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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JEFFREY KONVITZ, )  
                                  ) Plaintiff, )  
                                  ) v. )  
DENNY C. MATTE, MIDLAND- )  
WALWYN CAPITAL, INC. )  
                                  ) Defendants. )  
\_\_\_\_\_ )

CASE NO. CV 98-6913-AHM  
(MANx)  
  
ORDER PROVISIONALLY  
APPOINTING LIONEL SMITH AS  
COURT’S SPECIAL ADVISOR

**I. Circumstances Warranting Appointment of Special Advisor**

In this case, Plaintiff Jeffrey Konvitz alleges two claims against Defendant Denny Matte for fraud and for negligent misrepresentation. He also alleges that Defendant Midland-Walwyn Capital, Inc., for whom Matte worked, is vicariously liable for Matte’s misconduct. In late 1994, Konvitz began discussions with Matte and one Charles Smiley about creating a Canadian film company, Multipix Communications, Inc. (“Multipix”). Multipix was incorporated in, and engaged in business in, Montreal. What Konvitz and Matte represented to each other concerning their respective roles in Multipix and whether Matte ever was a director of Multipix are hotly contested issues.

///

1           Although there is no pending claim against Matte for breach of fiduciary  
2 duty or constructive fraud, Konvitz nevertheless claims that Matte was a director  
3 of Multipix and that as such he owed a fiduciary duty to Konvitz, who was a  
4 shareholder in that closely-held corporation. If Konvitz establishes that Matte was  
5 a director of Multipix, the issue whether Matte owed Konvitz a fiduciary duty or  
6 whether in good faith Konvitz believed Matte owed him such a duty may be  
7 relevant to other issues in this action, such as the reasonableness of Konvitz's  
8 reliance on Matte's alleged misrepresentations and Konvitz's ability to recover  
9 benefit-of-the-bargain damages.

10           On August 26, 2002, the Court ordered the parties to stipulate as to whether  
11 under applicable Canadian law the director of a close corporation owes a fiduciary  
12 duty to a shareholder. The Court further ordered that if the parties were unable to  
13 so stipulate, "they shall agree on and pay for a neutral expert on Canadian law who  
14 is a professor of law and obtain an opinion from him or her." Pre-Trial Conference  
15 Minutes, dated August 26, 2002. The parties were unable to reach a stipulation,  
16 and on September 10, 2002, during a hearing prior to the start of the trial in this  
17 matter, the Court provisionally agreed to appoint Plaintiff's proposed expert,  
18 Professor Lionel Smith, to be the Court's special advisor on the questions of  
19 Canadian law set forth in more detail below. The appointment is subject to the  
20 conditions described below.

## 21   **II. Authority for Appointment by the Court of an Expert**

22           Under the above-described circumstances, the Court has inherent authority  
23 to appoint advisors who can assist the Court in carrying out its adjudicative  
24 functions. *See, e.g., In re Peterson*, 253 U.S. 300, 312 (1920); *Ass'n of*  
25 *Mexican-American Educators v. California*, 231 F.3d 572, 609-15 (9<sup>th</sup> Cir. 2000).

## 26   **III. Scope of Engagement**

27           Unless the Court otherwise orders, Professor Smith's functions are limited  
28 to providing answers to the following questions.

- 1           A.    What provisions of Canadian law, federal and/or provincial, apply in  
2                    this case to the determination whether Matte was a director or a *de*  
3                    *facto* director of Multipix?
- 4           B.    What requirements must be satisfied for someone to be legally  
5                    deemed a director of a closely-held company such as Multipix? For  
6                    example, are internal corporate records required? Regulatory  
7                    filings? Other documents or acts? May someone be appointed  
8                    director, and thereby assume the duties of a director, by being so  
9                    designated by the corporation's then-existing sole shareholder and  
10                  director, at a dinner meeting?
- 11          C.    Under what, if any, circumstances may someone who may have held  
12                  himself out as a director of Multipix, and was identified as a director  
13                  in Multipix's promotional materials, be estopped to deny that he was  
14                  in fact a director? Would the answer be affected if the other persons  
15                  claiming the individual was a director were aware that there were no  
16                  written or filed standard corporate documents establishing that the  
17                  individual had been so appointed?
- 18          D.    Under what, if any, circumstances would someone deemed legally to  
19                  be a director of Multipix have a fiduciary duty to:
- 20                  1.    Shareholders of Multipix?
- 21                  2.    Other directors of Multipix?
- 22          E.    Could the ownership of shares of Multipix be changed (transferred  
23                  from one person to another) or could Multipix authorize the issuance  
24                  of otherwise unissued shares without entries being placed in the  
25                  minute book?

26            The Court will require a written analysis of these issues, by not later than  
27            September 20, 2002. In Professor Smith's analyses and opinions concerning all  
28            of the above, he should cite applicable statutes and cases. Professor Smith may

1 “fax” the responses to the Court, at the following number: (213) 894-0249.

2 If before then he needs additional information, he may request it from the Court.

3 **IV. Conflicts of Interest**

4 The Court previously ordered the parties to notify Professor Smith about:

- 5 1. The identity of the parties to the lawsuit;
- 6 2. The identity of their attorneys; and
- 7 3. The identity of other interested parties.

8 On Sept. 10, 2002, the parties jointly “faxed” a letter to Professor Smith; it  
9 is attached hereto as Exhibit A.

10 By accepting this appointment and as a condition of the appointment,  
11 Professor Smith will be required to execute a declaration confirming that:

- 12 1. He is a neutral third party in regard to this action, with no  
13 ideological, financial or professional interest in the outcome of this  
14 litigation.
- 15 2. He has never had, nor presently has, nor anticipates in the future  
16 having any financial, business or personal relationship with any  
17 party, including stock ownership, grant money, consulting or  
18 employment. He understands that if he becomes aware of any such  
19 conflict or potential conflict, he will inform the Court immediately.
- 20 3. He agrees that he will not acquire stock in any party until final  
21 resolution of this action, nor use or seek to benefit from any  
22 confidential information he may acquire during the course of this  
23 engagement.
- 24 4. He has no financial, business or personal relationship with any of the  
25 lawyers or law firms who are counsel of record in this case.
- 26 5. He understands and agrees that should any party contact him or seek  
27 to communicate with him about this litigation (except to provide  
28 payment as set forth in any order of the Court), he will not discuss

1 the issues or merits, will not disclose his communications with the  
2 Court and will inform the Court immediately of all facts and  
3 circumstances concerning such contact.

4 6. He agrees to keep accurate records of his time and submit a monthly  
5 statement for the Court's approval showing the hours he has  
6 expended on matters referred to him by the Court.

7 **V. Terms of Appointment**

8 During the hearing prior to trial, the Court indicated its intention to  
9 communicate *ex parte* with Professor Smith. Neither party objected. The Court's  
10 *ex parte* communications with Professor Smith are authorized by Canon 3A(4) of  
11 the Code of Conduct for United States Judges. ("A judge may . . . obtain the  
12 advice of a disinterested expert . . . if the judge gives notice to the parties of the  
13 person consulted and the substance of the advice, and affords the parties  
14 reasonable opportunity to respond.").

15 Unless the Court otherwise orders upon good cause, the parties shall split  
16 equally the obligation of compensating Professor Smith, including reimbursement for  
17 reasonable and necessary expenses. Professor Smith shall bill both Plaintiff's firm  
18 (O'Neill Lysaght & Sun) and Defendant Matte's firm (Fasken Martineau DuMoulin)  
19 for one half of the total and each firm shall pay him within thirty days of receipt of his  
20 bill. (Professor Smith shall submit copies of those bills to the Court.) Those firms  
21 shall work out with the other law firms on their respective side how to split that side's  
22 half of the bill. The Court reserves the authority to reallocate these charges as taxable  
23 costs at the conclusion of the case.

24 This Order is subject to the acceptance by Professor Smith of this  
25 appointment.

26 IT IS SO ORDERED.

27 DATE:

28 A. Howard Matz  
United States District Judge

COPY

September 10, 2002

Via Facsimile

Professor Lionel Smith

**Re: Konvitz v. Matte**

Dear Professor Smith:

The undersigned are attorneys for both plaintiff and defendants in the case of *Jeffrey Konvitz v. Denny C. Matte and Merrill Lynch Canada, Inc.* (fka Midland Walwyn Capital, Inc.), pending in the United States District Court for the Central of California. In this case in which trial has just commenced, there are potential questions of Canadian corporate law. As the result of submissions to the Court, including a copy of your curriculum vitae, you have been designated as a potential Court expert by Judge A. Howard Matz, the presiding judge in this matter, to provide certain opinions concerning Canadian corporate law and Quebec civil law. Your fees will be paid equally by the parties, and the Court can and will enforce that obligation, if necessary. Please also provide us with the best contact information for you, so we can provide it to the Court.

Before preparing any opinion, however, we need to ask that you affirm to the Court and the parties that you have no interest in the subject litigation, that you have no knowledge or information regarding the litigation, or the facts giving rise to the litigation, that you have no knowledge of any fact or circumstance which would prevent you from furnishing the Court a fair, reasoned and impartial opinion, and that you have no past or current relationship of any kind that would call your impartiality into question. The parties with an interest in this matter are Jeffery Konvitz, Merrill Lynch Canada, Inc., Midland-Walwyn Capital, Inc., and Denny Matte. Other persons or entities who have been involved with some aspect of the facts that have given rise to this litigation include but are not limited to Charles Smiley, Investpro Securities, Inc., and Multipix

**EXHIBIT A**

Professor Lionel Smith  
September 10, 2002  
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Communications, Inc. Several Canadian lawyers have also been involved in different capacities including Charles Smiley, Robert Rivard, Eric Favreau, Pierre Lefevre, Marie Josee-Hogue, Philippe Trudel, Ogilvy-Renault, LaPointe Rosenstein, Fasken Martineau, and Heenan Blaikie.

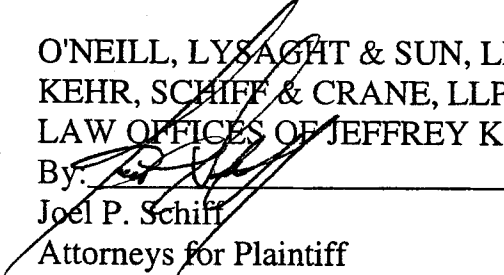
If you are able to serve as a Court expert, Judge Matz will ultimately determine the questions on which he would require your opinion as to Canadian corporate law and Quebec civil law, and communicate directly with you about this matter. For this purpose, we believe that your opinion might be needed as soon as September 17, 2002.

The precise questions have not been fully formulated, but we believe that they will involve the election of directors, duties of directors, and to whom they are owed, for corporations organized under the Canada Business Corporations Act, and doing business in Quebec.

Please let us know if you are available, and willing to serve in the capacity of Court appointed expert as set forth above. You may contact Mr. Ireland at 310-215-7502, or at [wireland@hbblaw.com](mailto:wireland@hbblaw.com), and/or Mr. Schiff at 310-820-3455, or at [jpschiff@kscllp.com](mailto:jpschiff@kscllp.com) Thank you for your assistance.

Very truly yours,

O'NEILL, LYSAGHT & SUN, LLP  
KEHR, SCHIFF & CRANE, LLP  
LAW OFFICES OF JEFFREY KONVITZ

By:   
Joel P. Schiff

Attorneys for Plaintiff

KEESAL, YOUNG & LOGAN

Attorneys for Merrill Lynch Canada, Inc. fka  
Midland-Walwyn Capital, Inc.

HAIGHT, BROWN & HONESTEEL

By:   
William E. Ireland,

Attorneys for Denny C. Matte