

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.;
DEUTSCHE BANK TRUST COMPANY AMERICAS, Petitioners
(Related to U.S. Bankruptcy Court for the District of DE No. 01-01139)

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

**ANSWER OF THE UNOFFICIAL COMMITTEE
OF SELECT ASBESTOS CLAIMANTS TO
EMERGENCY PETITION FOR A WRIT OF MANDAMUS**

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CORPORATE DISCLOSURE STATEMENT

The disclosure required by Rule 26.1 and Third Circuit LAR 26.1 is not applicable to Respondents The Unofficial Committee of Select Asbestos Claimants in that no entity within that Unofficial Committee is a publicly traded company.

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B. THE APPOINTMENT BY ANOTHER COURT OF MR. HAMLIN TO REPRESENT PRESENT AND FUTURE ASBESTOS CLAIMANTS, WITH MR. GROSS AS HIS COUNSEL, DID NOT CREATE AN ACTUAL OR POTENTIAL CONFLICT WITH THEIR ROLES AS CONSULTANTS TO JUDGE WOLIN.

C. THE INSTANT PETITIONERS (1) CORRECTLY CONCEDE THAT THEY HAVE BEEN AWARE FROM THE OUTSET THAT THE CASE MANAGEMENT SYSTEM IN THE FIVE ASBESTOS CASES RELIED ON ROUTINE *EX PARTE* COMMUNICATIONS BETWEEN THE COURT AND COUNSEL AND PARTIES AND (2) ALSO CONCEDE THAT THE PETITIONERS MADE NO OBJECTION TO THAT PROCEDURE FOR ALMOST TWO YEARS.

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Respondents The Unofficial Committee of Select Asbestos Claimants (“the SAC”) respond to the above-captioned Emergency Petition of D.K. Acquisition Partners, L.P. *et al.* (“Petitioners”) for a Writ of Mandamus and urge that there are not meritorious grounds that would disqualify the Honorable Alfred M. Wolin, United States District Judge, from further participation in the jointly administered Chapter 11 cases captioned *In re: W.R. Grace & Co., et al., Debtors*, No. 01-01139 in the United States Bankruptcy Court for the District of Delaware.

I. THE INTERESTS REPRESENTED BY THE SAC

The Unofficial Committee of Select Asbestos Claimants (“the SAC”) is a group of law firms specializing in the representation of individuals suffering with cancers (mesothelioma, lung and others) caused by exposure to asbestos products.¹ The SAC and its members actively participate in the bankruptcy cases of numerous asbestos companies including: *W.R. Grace & Co.*, No. 01-01139 (D. Del.), which is the above-captioned case; *Owens Corning*, No. 00-03837 (D. Del.); *Pittsburgh Corning Corp.*, No. 00-22876 (W.D. Pa.); *GAF Corp. (G-I Holdings, Inc.)*, No.01-30135 (D. N.J.); *U.S. Gypsum Co.*, No. 01-02094 (D. Del.); *Federal-Mogul Global Inc.*, No. 01-10578 (D. Del.); *Babcock & Wilcox Co.*, No. 00-0558 (D. La.); *United States Mineral Products Co.*, No. 01-02471 (D. Del.); *Harbison Walker*

¹ The SAC is administered by a steering committee composed of seven law firms, Kazan, McClain, Edises, Simon & Abrams; Waters & Kraus; Early, Ludwick & Sweeney, LLC;

Refractories Co., No. 02-21627 (W.D. Pa.); *A.P. Green*, No. 02-21639 (W.D. Pa.); *North American Refractories Co.*, No. 02-21639 (W.D. Pa.); *AC and S, Inc.*, No. 02-12687 (D. Del.); and *Kaiser Aluminum Corp.*, No. 02-10429 (D. Del.). The members of the SAC represent numerous persons with claims for asbestos related injury against W.R. Grace & Co. (“W.R. Grace” or “Debtor”).

II. SHORT SUMMARY OF THIS ANSWER

Each of the facts purporting to support the alleged grounds advanced by the Movants has been obvious to all parties in the instant case for many months, at least since January 2002, as Movants impliedly concede (*e.g.*, Petition at 2, using the time-obscuring phrase “what has been brought into sharp focus in recent weeks”). Only the scorched-earth litigation tactics being pursued by a group of bond investors in the *Owens Corning* cases have caused the instant Petitioners, creditors pursuant to revolving credit facilities, to attempt to derail the effort initiated by the Court of Appeals to create a mechanism for the comprehensive management of the group of five reorganizations (referred to in the Petition as the “Five Asbestos Cases”) precipitated by the inability of the Debtors to deal with their asbestos liabilities other than through the bankruptcy system.

Bergman, Senn, Pageler & Frockt; Stanley, Mandel & Iola; Wise & Julian; and Paul, Hanley & Harley.

Not only are the instant Petitioners barred by their own acquiescence in procedures that they now purport to decry, but each of the alleged grounds stated in the Petition, considered separately or in the aggregate, cannot justify the disqualification of Judge Wolin.

First, the appointment of Messrs. Hamlin and Gross as “Consultants in the Five Asbestos Cases,” did not impose on those consultants a duty “to remain neutral, and avoid anything that would raise the specter of partiality or bias” (Motion ¶ 36). In their District Court Motion, the instant Petitioners prefaced this conclusory allegation with the word “clearly” (“Clearly, then, because of this role [as consultants], Messrs. Hamlin and Gross were duty bound to remain neutral, and avoid anything that would raise the specter of partiality or bias”). Substantially the same allegation appears in the Petition at page 12, but in both papers the word “clearly” is used because the Petitioners are unable to cite any precedent or statutory basis for the proposition that court-appointed consultants, unlike court-appointed “experts,” are “duty bound to remain neutral.”

Second, the appointment by another Court of Mr. Hamlin as “Legal Representative of Present and Future Holders of Asbestos-Related Demands” in the *G-I* asbestos bankruptcy, with Mr. Gross as his counsel in that capacity, does not create any “Potential and Actual Conflicts of Interest” or “the Appearance of Impropriety or Bias” (Petitioners’ heading 3 at page 13). Mr. Hamlin’s fiduciary

duties assumed with Court-approval in the *G-I* case are not only compatible with his duties as a consultant to Judge Wolin but are wholly congruent with those duties. Moreover, the instant Petitioners, together with the other participants in the Five Asbestos Cases, must be assumed to have been aware of Mr. Hamlin's appointment in the *G-I* case, made on October 11, 2001, and which preceded by eleven weeks his appointment as a consultant by Judge Wolin.

Third, the Petitioners explicitly conceded in a footnote buried near the end of their District Court Motion to Disqualify Judge Wolin that their shrill arguments based on the existence of *ex parte* communications between the consultants and Judge Wolin are totally undermined by the circumstance that Judge Wolin, in a "procedure followed by the District Court from the outset," footnote 8 at page 18, announced that there would be "*ex parte* communications between the District Court and the Consultants and the other parties to this case" (underlined emphasis added). Petitioners conceded in next sentence of their footnote 8 that "It may well be the case that some parties have been on notice, or at least may have heard or understood, that there would be *ex parte* communications." Petitioners have now included substantially the same text at page 22 of the instant Petition. As with the initial appointment of Messrs. Hamlin and Gross, Petitioners have known since early 2002 of the communications between Judge Wolin and the two consultants. Only now have the Petitioners stated any objection to those communications.

The truth is that the experienced counsel for the Petitioners were fully aware of the backgrounds and status in the *G-I* case of Messrs. Hamlin and Gross, and were equally aware that Judge Wolin, in attempting to discharge the heavy responsibilities placed upon him for the management of the Five Asbestos Cases, would receive *ex parte* communications not only from the consultants but also from counsel for the parties in the cases. But only after other financial interests launched a preemptive attack intended to oust Judge Wolin and prevent a potential adverse ruling on consolidation did the instant Petitioners, for the first time, raise any objections to that which they concede had been both announced and followed by Judge Wolin “from the outset” of the case. The Petitioners’ belated effort to seek a strategic advantage by removing the District Judge should be denied.

I. ARGUMENT

A. The appointment of Messrs. Hamlin and Gross as “Court Appointed Consultants” did not impose upon them the duty of neutrality imposed on law clerks or on court-appointed expert witnesses.

Petitioners attempt to manufacture a duty of neutrality imposed on Messrs. Hamlin and Gross by citing to the single instance of District Court disqualification in an asbestos context, *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), and to cases involving either law clerks or court-appointed experts. But Messrs. Hamlin and Gross were neither law clerks nor Federal Rule of Evidence

706 court-appointed *neutral* experts, such as the experts appointed in *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996). The Manual for Complex Litigation (Third) and the pertinent decisions explicitly distinguish between the appointment of “court-appointed expert witnesses” subject to Rule of Evidence 706 and other advisors. See *Reilly v. United States*, 863 F.2d 149, 156 (1st Cir. 1988)(distinguishing “court-appointed expert witnesses” from “expert advisors or consultants” and “technical advisors”); Manual for Complex Litigation (Third) at 118, 125 (distinguishing between “court-appointed experts” and “other referrals,” including “consultation with a confidential advisor to the court”).

Although the Petition argues that “the similarities between this case and the situation presented in *Edgar*. . . are undeniable” (Petition at 18), the facts of *Edgar* are different in every significant respect. Most significantly, the district judge in *Edgar* met *ex parte* with Federal Rule of Evidence 706 court-appointed neutral experts to discuss the merits of the case, contrary to an appointment order that could have, but did not, provide for *ex parte* communication. 93 F.3d 256, 257-60. Moreover, the substance of these contacts appears to have been concealed from the defendants in that case for approximately one year. *Id.*

The much closer fact pattern to the instant case is *Rios v. Enterprise Ass’n Steamfitters Local Union 638*, 860 F.2d 1168, 1173-75 (2d Cir. 1988), in which the Court of Appeals found no basis for recusal where an individual 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. Recognizing a district court's "need to hire individuals with expertise in particular subject matters," the Court of Appeals 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 master." 860 F.2d at 1174.

Further, the SAC is not aware of any allegation made in the instant Petition or in the various papers filed in the *Kensington International* proceeding that would support the conclusion that Messrs. Hamlin and Gross participated in any communications concerning division of the debtors' estates among the various creditor constituencies in any of the Five Asbestos Cases. The SAC does not believe that any such participation occurred. Accordingly, the roles of Messrs. Hamlin and Gross as advisors to the Court could not have resulted in any prejudice to any party in those cases.

B. The appointment by another Court of Mr. Hamlin to represent present and future asbestos claimants, with Mr. Gross as his counsel, did not create an actual or potential conflict with their roles as consultants to Judge Wolin.

Neither the instant Petitioners nor the parties to the *Kensington Partners* proceeding have questioned the competence of either Mr. Hamlin or Mr. Gross in the performance of their duties as court-appointed consultants to Judge Wolin in the Five Asbestos Cases. But the instant Petitioners attempt to smear Judge Wolin

by making a different argument directed to the conduct of Mr. Gross in the *G-I* case, which is not one of the cases assigned to Judge Wolin. The argument made by the instant Petitioners does not allege an injury suffered to them, that is, suffered by creditors of W.R. Grace & Co. as the result of what Mr. Gross has done or said during the proceedings in *G-I*. Instead, the instant Petitioners seem to argue that the disqualification of Judge Wolin is required in the Five Asbestos Cases because Mr. Gross may have taken some unfair advantage, in Petitioners' view, in the course of making argument in the *G-I* case. After four pages of citations to what Mr. Gross has said during his representation of Mr. Hamlin in the *G-I* case (Petition at 14-17), Petitioners state their conclusion based on those examples:

What these examples demonstrate is that Mr. Gross and Mr. Hamlin, in their roles as lawyers or legal representatives, have repeatedly suggested that their views on issues in the *G-I* case should carry more weight, or resonate more effectively, by virtue of their involvement with the Judge who presides over five of the largest asbestos-bankruptcy cases and whose decisions have affected and will [affect]² the parties interested in those cases.

Petition at 17-18 (bracketed word supplied). But what "these examples" totally fail to demonstrate is some injury to the instant creditor Petitioners, who are not parties to the *G-I* case. Moreover, "these examples" fail to demonstrate a basis on which

² The bracketed word appears to have been inadvertently omitted.

to conclude that what Mr. Gross said during the *G-I* case requires the disqualification of Judge Wolin in the Five Asbestos Cases.

- C. The instant Petitioners (1) correctly concede that they have been aware from the outset that the case management system in the Five Asbestos Cases relied on routine *ex parte* communications between the Court and counsel and parties and (2) also concede that the Petitioners made no objection to that procedure for almost two years.**

The instant Petitioners conceded in their Motion filed in the District Court that they were aware “from the outset” that Judge Wolin believed that the effective management of the Five Asbestos Cases required *ex parte* communications between the District Court and the consultants, counsel and the parties. Motion at 18 n.8, quoted *supra* at page 5 of this Answer, and Petition at 22. Although the instant Petitioners state “these Petitioners have not availed themselves of what the District Court describes as ‘free access to the Court’ in the W.R. Grace case,” they also concede that for more than twenty months they failed to object to the procedure. Nor did any other party in any of the five cases state any objection to the written case management order stating the procedure to be followed by the District Court.

Under these circumstances, the effort to recuse Judge Wolin based on his participation in *ex parte* communications should be governed by the standard that motions seeking recusal must be promptly made once the grounds for recusal 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). See also *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978). That standard is especially appropriate in these multiple and complex proceedings in which no party, either the instant Petitioners or the parties to the *Kensington Partners* proceeding, has attempted to set forth an actual instance in which any of the procedures used by Judge Wolin has resulted in an unfair advantage to any party in any of the Five Asbestos Cases. The undersigned counsel for the SAC believe, based on their extensive involvement in the Five Asbestos Cases, that those procedures have not resulted in an unfair advantage to any party.

II. CONCLUSION

For the reasons stated the relief sought by the Petition should be denied.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), I, Elizabeth Wall Magner, counsel for Respondents The Unofficial Committee of Select Asbestos Claimants, certify that I am a member of the bar of this Court.

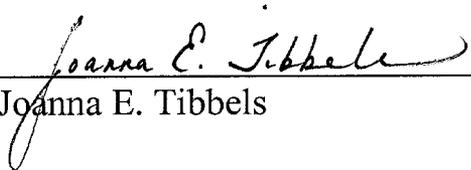
Dated: December 3, 2003

/s/ Elizabeth Wall Magner

Elizabeth Wall Magner

CERTIFICATE OF SERVICE

I, Joanna E. Tibbels, hereby certify that on December 3, 2003, I caused a true and correct copy of the foregoing Answer of the Unofficial Committee of Select Asbestos Claimants To Emergency Petition For a Writ of Mandamus to be served by electronic submission as an email attachment in PDF format to the persons on the attached list for the proceedings captioned *In re W.R. Grace & Co., et al.*, Debtors, No. 01-01139 and *In re Owens Corning*, Debtors, No. 00-03837 in the United States Bankruptcy Court for the District of Delaware, with additional service by first class mail, postage prepaid, on the persons listed in the Clerk's Order dated December 2, 2003.



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