

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:)
) Case No. 01-0706 (MFW)
eTOYS, INC., et al.,)
)
Confirmed Debtors.)

COPY

Deposition of MICHAEL G. BUSENKELL, ESQ.,
taken pursuant to notice at Federal Court, 824
Market Street, Third Floor, Wilmington, Delaware,
beginning at 9:08 a.m., on Wednesday, February 9,
2005, before Stacy L. Vickers, Registered
Professional Reporter and Notary Public.

APPEARANCES:

ROBERT ALBER, Pro Se

RONALD R. SUSSMAN, ESQ.
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and

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For Traub, Bonacquist & Fox

MARK S. KENNEY, ESQ.
UNITED STATES DEPARTMENT OF JUSTICE
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Wilmington, Delaware 19801
For the United States Trustee

DEREK C. ABBOTT, ESQ.
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For the Debtor

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APPEARANCES (Continued):

MARK MINUTI, ESQ.
SAUL EWING, LLP
222 Delaware Avenue
Wilmington, Delaware 19899
For Barry Gold

Also Present:

Sheryl Ann Dec, eToys
Gary Ramsey

1 MR. HUNT: My name is Tom Hunt from
2 Morris, Nichols, Arsht & Tunnell. Hunt,
3 H-u-n-t.

4 At your request we are producing
5 Mike Busenkell from our firm, and also with me
6 is Derek Abbott. You're is it Jim?

7 MR. ALBER: Robert Alber.

8 MR. KENNEY: Mark Kenny, Office of
9 the United States Trustee.

10 MR. GARRITY: Jim Garrity. Law
11 firm of Shearman & Sterling on behalf of the
12 Traub firm.

13 MR. SUSSMAN: Ronald Sussman.
14 Kronish, Lieb, Weiner & Hellman, also on behalf
15 of Traub, Bonacquist & Fox.

16 MR. MINUTI: I'm Mark Minuti. I'm
17 with the law firm of Saul Ewing and I'm here
18 today for Barry Gold.

19 MS. DEC: Sheryl Dec with eToys
20 Shareholders group. Secretary.

21 MR. ALBER: Robert Alber.

22 MR. RAMSEY: Gary Ramsey.

23 MR. HUNT: It's my understanding
24 that the court has not yet formerly entered the

1 scheduling order, but it's our expectation that
2 it will be, and so we will proceed according to
3 the terms of that order with the expectation
4 that it will be entered.

5 MR. ALBER: That's fine. I didn't
6 get the final version, but I believe what I
7 have is close enough. I checked my e-mail, it
8 just wasn't there. But I know we agreed on
9 everything.

10 MR. MINUTI: I will have them
11 brought over. I'll e-mail my secretary and ask
12 her to bring one over so you have it.

13 MR. ALBER: That will be fine.
14 Thank you. I have no doubt that everything was
15 done the way we all agreed.

16 Will Mr. Gold, Mr. Fox and
17 Mr. Traub be here today?

18 MR. SUSSMAN: Yes. As you
19 requested, you wanted one at a time.

20 MR. ALBER: Right. Yes.

21 MR. MINUTI: I've asked Mr. Gold to
22 come over at approximately ten o'clock and I
23 guess at that time we can tell him to hang out
24 or go away, what you'd like.

1 MR. ALBER: That's fine.

2 What I would request though is only
3 the attorneys for the parties being questioned
4 be present.

5 MR. HUNT: That's not normal
6 practice.

7 MR. ALBER: Why? We're having four
8 separate depositions.

9 MR. HUNT: Normal practice is for
10 all parties be represented in depositions by
11 their attorney. It's one thing to exclude
12 witness or to sequester witnesses but not
13 attorneys.

14 MR. ALBER: Since we have two
15 separate issues here we have Morris, Nichols,
16 Arsht and Tunnell, and then we have Traub,
17 Bonacquist and Fox, they're really two
18 separate.

19 As the judge explained, although
20 they're same code violations or whatever, they
21 are different issues so we don't know why the
22 TB&F people have to be in here while we're
23 asking questions of MNAT. I mean, surely it's
24 none of their business anyway.

1 MR. HUNT: Well, I'm not sure that
2 that's right that there is no inner play, but
3 our practice is that all attorneys are
4 permitted to be present. This would be very
5 unusual. In fact, I've never seen.

6 MR. ALBER: Really. Mr. Kenney,
7 would you have anything to say about that?

8 MR. KENNEY: I believe Mr. Hunt has
9 stated correctly it would be highly unusual for
10 any of the counsel to the parties of interest
11 in this case not to be present.

12 MR. ALBER: Even though they're
13 separate issues?

14 MR. KENNEY: That's correct.

15 MR. ALBER: Okay.

16 MR. HUNT: And I'm not sure that
17 they are separate issues, at least the way you
18 present them, but we'll see. We'll know by the
19 end of the day.

20 MR. ALBER: Okay. Well, if there
21 is a connection between all the parties that's
22 fine. I don't have a problem with that. Okay.

23 First time I've ever done anything
24 like this, so pardon my ignorance on my part.

1 MR. HUNT: We'll get through it.
2 Don't worry.

3 MR. ALBER: Thank you.

4

5 MICHAEL G. BUSENKELL,
6 the deponent herein, having first
7 been duly sworn on oath, was
8 examined and testified as follows:

9 BY MR. ALBER:

10 Q. Pleased to meet you. Okay. For
11 purposes of this deposition MNAT shall stand
12 for Morris, Nichols, Arsht & Tunnell.

13 Mr. Busenkell, are you employed at
14 MNAT?

15 A. I am.

16 Q. When were you hired at MNAT?

17 A. When was I hired or when did I
18 start?

19 Q. When did you start?

20 A. I think it was August or September
21 of 1999.

22 Q. Please state all cases you've
23 worked or otherwise participated during your
24 tenure at MNAT that have anything to do with

1 Goldman Sachs when Goldman Sachs was a party?

2 A. Other than eToys that I directly
3 worked on and was involved with? You have to
4 clarify what you mean by if I worked on.

5 Q. Either you directly worked on or as
6 a periphery, whether if you worked on the case
7 but may not have been named in the case?

8 A. What do you mean by "periphery"?

9 Q. If you helped prepare any documents
10 but you weren't actually an entered attorney
11 into the case, as far as you weren't named?

12 A. Then to the best of my knowledge
13 eToys is the only case that Goldman was a party
14 that I've ever worked on.

15 Q. eToys. Okay. Which MNAT attorney
16 was detailed to appear at the December 6th,
17 2001 court hearing in the eToys case?

18 A. I don't recall.

19 Q. Were you? Do you recall that case?
20 That was the Goldman Sachs issue that was being
21 argued that day by debtor's counsel and there's
22 supposed to have been an MNAT -- I'm trying to
23 refresh your memory if I may.

24 MR. HUNT: If you have a name, give

1 it to him.

2 Q. There was supposed to be an MNAT
3 attorney there representing debtor's counsel.

4 A. If there was a hearing on that date
5 I'm sure there was an attorney representing
6 debtor's counsel, I just don't remember.

7 Q. Okay. That's fine. I'm not asking
8 you to remember anything you don't remember.
9 But debtor's counsel never showed up, that's
10 why I'm asking who was detailed to show up. So
11 you have no recollection of that event?

12 A. I have no recollection of that
13 event.

14 Q. Thank you very much.

15 Are you aware of any other cases
16 that MNAT has done on behalf of Goldman Sachs,
17 representing Goldman Sachs or its subsidiary
18 affiliate?

19 A. Yes. I mean, I know that they
20 either were our client. In which cases, I
21 can't tell you.

22 Q. You don't recall any of the names
23 of the cases?

24 A. No, I don't.

1 Q. Please state all attorneys who are
2 or have been retained by MNAT that you're aware
3 of, through any means, who performed any work
4 for Goldman Sachs?

5 A. I'm sorry, can you repeat that
6 question? I can't really hear you.

7 Q. Pardon me. Please state any
8 attorneys who are or have been retained by MNAT
9 that you're aware of who performed any work for
10 Goldman Sachs.

11 Are you aware of any other
12 attorneys at MNAT that worked for Goldman
13 Sachs?

14 MR. HUNT: When you say "retained,"
15 do you mean work at the firm?

16 To attorneys the term "retention"
17 implies an attorney/client relationship.

18 MR. ALBER: Okay.

19 MR. HUNT: Do you mean work at the
20 firm?

21 MR. ALBER: Yes.

22 MR. HUNT: Do you understand the
23 question?

24 THE WITNESS: I think. Like I

1 mentioned to you before, I'm not really
2 familiar with all the cases in which we may
3 have a relationship with Goldman Sachs, so I
4 really can't answer that question. I don't
5 know.

6 BY MR. ALBER:

7 Q. The reason I asked the question as
8 I did, and I'd like to restate the question, is
9 because Mr. Sudell states he has offices at
10 MNAT. And not being attorneys, we're not sure
11 if that implies there's a difference in how the
12 attorney would be listed either working for
13 MNAT or having offices at MNAT. It's just
14 listed differently on the court papers.

15 MR. HUNT: Are you referring to
16 something he said in a transcript?

17 MR. ALBER: I'm referring to some
18 of the dockets for Finova case where it says in
19 Bill Sudell's filings that Bill Sudell who has
20 offices at MNAT.

21 MR. HUNT: I can tell you Bill
22 Sudell has been an attorney at Morris, Nichols,
23 Arsht and Tunnell either as an associate or a
24 partner for I think 34 years.

1 MR. ALBER: I know he's been there
2 quite a while. We didn't know if there was a
3 difference.

4 MR. HUNT: There is no difference.

5 MR. ALBER: We don't want to make
6 any exceptions, basically.

7 MR. HUNT: He's an attorney.
8 Partner at the firm.

9 MR. ALBER: Yes, I met Mr. Sudell.
10 He's a very gracious gentleman.

11 BY MR. ALBER:

12 Q. Have you ever had any connection to
13 Finova, the Finova case?

14 A. The Finova bankruptcy case?

15 Q. Yes.

16 A. Yeah. We currently represent
17 Thaxton, the Thaxton group, and its affiliated
18 debtors and debtors in possession. Their
19 secured lender was Finova and there's --
20 because of that, because Finova itself is a
21 liquidating Chapter 11 cases we are required to
22 file certain orders from the Thaxton bankruptcy
23 case in the Finova bankruptcy case to give
24 Finova creditors notice of asset sales by

1 Thaxton.

2 Q. So the Thaxton issue, the Thaxton
3 dockets and the Goldman Sachs GE dockets in the
4 Finova case are separate issue or the same?

5 A. Repeat that question.

6 Q. You said Thaxton group, you
7 mentioned the Thaxton group.

8 A. The Thaxton group are debtors in a
9 separate bankruptcy case in this district.

10 Q. Okay. I'm referring to parties in
11 the Finova case. We're aware that --

12 A. Your question to me was whether or
13 not I've had any involvement with the Finova
14 bankruptcy case.

15 Q. Yes.

16 A. I'm explaining to you my
17 involvement. If there's something you don't
18 understand about my answer, let me know and
19 I'll try to clarify it, but that's our
20 involvement in the Finova case.

21 Q. Okay. So you had no involvement
22 with Goldman Sachs issues in the Finova case?

23 A. I think, and I don't entirely
24 recall, but I think Bill Sudell represents or

1 represented Goldman in the Finova case. And I
2 don't recall having any direct or meaningful
3 involvement in that case. I may have signed
4 something for Bill at some point in time but I
5 certainly wasn't one of the attorneys that was
6 materially or immaterially involved in the
7 Finova bankruptcy case representing Goldman
8 Sachs.

9 MR. HUNT: Now there was a lot of
10 speculation in that last answer. It will just
11 extend the deposition unnecessarily and not
12 give them any useful information if you
13 speculate.

14 MR. ALBER: That's okay. He's free
15 to ramble on. I'm not saying you're rambling
16 on.

17 MR. HUNT: I said that.

18 MR. ALBER: We don't have any time
19 limits but of course we want to get done in an
20 expeditious matter if possible.

21 BY MR. ALBER:

22 Q. So what were the dates of your
23 tenure during the Finova case representing the
24 Thaxton group?

1 A. Since the Thaxton case began,
2 Thaxton filed their petitions on October 17th
3 of 2003.

4 Q. Okay. We're talking Finova case
5 which was filed March 7th, 2001.

6 A. I don't know.

7 Q. I'm talking about connections
8 within the Finova bankruptcy case. I
9 understand there are connections between Finova
10 and Thaxton, but I'm referring to Finova
11 bankruptcy case, not the --

12 A. And what's your question?

13 Q. What was your tenure during the
14 Finova bankruptcy case in particular, not the
15 Thaxton. We're not really dealing with the
16 Thaxton issue.

17 A. What I'm explaining to you is my
18 only involvement in the Finova case is through
19 Thaxton bankruptcy case.

20 Q. And when you say you may have
21 signed some papers in the Finova case for Bill
22 Sudell or on the GE issue or Goldman Sachs
23 issue, were you a listed attorney for the --
24 were you one of the attorneys that was listed

1 as representing either one of those two parties
2 for Morris, Nichols, Arsht, Tunnell?

3 A. I have no idea.

4 Q. You have no idea?

5 A. I would be surprised. I don't
6 know.

7 Q. Who filed the Statement of
8 Disinterestedness in the eToys case for MNAT?

9 A. I have no idea.

10 Q. Okay. Have you ever read that
11 document?

12 A. I don't think so.

13 Q. Are you a listed attorney on the
14 eToys bankruptcy case?

15 A. What do you mean by "listed
16 attorney"?

17 Q. Are you one of the attorneys that's
18 named in various filing as working directly on
19 the eToys case?

20 A. Named where?

21 Q. Excuse me?

22 A. Named where? Again, I don't
23 understand your question.

24 Q. The documents that debtor's counsel

1 has filed on behalf of eToys where they gave a
2 list of the attorneys who were working on the
3 case --

4 MR. HUNT: You mean the signature
5 block?

6 MR. ALBER: Right.

7 THE WITNESS: If you're asking if
8 my name has appeared in the signature block in
9 the pleadings that have been filed in the eToys
10 case on behalf of the debtor the answer is yes.

11 Q. Have you had any direct involvement
12 with the eToys bankruptcy case, appeared in
13 court or signed any documents?

14 A. Yes.

15 Q. Would you please state those
16 instances for us?

17 A. Numerous times. I don't recall.

18 MR. HUNT: I would say that it's
19 reflected in the docket. You can ask him what
20 he remembers, but the docket is the ultimate
21 proof of what he signed and I would suggest
22 that's probably where you'd probably go for
23 that information, but you can go ahead and ask
24 him whatever you want.

1 Q. I don't expect your memory to be
2 faultless.

3 Pardon me for restating, I didn't
4 write it down, what was the date you began
5 working for MNAT?

6 A. The exact date I don't recall.

7 Q. Approximate?

8 A. August or September of 1999.

9 Q. Did the MNAT firm do any work in
10 the Adelpia case that you're aware of?

11 A. I have no idea.

12 Q. Can you please give us the name of
13 some of the cases that you have worked on?

14 A. It's endless, and I couldn't sit
15 here and recall the cases I've worked on.

16 Q. Just to the best of your
17 recollection any cases that you can recall?

18 A. You're talking about every single
19 case I've ever worked on since I've been at
20 Morris Nichols?

21 Q. I'm talking the best of your
22 recollection the cases you have worked on at
23 Morris, Nichols, Arsht and Tunnell?

24 A. I can't give you a complete and

1 definitive answer of that.

2 Q. Can you give me a partial answer?
3 Can you tell me what you're working on right
4 now, for instance, or what you've worked on
5 within the past year?

6 THE WITNESS: Is this relevant at
7 all?

8 MR. HUNT: If you want to waste
9 your time on questions like this --

10 THE WITNESS: I'll try to answer
11 your question.

12 MR. HUNT: Let me just say we do
13 not have endless time. I know you said that,
14 but we have today, as I understand it.

15 THE WITNESS: I'm working on the
16 Thaxton group bankruptcy cases. That takes up
17 most of my time. Working on the National Waste
18 Services bankruptcy case, involved in
19 representing numerous creditors in other
20 bankruptcy cases, involved in the Oakwood Homes
21 bankruptcy case. Sitting here that's generally
22 what I've been working on.

23 MR. HUNT: Mr. Alber, just one
24 second. I know the order hasn't been entered

1 yet, but in the court's scheduling order the
2 examination of Mr. Busenkell is supposed to be
3 limited to two topics, the nature and extent of
4 the disclosures made by Morris, Nichols, Arsht
5 and Tunnell in these Chapter 11 cases, and the
6 nature and extent of the relationship between
7 Morris, Nichols, Arsht and Tunnell and Goldman
8 Sachs and its affiliate as that relates to
9 these Chapter 11 cases.

10 I understand you want some
11 background and you're certainly entitled to
12 that, but I would ask you to try and stick to
13 those two topics because that's what the judge
14 has said the deposition is about.

15 MR. ALBER: Okay. Right. We do
16 understand -- we're trying to delve into
17 whatever memories Mr. Busenkell may have.
18 We're not saying Mr. Busenkell is being
19 nonresponsive to the questions, but we have
20 certain documentation of certain cases that
21 we're merely trying to verify with
22 Mr. Busenkell that we know that MNAT and
23 Goldman Sachs are working together in some
24 form.

1 MR. HUNT: I understand. I mean,
2 you're doing a fine job, but I understand
3 you're not a trade attorney, and so I'm
4 certainly going to be understanding that maybe
5 it takes you a little longer to get at it, but
6 those are the two topics that the deposition is
7 supposed to be restricted to.

8 MR. ALBER: Right. It's going to
9 be difficult to establish any verification of
10 any cases that we're aware of between Goldman
11 Sachs and MNAT.

12 MR. HUNT: If you know a case where
13 Goldman Sachs and Morris, Nichols, Arsht and
14 Tunnell were both involved, you can tell him
15 that to see if that refreshes his recollection.
16 If you've got the document that says that we're
17 certainly not going to --

18 MR. ALBER: Not to be
19 argumentative, I've been trying to do that
20 Finova case and Mr. Busenkell seems to have
21 very little recollection have signing any
22 documents or doing anything really in the
23 Finova case. He's referring to the Thaxton
24 group case which we understand to be two

1 separate bankruptcies.

2 MR. HUNT: Right. I think what
3 he's telling you, he really didn't work in the
4 Finova case, so he can't tell you something he
5 doesn't know. If you want to know about the
6 Finova case, this is not the witness.

7 MR. ALBER: The problem I'm having
8 here in understanding all this is we would
9 assume, if I assume correctly, that an attorney
10 who is working on a certain case and he signs
11 documents filed with the court in a certain
12 case, which would make it a statement under
13 oath with once entered in the federal docket,
14 we would believe that they would be familiar
15 with the case that they're signing under oath,
16 dockets into the case.

17 MR. HUNT: The answer to that is
18 yes at some levels, no at some levels. We can
19 spend a lot of time talking about that. Not
20 every attorney understands every single aspect
21 of the case just because they've signed a
22 particular document. When he signs the
23 document he's saying that as to that document
24 he's made the necessary investigation but he's

1 not saying that as to every other document in
2 the case.

3 MR. ALBER: We do not want to
4 presume then that every attorney at the firm
5 MNAT knows the appropriate codes as far as what
6 constitutes disinterested parties or conflicts
7 of interest?

8 MR. HUNT: You'd have to ask
9 everyone -- I can tell you my understanding is
10 that everybody at the firm is extremely
11 ethical. We've never faulted once.

12 MR. ALBER: We're not calling your
13 ethics into question. We're calling the
14 education or perhaps ignorance of the
15 appropriate codes into -- and their knowledge
16 of these codes in the question.

17 MR. HUNT: I can assure you that
18 those who need to know these codes know those
19 code.

20 MR. ALBER: Is there a requirement
21 at the MNAT firm that all attorneys know those
22 codes?

23 MR. ABBOTT: With respect,
24 Mr. Alber, I appreciate what you're here doing,

1 but we're here for you to ask questions of
2 Mr. Busenkell within the scope of this order.
3 There can be a lot of debate all day long.
4 It's not going to be helpful for anybody. So I
5 would suggest that you proceed with your
6 examination of Mr. Busenkell, and if you want
7 to make legal argument in the court when we
8 have that opportunity we're happy to respond to
9 that.

10 MR. ALBER: I'm not trying to make
11 legal argument, perhaps increase my
12 understanding of what's really going on here.
13 I apologize for any misstatement I may have
14 made.

15 MR. HUNT: No problem.

16 MR. ALBER: Well, since
17 Mr. Busenkell's recollection seems to be so
18 limited, we're done with Mr. Busenkell.

19 Thank you very much for appearing.

20 THE WITNESS: Sure.

21 MR. HUNT: Thank you.

22 (Deposition concluded at 9:30 a.m.)
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I N D E X

<u>DEPONENT:</u> MICHAEL G. BUSENKELL, ESQ.	<u>PAGE</u>
Examination by Mr. Alber	3

E X H I B I T S

(There were no exhibits marked for identification.)

CERTIFICATE OF REPORTER	PAGE 26
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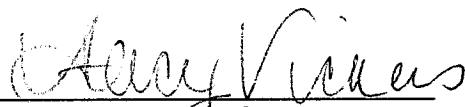
1 State of Delaware)
)
2 New Castle County)

3
4 CERTIFICATE OF REPORTER

5
6 I, Stacy L. Vickers, Registered
7 Professional Reporter and Notary Public, do hereby
8 certify that there came before me on the 9th day
9 of February, 2005, the deponent herein, MICHAEL G.
10 BUSENKELL, ESQ., who was duly sworn by me and
11 thereafter examined by counsel for the respective
12 parties; that the questions asked of said deponent
13 and the answers given were taken down by me in
14 Stenotype notes and thereafter transcribed by use
15 of computer-aided transcription and computer
16 printer under my direction.

17
18 I further certify that the foregoing is a
19 true and correct transcript of the testimony given
20 at said examination of said witness.

21
22 I further certify that I am not counsel,
23 attorney, or relative of either party, or
24 otherwise interested in the event of this suit.

25
26
27 
28 Stacy L. Vickers, RPR
29 Cert.#: 115-RPR
30 Exp.: 01/31/05

31
32 DATED: February 9, 2005