMPLEX NATURE OF THESE CASES.

Respondents argue that Petitioners should not be heard to complain about there having been *ex parte* communications between the District Court and the Consultants and other parties to this case, as that has been the procedure from the outset and Petitioners somehow acquiesced in that conduct. (See Select Asbestos Committee Response at 9.) This is not correct.

While some parties have known there would be *ex parte* communications, Petitioners themselves were not involved in the case when any such disclosures were made. The case management directive disclosed by the District Court in its Supplemental Response does not appear to have been entered in the docket as a case management order. That same directive also preemptively overruled any objections that may have been laid against *ex parte* communications. (A-346.) Nor, in any event, can it be said that the directive adequately disclosed that the District Court's case management in the Five Asbestos Cases would consist mainly of off-the-record conferences and *ex parte* meetings and conversations with parties,

their counsel, and the Court-Appointed Consultants. No matter how novel, complex or challenging these Five Asbestos Cases have been (see Grace Response at 1), there is no excuse for making *ex parte* communications the rule rather than the exception in the District Court's case management. In these circumstances, it can hardly be said that any party, much less Petitioners, have acquiesced in these "unorthodox" and inappropriate *ex parte* communications. As one court observed, "[i]t 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 communications were 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." In re Wisconsin Steel Co., 48 B.R. 753, 760 (N.D. Ill. 1985).

Further, any suggestion that Petitioners have availed themselves of *ex parte* communications is incorrect. Affidavits submitted by representatives of each of the Petitioners (see SA-1-10)⁶ make clear that none of the Petitioners has availed themselves of what the District Court has described as "free access to the Court."

⁶ Cites to "SA-__" are to the Supplemental Appendix filed in connection with the Reply To Responses To Emergency Petition For A Writ Of Mandamus.

(A-340 ("Curious as it may be, the proponents of my recusal are some of the very people who availed themselves of free access to the Court.").)

Indeed, with so many parties having an interest in the outcome of these case, a regime of *ex parte* communications as a substitute for hearings and conferences on the record invites abuse no matter how well-intentioned or known the practice was. *Ex parte* communications by nature create a likelihood a reasonable person will believe that bias might or could exist, and it certainly will be perceived to exist. See Burgess v. Stern, 311 S.C. 326, 330-331 (Sup. Ct. 1993). The complex nature of the Five Asbestos Cases does not exempt them from section 455(a).

VI. PETITIONERS MOTION FOR RECUSAL WAS NOT UNTIMELY NOR IS THE RELIEF SOUGHT IN THE EMERGENCY PETITION PREMATURE.

Respondents next attack Petitioners as having acted both too late and too soon in responding to the Consultants' conflicts. They argue that, regardless of whether section 455(a) mandates recusal under the facts and circumstances here, Judge Wolin should be permitted to continue presiding over the Five Asbestos Cases because Petitioners' request for disqualification under section 455(a) was untimely. (See, e.g. Asbestos Committee Response at 10 ("Petitioners do not claim to have just learned of Hamlin's and Gross's appointments in *G-I*"); Select Asbestos Committee Response at 5 ("The truth is that the experienced counsel for the Petitioners were fully aware of the background and status in the *G-I* case of

Messrs. Hamlin and Gross”).) And Grace contends that Petitioners acted prematurely in seeking this Court’s involvement without letting Judge Wolin decide the motion and without having taken discovery.

These arguments are unavailing. First, Petitioners have not waived their right to question the role of the Consultants or the *ex parte* communications. The manner in which the District Court appointed the Consultants -- by announcing at the December 20, 2001 conference that it would be appointing the Consultants and then issuing an order on December 28, 2001, appointing them -- was not designed to put the world on notice as would a more formal application process, involving the disclosures typically accompanying such applications. Thus, the procedure used did not ensure that all interested parties would know that, more than a month before the District Court appointed Hamlin and Gross as two of its close advisors in the Five Asbestos Cases, Hamlin had been appointed as a partisan advocate for asbestos claimants in *G-I*. Nor did Judge Wolin provide any such disclosure, even though he apparently had knowledge of the conflicting roles played by Hamlin and Gross. (See A-299.)

A review of the record of this case, therefore, would not have disclosed to Petitioners that Hamlin and Gross held conflicting roles in the *G-I* case. Instead, as the Petition makes clear, and as their Affidavits reaffirm (see SA-2,5 and 8), Petitioners first learned this information in connection with the recusal motion

brought in the *Owens Corning* case. Thus, Respondents are correct that Petitioners' disqualification motion was not brought until "after a similar motion to recuse ha[d] been filed in *re Owens Corning, et al.*" (Asbestos Committee Response at 2.) Indeed, Petitioners did not act until they had the opportunity carefully to consider the issues raised by that disqualification motion. Only after that review were Petitioners in a position to determine that the facts required the District Court's disqualification. They filed a motion to that effect with all deliberate speed; admittedly, they did not act reflexively and with inappropriate haste.⁷

As Respondents concede, there is "no express timeliness requirements" for a motion under section 455(a). (Asbestos Committee Response at 14 (citing *In re Kansas Pub. Employees Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996)).) Instead, a motion under section 455(a) should be brought "at the earliest possible moment after obtaining knowledge of facts demonstrating the bases for such a claim." *Apple v. Jewish Hosp. and Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987). That is precisely what was done here by Petitioners. Their motion to disqualify Judge Wolin was timely.

⁷ Grace takes the rather absurd position that "[P]etitioners belatedly moved for recusal of Judge Wolin" because the "motion was filed one month after the recusal motion in *Owens Corning*" (Grace Response at 16) Clearly, the few weeks taken by Petitioners to carefully consider the bases for and serious issues in their disqualification motion do not provide a basis to ignore those issues by denying the disqualification motion.

Nor was Petitioners request for intervention from this Court premature. On or about October 10, 2003, Kensington International Limited and Springfield Associates, LLC, creditors of Owens Corning, filed their motion to recuse Judge Wolin from further participation in the *Owens Corning* case. (A-335.) They also propounded discovery to better understand what had occurred behind the scenes. (See Kensington A-369-70.) Rather than acting on the motion quickly, Judge Wolin, *sua sponte* suspended all briefing and discovery. (A-83.) Then, on November 3, 2003, after this Court decided to entertain Kensington's and Springfield's Petition for Mandamus, Judge Wolin filed a Response to the Petition, which questioned their motives for bringing it. (See Response By The District Court Judge To The Petition For A Writ Of Mandamus, Pursuant To The Invitation Of The Court Of Appeals.)

On November 14, 2003, Petitioners filed their motion to disqualify Judge Wolin. In response, the District Court filed its Supplemental Response in the Kensington matter on November 21, 2003, in which he intimated that Petitioners here had partaken of *ex parte* contacts with the District Court (which they have not done). (A-340.) Only after it became clear that the District Court had not taken and would not take any action on the motion, and apparently had prejudged the matter, did Petitioners approach this Court. Thus, the inaction by the District

Court, coupled with the gravity of the issues raised by the motion, counseled in favor of seeking immediate mandamus relief.

Equally without merit is Grace's suggestion that Petitioners' mandamus petition is premature because discovery of facts specific to the Consultants' role in the *Grace* case has not been taken. The very first action by the District Court was to preclude any discovery from going forward with respect to the recusal motion in the *Owens Corning* case, apparently on the basis of an off-the-record request by a party in interest for "procedural" advice from the District Court on how to respond to the discovery. (Kensington A-369-70.) In any event, it was clear that any effort to take discovery would not bear fruit. In response to discovery served in connection with Petitioners' opposition to Grace's application for appointment of Mr. Hamlin as Representative of Future Asbestos claimants, the Consultants simply ignored the subpoenas served on them and their firms, while Grace reluctantly turned over only a small collection of documents but would not allow deposition discovery to go forward.

CONCLUSION

In sum, the objections to the Petition should be rejected, and the Court should disqualify Judge Wolin from further participation in these jointly administered chapter 11 cases on the basis of the record before it.

Dated: December 8, 2003

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CONCLUSION

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Richard Mancino
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787 Seventh Avenue
New York, NY 10019
(212) 728-8000

Counsel for Petitioners

EXHIBIT B

No. 03-4526

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

In re D.K. ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P.
AND DEUTSCHE BANK TRUST COMPANY AMERICAS,

Petitioners.

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

**SUPPLEMENTAL APPENDIX TO REPLY TO RESPONSES TO
EMERGENCY PETITION FOR A WRIT OF MANDAMUS**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

In re D.K. ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P. AND
DEUTSCHE BANK TRUST COMPANY AMERICAS,

Petitioners.

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

**AFFIDAVIT OF DAVID FORER IN SUPPORT OF REPLY TO ANSWERS
TO EMERGENCY PETITION FOR MANDAMUS**

**KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP**
919 Market Street, Suite 1000
Wilmington, DE 19809-3062
(302) 426-1189

WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

I, David Forer, being duly sworn, declare as follows:

1. I am a General Partner at Fernwood Associates, L.P. ("Fernwood"). I am the person responsible for monitoring Fernwood's involvement in the W.R. Grace bankruptcy proceedings

2. I submit this affidavit to correct and clarify the record with respect to the allegations contained in the Answer of the W.R. Grace, & Co. et al. Official Committee of Asbestos Personal Injury Claimants to Emergency Petition for a Writ of Mandamus ("OC Answer"), and the Answer of the Unofficial Committee of Select Asbestos Claimants to Emergency Petition for a Writ of Mandamus ("UC Answer") that Fernwood had actual knowledge of the appointments of Messrs. Hamlin and Gross in the G-I Holdings chapter 11 case before the filing of the Motion to Recuse the Honorable Alfred N. Wolin, United States District Judge, from Further Participation in these Jointly Administered Cases, filed by Kensington International Limited and Springfield Associates, LLC on October 10, 2003 ("Kensington Recusal Motion") See OC Answer at 1-2, 10-13; UC Answer at 5.

3. These allegations are incorrect. After reasonable inquiry into the issue, I can confirm that Fernwood only learned of these appointments when the Kensington Recusal Motion was filed.

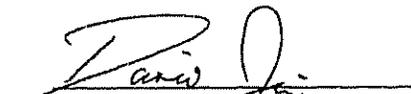
4. Furthermore, to the extent that any party alleges that Fernwood has engaged in ex parte meetings with Judge Wolin with regard to the W.R. Grace bankruptcy, this allegation is also incorrect. I have not had any conversations with Judge Wolin and am not aware of anyone else from Fernwood having had such conversations

Dated: New York, New York
December 5, 2003



David Forer

Sworn to before me this
8 day of December, 2003



Notary Public

DAVID JIN
Notary Public, State of New York
No. 0186063867
Qualified in Queens County
Certificate Filed in New York County

No. 03-4526

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

In re D.K. ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P. AND
DEUTSCHE BANK TRUST COMPANY AMERICAS,

Petitioners.

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

**AFFIDAVIT OF MATTHEW DOHENY IN SUPPORT OF REPLY TO
ANSWERS TO EMERGENCY PETITION FOR MANDAMUS**

**KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP**
919 Market Street, Suite 1000
Wilmington, DE 19809-3062
(302) 426-1189

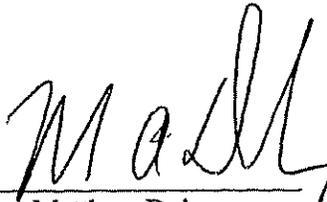
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

I, Matthew Doheny, being duly sworn, declare as follows:

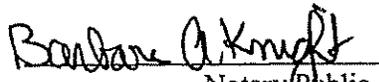
1. I am a Director of the Distressed Products Group at Deutsche Bank Securities Inc. I am the person responsible for monitoring Deutsche Bank Trust Company Americas (“Deutsche Bank”) involvement in the W.R. Grace bankruptcy proceedings.
2. I submit this affidavit to correct and clarify the record with respect to the allegations contained in the Answer of the W.R. Grace, & Co. et al. Official Committee of Asbestos Personal Injury Claimants to Emergency Petition for a Writ of Mandamus (“OC Answer”), and the Answer of the Unofficial Committee of Select Asbestos Claimants to Emergency Petition for a Writ of Mandamus (“UC Answer”) that Deutsche Bank had actual knowledge of the appointments of Messrs. Hamlin and Gross in the G-I Holdings chapter 11 case before the filing of the Motion to Recuse the Honorable Alfred N. Wolin, United States District Judge, from Further Participation in these Jointly Administered Cases, filed by Kensington International Limited and Springfield Associates, LLC on October 10, 2003 (“Kensington Recusal Motion”). See OC Answer at 1-2, 10-13; UC Answer at 5.
3. These allegations are incorrect. After reasonable inquiry into the issue, I can confirm that Deutsche Bank only learned of these appointments when the Kensington Recusal Motion was filed.
4. Furthermore, to the extent that any party alleges that Deutsche Bank has engaged in ex parte meetings with Judge Wolin with regard to the W.R. Grace bankruptcy, this allegation is also incorrect. I have not had any conversations with Judge Wolin and am not aware of anyone else from Deutsche Bank having had such conversations.

Dated: New York, New York

December 5, 2003


Matthew Doheny

Sworn to before me this
8th day of December, 2003


Notary Public

BARBARA A KNIGHT
NOTARY PUBLIC State of New York
No 01KN5038063
Qualified in New York County
Commission Expires February 21, 2007

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

In re D.K. ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P. AND
DEUTSCHE BANK TRUST COMPANY AMERICAS,

Petitioners.

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

**AFFIDAVIT OF MICHAEL LEFFELL IN SUPPORT OF REPLY TO
ANSWERS TO EMERGENCY PETITION FOR MANDAMUS**

**KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP**
919 Market Street, Suite 1000
Wilmington, DE 19809-3062
(302) 426-1189

WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

I, Michael Leffell, being duly sworn, declare as follows:

1. I am a Partner at M.H. Davidson & Co., LLC, the ultimate parent of D.K. Acquisition Partners, L.P. ("Acquisition"). I am the person responsible for monitoring Acquisition's involvement in the W.R. Grace bankruptcy proceedings.

2. I submit this affidavit to correct and clarify the record with respect to the allegations contained in the Answer of the W.R. Grace, & Co. et al. Official Committee of Asbestos Personal Injury Claimants to Emergency Petition for a Writ of Mandamus ("OC Answer"), and the Answer of the Unofficial Committee of Select Asbestos Claimants to Emergency Petition for a Writ of Mandamus ("UC Answer") that Acquisition had actual knowledge of the appointments of Messrs. Hamlin and Gross in the G-I Holdings chapter 11 case before the filing of the Motion to Recuse the Honorable Alfred N. Wolin, United States District Judge, from Further Participation in these Jointly Administered Cases, filed by Kensington International Limited and Springfield Associates, LLC on October 10, 2003 ("Kensington Recusal Motion"). See OC Answer at 1-2, 10-13; UC Answer at 5.

3. These allegations are incorrect. After reasonable inquiry into the issue, I can confirm that Acquisition only learned of these appointments when the Kensington Recusal Motion was filed.

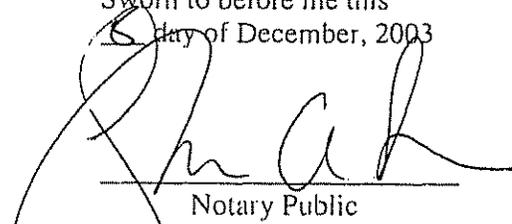
4. Furthermore, to the extent that any party alleges that Acquisition has engaged in ex parte meetings with Judge Wolin with regard to the W.R. Grace bankruptcy, this allegation is also incorrect. I have not had any conversations with Judge Wolin and am not aware of anyone else from Acquisition having had such conversations.

Dated: New York, New York
December 5, 2003



Michael L. Lell

Sworn to before me this
5 day of December, 2003



Notary Public

KIMBERLY A. SMITH
NOTARY PUBLIC, State of New York
No. 01SM5085654
Qualified in New York County
Commission Expires Sept. 8, 2006

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

In re D.K. ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P.
AND DEUTSCHE BANK TRUST COMPANY AMERICAS,
Petitioners.

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

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and
32(a)(7)(B)(ii), and 3rd Circuit Local Appellate Rule 28.5., the undersigned
attorney for the Petitioners hereby certifies that the foregoing Reply Brief of
Petitioners contains 4,242 words as counted by the word-processing system used to
prepare this brief.

Dated: December 8, 2003

**KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP**

By: Joanne B. Wills
Joanne B. Wills (DE Bar No. 2357)
Jennifer L. Scoliard (DE Bar. No. 4147)
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