

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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

COPY

Deposition of MICHAEL SCOTT FOX, taken pursuant to notice at Federal Court, 824 Market Street, Third Floor, Wilmington, Delaware, beginning at 2:33 p.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.
KRONISH, LIEB, WEINER & HELLMAN, LLP
1114 Avenue of the Americas
New York, New York 10036-7798

and
JAMES L. GARRITY, JR., ESQ.
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New York, New York 10022-6069
For Traub, Bonacquist & Fox

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

DEREK C. ABBOTT, ESQ.
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MORRIS, NICHOLS, ARSHT & TUNNELL
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Wilmington, Delaware 19899
For the Debtor

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
Steven Fox, Esq., Traub, Bonacquist & Fox

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MICHAEL SCOTT FOX,

the deponent herein, having first
been duly sworn on oath, was
examined and testified as follows:

BY MR. ALBER:

Q. For purposes of this deposition
TB&F is going to stand for Traub, Bonacquist
and Fox. You work for TB&F?

A. Yes, I do.

Q. Approximately how long have you
worked for TB&F?

A. Since 1989.

Q. How long have you been a partner at
TB&F?

A. Since 1989.

Q. Who were the partners at the firm
when you joined?

A. Paul Traub, Harold Bonacquist and
Dwight Young.

Q. Concerning eToys bankruptcy, do you
know of who at TB&F, if anyone, spoke to eToys
or anybody representing eToys concerning the
retention of Barry gold?

A. Yes.

1 Q. Who would that be, please?

2 A. I think it would have been myself,
3 Susan Balaschak and/or Paul Traub.

4 Q. And do you recall who you spoke to
5 there?

6 A. To the best of my recollection I
7 spoke to Howard Steinberg, who was counsel for
8 the debtor. Both David Haddad and David Gatto
9 who were the then officers of eToys. I believe
10 there might have been a representative that I
11 spoke to at Cross Roads.

12 Q. For the record, Howard Steinberg is
13 with Arella Manella. Arella Manella is named
14 attorney who Howard Steinberg is with.

15 You don't recall the name of the
16 individual at Cross Roads?

17 A. Might have been Alan Gordon and/or
18 I believe Dennis Simon himself.

19 Q. Dennis --

20 A. Dennis Simon.

21 Q. Okay. I'm not familiar with that
22 person. What other candidates are you aware of
23 that were applying for the position?

24 A. In addition to Barry Gold I know

1 Cross Roads itself was trying to become a
2 candidate. Richard Cartoon was considered.
3 Anthony Labroschiano was considered. And
4 Dennis Simon was considered also at Cross
5 Roads. And there may have been a few other
6 people. Those are the only people that I'm
7 aware of.

8 Q. When did you first meet Barry Gold?

9 A. I first met Barry Gold in about
10 1995.

11 Q. Was it personal or was it during a
12 case or how was that --

13 A. It was an out of court case called
14 Witmark. It was a catalog showroom that was
15 liquidating its assets under a composition
16 agreement. Barry, I believe, was the wind down
17 coordinator for Witmark. My firm had
18 represented and informal creditors committee
19 and negotiated a composition agreement.

20 Q. What has been your association with
21 Mr. Gold since then? I mean, has it become a
22 person relationship? Is it strictly business
23 relationship?

24 MR. MINUTI: Object to the form.

1 MR. SUSSMAN: Object to the form.

2 You can answer.

3 A. I had very little contact with him
4 after the case concluded in Witmark. I don't
5 think I spoke to him at all from '96, '97, '98,
6 '99 and 2000. I know that he was working for a
7 company, Jumbo Sports, I believe. At best it
8 could be a business relationship.

9 Q. Okay. Would you happen to know who
10 -- you mentioned that you believe Susan
11 Balaschak and another member of your firm
12 talked to eToys about the retention of Barry
13 Gold?

14 MR. SUSSMAN: Object to the form of
15 the question. You can answer it.

16 A. I'm not sure I understand the
17 question.

18 Q. Well, I'd have to ask them who they
19 spoke to, not yourself. Right. Hearsay.

20 Did you have any -- did you
21 participate in any way in the formation of ADA?

22 A. No.

23 Q. And now you had very little contact
24 with Barry Gold up until 2000, then Jumbo

1 Sports. What was the basis for your promoting
2 him as a candidate in eToys?

3 A. Well, it had a lot to do with
4 having worked with him in the opposite side of
5 Witmark. I know he worked in Jumbo Sports with
6 other members of my firm, so I spoke to them.
7 I asked them how they felt about him. It was
8 consistent with I know the job he did in
9 Witmark and I felt that he should be
10 considered.

11 Q. Did you discuss this with Paul
12 Traub?

13 A. Among many people, yes.

14 Q. What were your discussions with
15 Paul Traub as far as promoting Barry Gold?

16 A. I'm not sure I understand.

17 MR. SUSSMAN: You're asking him
18 about what were the discussions with Traub
19 relative to recommending Gold into the eToys
20 case?

21 MR. ALBER: Yes.

22 MR. SUSSMAN: That's what he's
23 asking.

24 MR. ALBER: That will work.

1 A. Around the time of April of 2001
2 when it became apparent that Mr. Gatto and
3 Haddad were leaving the company.

4 Q. Okay. Were Mr. Gatto and
5 Mr. Haddad approached as far as extending their
6 tenure at eToys?

7 A. Yes.

8 Q. And neither one of them wanted to
9 do it?

10 A. Neither one had availability. I
11 think they both took other jobs, so they had
12 commitments that -- they had already extended
13 it from the initial period through the 18th.

14 Q. Right. Okay. We see Mr. Gatto
15 signed some documents as eToys president and
16 CEO after May 18th and that confuses us so we'd
17 like to know more about the participation of
18 David Gatto in eToys bankruptcy after May 18th.

19 MR. SUSSMAN: Object to the form of
20 the question but by all means you can answer
21 it.

22 A. His full-time basis, I think, was
23 concluded around May 18th since the company
24 still needed an officer. I believe until the

1 company secured another officer he made himself
2 available and he stayed on, agreed to stay on
3 as the president through the selection process
4 and ultimate appointment of another officer.

5 Q. Okay. To the best of your
6 knowledge was eToys board of directors still a
7 function or had they been disbanded by the time
8 Mr. Gold was retained?

9 A. I don't know.

10 Q. Did you have any contact at any
11 time with eToys bankruptcy with any of the
12 board of directors of eToys?

13 A. I don't recall. I might have had
14 conversations with people that were board
15 members but I never made a presentation nor did
16 I speak with the board as a whole.

17 Q. Did you know if Dave Gatto was a
18 member of the board?

19 A. No, I don't know.

20 Q. Are you familiar with a person by
21 the name of Ian Hunter?

22 A. No.

23 Q. To the best of your knowledge was
24 it ever suggested by anybody at ADA participate

1 in eToys bankruptcy case?

2 A. Can you repeat the question?

3 Q. To the best of your knowledge was
4 it ever mentioned that ADA participate in eToys
5 bankruptcy case?

6 A. No.

7 Q. Solely Barry Gold's employment as
8 CEO/president?

9 A. Yes.

10 Q. As a partner in the TB&F firm,
11 would you be aware of any connections between
12 Susan Balaschack and Mr. Gold?

13 MR. SUSSMAN: Object to the form.
14 You can answer.

15 MR. MINUTI: Same objection.

16 A. Generally.

17 Q. Could you please explain what
18 knowledge you have available?

19 A. Would have reviewed time records
20 that Susan may have filled out and I may have
21 reviewed and I wouldn't have seen if she would
22 have spoken to or who she spoke to or how she
23 billed her time. To the extent that she would
24 have spoken to him or scheduled a conference

1 call I may in fact have participated in one or
2 several conversations that may have taken place
3 between Susan Balaschack and Gary Gold.

4 Q. Okay. What about prior to Mr. Gold
5 being retained by eToys?

6 MR. SUSSMAN: What's the question?

7 Q. Any connection Susan Balaschak may
8 have had with Barry Gold prior to Mr. Gold's
9 retention.

10 MR. SUSSMAN: Object to the form.
11 You can answer.

12 MR. MINUTI: Same objection.

13 A. I don't think she had any
14 connection with Barry Gold outside of her
15 employment as an employee of TB&F.

16 Q. Okay. Maybe I misphrased my
17 question. I meant -- what I'm trying to say
18 is, I'll try to say it more clearly, is did
19 Ms. Balaschack have any, I'm talking about
20 business relationship between Barry Gold and
21 herself prior to Mr. Gold's retention with
22 eToys?

23 MR. SUSSMAN: The problem with the
24 form of that question is that you're assuming

1 in that question that she has a business
2 relationship with him in eToys and that's what
3 the problem with that question is.

4 Q. Well, maybe I should preface that
5 by stating that we know that Ms. Balaschak did
6 speak with Mr. Gold during the normal course of
7 matters during eToys bankruptcy case.

8 MR. SUSSMAN: You're trying to find
9 out if she spoke to Gold prior to the eToys
10 case?

11 MR. ALBER: Right. Prior to his
12 retention.

13 MR. SUSSMAN: Why don't you ask him
14 that question.

15 A. I think I understand it, and I
16 would to the best it is helpful this will be my
17 response to that, prior to eToys Susan
18 Balaschak had never spoken to Barry Gold. She
19 did not work on the Witmark matter and I know
20 she wasn't involved in the other matters of
21 Jumbo Sports and Stage Stores, so it would be
22 my belief that she's had no other connection
23 with him whatsoever until the eToys case
24 happened. I hope that's helpful.

1 Q. Yes. Thank you. Please tell us
2 what members of TB&F who are involved with ADA?

3 A. "Members" you mean attorneys?

4 Q. Attorneys or we've heard the name
5 Cindy Williams who does the bookkeeping for
6 them, but, yeah, attorneys, any partners?

7 A. It would be Cindy Williams, Mora
8 Russell, Steven Fox and Paul Traub.

9 Q. Okay. Did you work at any time, or
10 TB&F, in connection with Office Max? Were you
11 involved in that?

12 A. Did I or TB&F? You asked two
13 questions.

14 Q. We know TB&F was involved with
15 Office Max. Did you participate?

16 A. I had nothing to do with the Office
17 Max matter.

18 Q. Drug Emporium?

19 A. I've had no work. No involvement,
20 no work, no time spent in that matter either.

21 Q. Pharmor?

22 A. I've had no work in that matter.

23 Q. Did you have any involvement with
24 Peachy Partners or with Paul Traub in the

1 PillowTex case?

2 A. No.

3 Q. Did you or TB&F ever have any
4 participation with Sun 'n Ski in that
5 bankruptcy?

6 A. Yes.

7 Q. Would you please tell us what your
8 involvement was?

9 MR. SUSSMAN: Why don't we stay
10 consistent with the procedure we used with
11 Traub. If you can ask him about Sun 'n Ski,
12 let's first find out if Gold and ADA had
13 anything to do with this case.

14 MR. ALBER: We have information
15 that tells us that Mr. Gold did have something
16 to do with that case, so we need to verify
17 further.

18 MR. SUSSMAN: You're making a
19 representation that you think that Gold and ADA
20 had something to do with that case?

21 MR. ALBER: We're not saying ADA,
22 Mr. Gold. We don't know that ADA had anything
23 to do with --

24 MR. SUSSMAN: But you're making the

1 representation that Mr. Gold did?

2 MR. ALBER: That's the information
3 we've been given. We're just trying to verify
4 what's going on.

5 MR. SUSSMAN: You can ask him.

6 A. Let me just clarify. When Sun 'n
7 Ski was ultimately in bankruptcy?

8 Q. Yes.

9 A. Neither TB&F nor myself were
10 involved. We had tried to represent the
11 company in an out of court prior to the filing.
12 When they actually filed for bankruptcy they
13 were represented by Texas counsel where the
14 case was filed.

15 I'm not trying to be disingenuous.
16 The question had to do with Sun 'n Ski
17 bankruptcy and we've had no involvement.

18 Q. It was an out of court case?

19 A. In the months preceding the filing
20 in an attempt to try to work out I deal with
21 the general unsecured creditors.

22 Q. Okay. Thank you for clarifying
23 that for me. And did you have any information
24 at all during that case that Barry Gold was

1 involved?

2 A. I don't recall.

3 MR. SUSSMAN: Wait for the next
4 question.

5 MR. ALBER: He can go ahead and
6 talk.

7 MR. SUSSMAN: I just assume you ask
8 the question and he'll be happy to answer what
9 questions you have.

10 Q. Sure. Did you or TB&F firm do any
11 work on the FAO Schwartz bankruptcy?

12 A. Yes.

13 Q. Did you personally work in that
14 bankruptcy?

15 A. Yes.

16 Q. Can you please tell us what the
17 duties of TB&F were in that bankruptcy?

18 MR. SUSSMAN: Mr. Alber, may I
19 suggest that we engage in the same procedure we
20 did with Mr. Traub. Before you start launching
21 off into questions about particular engagement
22 of TB&F, can we first establish whether ADA or
23 Mr. Gold had some involvement in that
24 bankruptcy, and then if the answer is yes, then

1 ask him anything you want.

2 MR. ALBER: I believe we already
3 have testimony that Mr. --

4 MR. SUSSMAN: But this is a fresh
5 witness so let's just go through the same
6 procedure because I don't know what companies
7 you're going to be mentioning and I just think
8 that procedure makes it clear if they're both
9 involved in the case then ask anything you
10 want.

11 MR. ALBER: If I may, I'm a little
12 unclear on let's say, for instance, if Mr. Gold
13 was involved in the case and we know Mr. Gold
14 was involved in the case but Mr. Fox is not --

15 MR. SUSSMAN: If you make a
16 representation --

17 MR. ALBER: -- was not aware that
18 Mr. Gold was in the case --

19 MR. SUSSMAN: If you make a
20 representation that you believe Mr. Gold was in
21 the case through information you have through
22 other witnesses or any other source, then by
23 all means you can ask him any question you'd
24 like. I'm not going to stop you. That's fine.

1 That keeps it within the scope of the order.

2 MR. ALBER: Okay.

3 BY MR. ALBER:

4 Q. Are you aware of Mr. Gold being
5 involved in the FAO Schwartz case?

6 A. That were two FAO Schwartz cases so
7 it would be helpful for me to understand which
8 one you're talking about.

9 Q. I believe the one was filed the end
10 of 2002, early 2003, and the other was early
11 2004?

12 A. Correct.

13 Q. Was Barry Gold involved in both
14 those cases, to your knowledge?

15 A. I don't believe Barry Gold
16 individually was involved in either case. I
17 believe ADA may have been involved in the
18 second FAO case.

19 Q. Okay. And you're aware -- ADA was
20 involved in the second FAO case, which would
21 have been, I believe, early 2004 when it was
22 filed?

23 MR. SUSSMAN: Are you asking him if
24 he knows when it was filed?

1 Q. When was -- what was the tenure of
2 TB&F? TB&F was involved in that case in the
3 second bankruptcy?

4 A. Yes.

5 Q. What was the tenure of TB&F in the
6 second bankruptcy?

7 A. Tenure was we were creditors
8 committee counsel.

9 MR. SUSSMAN: What he means is from
10 when to when were you in the case.

11 Q. Right.

12 A. From the filing through the
13 confirmation of the plan which is still
14 continuing to date.

15 Q. Did you personally play any part or
16 promote Barry Gold or ADA as participating in
17 that case?

18 MR. SUSSMAN: Object to the form.
19 You can answer.

20 A. I don't understand what --

21 MR. SUSSMAN: Are you asking him
22 whether or not he had anything to do with ADA
23 being retained in the FAO case?

24 MR. ALBER: Right.

1 MR. SUSSMAN: That's what he means.

2 A. Yes.

3 Q. Would you please describe your
4 involvement?

5 A. I was involved with speaking to the
6 committee about whether they needed ADA or
7 whether they needed the services of ADA. I
8 explained to the committee what those services
9 would be and I had much discussion with the
10 committee about the need to have ADA involved
11 in that particular case.

12 Q. Okay. Thank you. Did you or TB&F
13 work on the Stage Stores bankruptcy? It was
14 prior to that it was Apparel Retailers when
15 they went into bankruptcy. Did you work on
16 that bankruptcy case?

17 MR. SUSSMAN: Object to the form.
18 You can answer.

19 A. I'm sorry, I didn't hear the name.

20 Q. Stage Stores, which I mentioned was
21 prior to that was Apparel Retailers?

22 A. I had no involvement in the case.

23 Q. Did you or TB&F firm work on the KB
24 Toys bankruptcy?

1 A. Yes.

2 Q. Did you have any direct involvement
3 in that bankruptcy?

4 A. Yes.

5 Q. Can you please explain?

6 MR. SUSSMAN: Can we --

7 Q. I'll go back. Are you aware of
8 Barry Gold working on the KB Toys bankruptcy
9 either by himself or with ADA?

10 A. Yes.

11 Q. Can you please explain your
12 involvement with the KB Toys bankruptcy?

13 A. I worked on the matter as counsel
14 for the creditors committee.

15 Q. What other members of the TB&F
16 firm also did work?

17 A. I would say at one time or another
18 probably all the partners would have had some
19 involvement in the case.

20 Q. Could you name for us all the
21 partners?

22 A. No particular order I would name
23 Paul Traub, myself, Steven Fox, Susan
24 Balaschak, Mora Russell and Adam Friedman.

1 There's currently a partner that's effective
2 January 1st, Wendy McCarthy. But I don't
3 believe she had any involvement in the KB
4 manner.

5 Q. Is Harold Bonacquist still with the
6 TB&F firm?

7 A. He's of counsel.

8 Q. Did you play any personal role in
9 the retention of ADA in the KB Toys case?

10 A. Yes. I, again, explained to the
11 committee the need to hire an inventory sheriff
12 type and I explained to them what role, if any,
13 ADA would have and the advantage of them how it
14 would be staffed out, how it would be worked,
15 and ultimately the committee determined to
16 retain them.

17 Q. Did you promote any other entities
18 or individuals in that role or just ADA?

19 A. I don't recall. I don't recall.

20 Q. Did you have any personal
21 involvement or business involvement with Barry
22 Gold while he was working for ADA while you
23 were doing the inventory in the eToys -- KB
24 Toys Bankruptcy?

1 MR. SUSSMAN: Object to the form of
2 the question.

3 MR. MINUTI: Object to the form.

4 THE WITNESS: I'm not sure I
5 understand the question.

6 Q. Did you have any communications
7 with Barry Gold while Barry Gold was working
8 for ADA in the KB Toys bankruptcy case and you
9 were working on behalf of TB&F in the KB toys
10 bankruptcy? Did you have a business
11 relationship?

12 A. In the KB case?

13 Q. In KB Toys case. Right.

14 MR. SUSSMAN: Object to the form.
15 You can answer.

16 MR. MINUTI: Same objection.

17 A. Yes, I'm sure I spoke to Barry in
18 my capacity as counsel to the committee and his
19 capacity as a member of ADA.

20 Q. Have you or the TB&F firm ever
21 worked for Consolidates Stores who later
22 changed their name to Big Lots?

23 A. No.

24 Q. Did you or TB&F firm do any work on

1 the Bonus Stores bankruptcy case?

2 A. I did no work on the Bonus Stores
3 case. TB&F was retained as special counsel.

4 Q. Okay. Have you or TB&F firm ever
5 done any work for Bombay Company?

6 A. Not to my knowledge.

7 Q. Have you or the TB&F firm ever done
8 any work for Angelo, Gordon?

9 A. Not to my knowledge.

10 Q. Have you or the TB&F firm ever done
11 any work for Fleet Retail Finance Group?

12 A. Maybe. I never worked on that
13 particular matter but there may be occasions
14 where TB&F may have done work directly for
15 Fleet Bank.

16 Q. You don't recall the names of any
17 of these cases?

18 A. As I said, I didn't work on any of
19 them.

20 MR. ALBER: Right. I understand
21 you didn't. Okay. Anything else?

22 Okay. Thank you.

23 THE WITNESS: Thank you.

24 MR. SUSSMAN: That concludes the

1 deposition. Thank you very much.

2 (Deposition concluded at 3:04 p.m.)

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I N D E X

DEPONENT: MICHAEL S. FOX PAGE
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E X H I B I T S

(There were no exhibits marked for identification.)

CERTIFICATE OF REPORTER PAGE 27

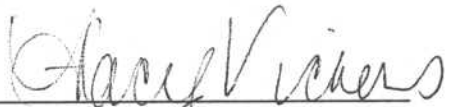
1 State of Delaware)
2 New Castle County)

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 S.
10 Fox, who was duly sworn by me and thereafter
11 examined by counsel for the respective parties;
12 that the questions asked of said deponent and the
13 answers given were taken down by me in Stenotype
14 notes and thereafter transcribed by use of
15 computer-aided transcription and computer printer
16 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 Stacy L. Vickers, RPR
28 Cert.#: 115-RPR
29 Exp.: 01/31/05

30 DATED: February 11, 2005