

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ART TECHNOLOGY GROUP, INC. : Consolidated
SHAREHOLDERS LITIGATION : Civil Action
: No. 5955-VCL

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, December 20, 2010
2:30 p.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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RULINGS OF THE COURT FROM ORAL ARGUMENT ON PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

2 CARMELLA P. KEENER, ESQ.
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3 -and-

4 GINA M. SERRA, ESQ.
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-and-

5 KIRA GERMAN, ESQ.
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-and-

7 JOSEPH RUSELLO, ESQ.
MARK S. REICH, ESQ.
8 of the New York Bar
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9 -and-

10 LOREN R. UNGAR, ESQ.
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11 for Plaintiffs

12 ROBERT S. SAUNDERS, ESQ.
STEPHEN D. DARGITZ, ESQ.
13 ELISA M. CANNIZZARO, ESQ.
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14 for Defendants Art Technology Group, Inc.,
Daniel C. Regis, Robert D. Burke, Michael A.
15 Brochu, David B. Elsbree, John Robert Held,
Gregory W. Hughes, Mary Makela, Phyllis S.
16 Swersky, and Ilene H. Lang

17 KENNETH J. NACHBAR, ESQ.
JOHN P. DiTOMO, ESQ.
18 S. MICHAEL SIRKIN, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
19 for Defendants Oracle Corporation and Amsterdam
Acquisition Sub Corporation

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2 THE COURT: Well, all right. I
3 thought about this during the recess and where I am on
4 it. I'm going to give you something in writing, but
5 because of the timing, I'm going to go ahead and tell
6 you.

7 I just can't get comfortable with the
8 Morgan Stanley issue, I really can't. I understand
9 the arguments that Mr. Saunders and Mr. Nachbar have
10 raised. They were very well argued, but I do think
11 that given the nature of the disclosure already in the
12 proxy statement, given the magnitude of the fees on
13 the Oracle side, there needs to be supplemental
14 disclosure of that. And I have thought about the
15 injunction risk and the balancing of the equities and
16 have taken into account those issues as well. But
17 because I do think that the Morgan Stanley issue is
18 material, I will be enjoining the vote on the
19 transaction.

20 Now, what I don't have any problem
21 with people doing is convening and adjourning to the
22 extent that is helpful to people who are holding
23 proxies and record dates. I, frankly, didn't think
24 through where you guys are in terms of the 60 days

1 or -- or in terms of the proxy. So to the extent you
2 all want to convene and adjourn in light of that, that
3 is fine with me.

4 I am going to give you something in
5 writing that gives you my thoughts in a more -- I
6 don't know if "eloquent" is the right answer, but at
7 least more detailed fashion on this issue. And I will
8 do that -- I'll try to do it as fast as I can. I
9 can't promise you that it will be tomorrow. It might
10 be later in the week. It will certainly be this week.
11 And in that I will address the amount of time that I
12 think is necessary for the curative disclosure to be
13 out there.

14 In terms of a bond, I am really
15 troubled by this. I think what a lot of Mr. Saunders
16 says makes a lot of sense to me. And I really think
17 there is a lot of reason to wonder whether
18 entrepreneurial plaintiffs really should have a free
19 option to enjoin deals, you know. And I don't know if
20 Guzzetta is supposed to get Chancery judges thinking
21 about that. It does seem to me to be a very
22 distinguishable set of facts and circumstances and
23 really a -- a, you know, radically different order of
24 magnitude in terms of what's going on.

1 I also think that there are
2 differential considerations in play in the deal
3 context, because although Oracle certainly could close
4 immediately -- and I have no reason to disbelieve Mr.
5 Nachbar that's their intent. I'm sure it is their
6 intent. (Continuing) -- you know, that intent could
7 change. The drop-dead date isn't for some time yet.
8 And, you know, part of what stockholders agree to
9 when, in the proxy that was solicited and necessarily
10 the board the board has the power to under Delaware
11 law, is adjourn. So it's not clear to me what
12 expectancy stockholders necessarily have in getting
13 money immediately, such that there should be a large
14 bond on the time-value-of-money basis.

15 So as of today, I'm not prepared to
16 revisit or change this Court's historical practice of
17 not requiring bond in the circumstances, but I'm not
18 intending to announce a rule for all-time. I
19 definitely think it's something that I am thinking
20 about, particularly in the context of the -- of the
21 free option against enjoining deals; but for those
22 reasons, I am not going to condition the injunction on
23 a bond.

24 Now, for Mr. Saunders and Mr. Nachbar,

1 is that sufficient for your purposes, or do you need a
2 one-page order from me saying that the vote on the
3 merger is enjoined and essentially saying that I'm
4 going to provide you with further detail this week?

5 MR. NACHBAR: I think in terms of what
6 Your Honor said -- I'll let Mr. Saunders speak, but I
7 think that's sufficient, provided we can get a copy of
8 the transcript. I'm sure we can at least get the
9 ruling very promptly.

10 The question that I have that's
11 unclear is whether the company, assuming it sends out
12 corrected disclosure and assuming it gives people the
13 full right to revoke, may vote the proxies that it
14 already has, because two-thirds of the stockholders
15 have spoken. And I -- I honestly don't think this is
16 material, so I don't think it's going to change very
17 many people's minds; but, you know, we might be proved
18 wrong. But I think it would be better not to have to
19 start over at Square 1.

20 THE COURT: No. And that's my
21 intention, and that was part of my intention in
22 letting you all convene and adjourn. I think if
23 people have the right to revoke, that's sufficient.
24 Look, it very well could be for a lot of reasons that

1 the vote pretty much stays as it is. But as I say,
2 I -- the Morgan Stanley number, at bottom, seems to me
3 something that could be material, is material to
4 stockholder voting decisions. Some stockholders may
5 look at it and say "We don't care." But it's
6 information that I think, given in this context, they
7 should have.

8 MR. NACHBAR: We understand.

9 THE COURT: Mr. Saunders?

10 MR. SAUNDERS: Yeah. I guess the
11 right to revoke was my first issue. We've nailed that
12 down.

13 My second issue was, I don't know for
14 sure, but I think we'll need to know tomorrow when we
15 have the meeting and adjourn, you know, until when
16 we're going to adjourn.

17 And I -- so I don't know -- I guess I
18 had hypothesized a week. I don't know how quickly we
19 could find out from Your Honor how much time you think
20 the supplemental disclosures need to get out there.

21 THE COURT: Right. Well, look, I
22 mean, I can tell you the range. I think because of
23 the drafting of 251, the notice requirement there,
24 under no circumstances would it be more than 20 days,

1 because given that the statute allows a notice of
2 merger ex ante to be given on 20 days' notice, it
3 doesn't make any sense to me that it would be outside
4 of 20 days.

5 I haven't -- I mean, when I researched
6 this issue before, it seemed to me that there was one
7 tight case -- it might have been Gintel v XTRA --
8 where five days was allowed. That always struck me as
9 a little short. So my expectation would be that I
10 would probably be in the 10 to 15 days' range, and I'm
11 probably going to fall off closer to 10; and if I had
12 to bet, I would bet on 10. And it'll be, you know --
13 part of what I know you have to wait for is
14 clarification from me on exactly how much I'm going to
15 require you all to disclose about the Morgan Stanley
16 fees. But I think 10 days in the market is probably
17 what I'm going to require.

18 MR. SAUNDERS: And then I guess that
19 was my third question, was do we know what we're going
20 to have to disclose, or is that coming in Your Honor's
21 opinion?

22 THE COURT: I think it's going to come
23 in My Honor's -- my opinion. My Honor's. How's that
24 for self-congratulatory?

1 I have to think about that. And there
2 again, to give you some insight into where I'm going,
3 reserving the right to change my mind, I am influenced
4 by the fact that the proxy chose to go back to 2007 in
5 terms of reciting historical facts and that that's
6 when the original Morgan Stanley agreement was entered
7 into. And so were I ruling orally, that would be the
8 amount -- the time period that I'm focused on, and
9 that's what I expect to focus on in my written
10 opinion.

11 MR. SAUNDERS: Would it be helpful,
12 Your Honor -- I mean -- and -- would it be helpful for
13 Your Honor for us to try to reach agreement on it? I
14 mean, obviously the sooner we can get out the
15 supplemental disclosure, the sooner --

16 THE COURT: Mr. Saunders, that would
17 be wonderful. And -- but my -- the fact that I plan
18 to write on this, you know, if you all want to moot
19 that, you know, feel free. What I felt like I needed
20 to do was give you all some explanation for where I'm
21 coming from more eloquently than I thought I could do
22 off-the-cuff here today. And while I don't find any
23 of the other plaintiffs' claims to be material, I also
24 thought that I should go through them and explain why.

1 But if the parties were to reach
2 agreement on a supplemental disclosure that were to
3 cover that period and to let me know about that, that
4 would be fine with me and it would, you know, save
5 what's going to be, you know, some hard work this week
6 for my clerks and me.

7 MR. NACHBAR: Your Honor, I'm pretty
8 confident that we'll be able to reach agreement, with
9 the guidance that Your Honor has given and some of the
10 statements that the plaintiffs have made as to the
11 type of disclosure they're looking for.

12 Again, we don't regard any of this as
13 sensitive or earth-moving. We may be proved wrong,
14 but it's -- it's, at least from our standpoint -- it's
15 obviously the company's disclosure -- but it's --
16 we're not afraid to put facts out there. So my guess
17 is we'll be able to agree on the best way to do that.

18 THE COURT: Well, let's do this, then:
19 We'll -- we've been working. We'll keep working. We
20 won't burn the midnight oil tonight. But, you know,
21 we'll probably have a late dinner, gentlemen. But
22 then if -- if you all can let us know. I mean, my
23 team and I will be working on this tomorrow and the
24 next day. And certainly if you call us up, call

1 chambers up and talk to Kristie and say where you all
2 are, that's fine.

3 Again, in terms of where my head is,
4 I'm thinking about, you know, 10 days in the market.
5 I'm thinking about the same time period covered by the
6 background of the merger section. And those are
7 really -- the Morgan Stanley issue is the only one
8 that bothered me, and I felt like the rest of it were
9 things that were adequately explained.

10 And I should say on the termination
11 fee, I do think that ultimately I don't think the
12 record, as developed, provides a basis for me to
13 provide any more targeted relief along the lines that
14 I was asking Mr. Nachbar and Mr. Saunders about
15 whether there might be some room for.

16 So that's -- that's essentially a
17 preview of what you will get sometime later this week.

18 Yes, sir.

19 MR. RUSELLO: Your Honor, the first
20 thing I wanted to note is that, of course, we will
21 make every effort to work out adequate disclosure; but
22 to the extent the Court has any additional guidance,
23 it would certainly be worthwhile for us.

24 The second is that the 10 days that

1 the Court has in mind presumably would be influenced
2 by the manner in which the disclosures are
3 disseminated to shareholders. In other words, if
4 they're mailed --

5 THE COURT: I'm not going to require
6 mailing. This is going to be a --

7 MR. RUSELLO: Form 8-K, Your Honor?

8 THE COURT: -- a Form 8-K or
9 supplement. The securities jocks can figure out what
10 has to be required there, but I'm not going to require
11 another mailing.

12 MR. RUSELLO: Understood. Thank you,
13 Your Honor.

14 MR. SAUNDERS: Is the -- I apologize,
15 Your Honor. Can I ask another question?

16 THE COURT: Yeah. Look, I -- I
17 actually think it's good to get this stuff hashed out,
18 because I could -- I could give you all a decision,
19 let's say, Wednesday night or the first thing Thursday
20 morning and you all could have all these questions.
21 So, please, Mr. Saunders, you're not disturbing me at
22 all.

23 MR. SAUNDERS: Can we reach agreement
24 on the amount of time as well or --

1 THE COURT: I think 10 days is where
2 I'm headed. And I think it would be difficult to get
3 me less than that. But I think 10 days is the right
4 amount for something like this. You know, something
5 that might be bigger, like if there really had been
6 some price-oriented stuff in the proxy statement about
7 the projections or that type of thing, I might have
8 erred on the side of 15; but for something like this,
9 I think 10 days is where I'm leaning.

10 MR. SAUNDERS: Thank you, Your Honor.

11 THE COURT: All right. And the last
12 thing that I wanted to say to everybody is really just
13 to compliment you on what I thought was a
14 well-presented case and particularly for those of you
15 who aren't in front of me often. You may be wondering
16 well, does he say that to everybody. And I don't.
17 We -- you know, we have a culture where everybody gets
18 a trophy, but I don't believe in everybody gets a
19 trophy. I believe that when you do something good,
20 you ought to be told you do something good. And when
21 you do something less good, you ought to be told you
22 do something less good so that you can do better next
23 time.

24 And there are three things that I

1 really thought were well-done in this case. First of
2 all, as I said before at the scheduling conference, I
3 very much appreciated the responsible approach
4 Mr. Saunders and Mr. Nachbar took to scheduling. I
5 had concern that we were going to be jammed. And so I
6 was very glad to know that they had already undertaken
7 to start the process of making sure this case was
8 presented responsibly.

9 The second thing that I thought was
10 well-done were depositions. I read the depositions
11 and I didn't see any type of, you know, obstructionist
12 objections. The objections were minimal. I think,
13 you know, the only, frankly, eyebrow-raising moment I
14 had was the pound sand answer; but people seemed to
15 drive on over that. Maybe if you called me, I would
16 have said "Look, you know, I get to decide and you can
17 caveat it however you want." But, you know, in terms
18 of fights among counsel, there weren't any. And I
19 think that's a very important part of Delaware
20 practice, that people handle themselves appropriately
21 at deposition. And it was clearly done in this case.
22 And so I appreciate that.

23 And then, finally, I did think that in
24 terms of the briefing, while I empathize with

1 Mr. Saunders and I agree that, you know, you shouldn't
2 be intimating intentional misconduct, I generally
3 thought the briefing was -- was very well-targeted. I
4 thought that the plaintiffs picked their spots. So
5 many times you guys come in and have the laundry list
6 of disclosure issues. And I thought you did a good
7 job here of focusing in on what you really cared about
8 and allowed the defendants to address it.

9 So, as I say, I thought it was a
10 well-presented case. And I don't say that every time.
11 And so I appreciated your all's professionalism and
12 hearing the arguments today.

13 So I will get to work on an opinion.
14 If you guys can alleviate our burden in that regard,
15 certainly just give my chambers a call.

16 Thank you, everyone.

17 We stand in recess.

18 (Court adjourned at 4:53 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 15 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 20th day of December 2010.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent