

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

DOCKETED

MAY - 8 2017

R. POSTELL
COMMERCE PROGRAM

| | | |
|---|---|----------------------|
| ARTHUR EHRLICH, Individually and | : | APRIL TERM 2017 |
| On behalf of all others similarly situated, | : | |
| | : | NO. 02581 |
| Plaintiff, | : | |
| | : | COMMERCE PROGRAM |
| v. | : | |
| | : | Control No. 17043380 |
| ARCONIC, INC., et al., | : | |
| | : | |
| Defendants. | : | |

ORDER

AND NOW, this 3rd day of May, 2017, upon consideration of Plaintiff's Emergency Motion for Entry of Preliminary or Special Injunction and Directing Expedited Discovery, the response thereto, and all other matters of record, after a hearing on the Motion, and in accord with the Opinion issued simultaneously, it is **ORDERED** that said Motion is **DENIED**.

BY THE COURT,


PATRICIA A. McINERNEY, J.

Ehrlich Vs Arconic, Inc. Etal-ORDOP



**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

| | | |
|---|---|----------------------|
| ARTHUR EHRLICH, Individually and | : | APRIL TERM 2017 |
| On behalf of all others similarly situated, | : | |
| | : | NO. 02581 |
| Plaintiff, | : | |
| | : | COMMERCE PROGRAM |
| v. | : | |
| | : | Control No. 17043380 |
| ARCONIC, INC., et al., | : | |
| | : | |
| Defendants. | : | |

OPINION

Plaintiff Arthur Ehrlich purports to represent a class of current shareholders of defendant Arconic, Inc., a Pennsylvania corporation. Arconic is currently the subject of a proxy fight between Arconic's current Board of Directors, who were also named as defendants, and an investor, Elliott Management Corp., which holds approximately 12% of Arconic's shares. Five board members are up for re-election this month, and Elliott supports alternative candidates to fill four of their seats.

One March 13, 2017, Arconic filed its Proxy Statement supporting re-election of the incumbent directors.¹ On or about the same day, Elliott filed its competing proxy materials.²

¹ Arconic's Proxy Statement is available on-line at <https://www.sec.gov/Archives/edgar/data/4281/000119312517079518/d316303ddefc14a.htm>. A link to that web address was included in a declaration of counsel attached as an exhibit to plaintiff's Motion for Preliminary Injunction.

² Elliott's Proxy Statement is available on-line at https://www.sec.gov/Archives/edgar/data/4281/000092189517000683/dfan14a10168012a_03102017.htm. A link to that web address was included in a declaration of counsel attached as an exhibit to plaintiff's Motion for Preliminary Injunction.

Both parties provided the shareholders with proxy voting cards to be filled out and returned before the shareholders' meeting on May 16, 2017.³

On April 12, 2017, Arconic filed a Form 8K with the SEC to which it attached an "Amendment and Restatement of the Trust Agreement between Wells Fargo Bank, N.A. (as successor trustee) and Arconic Inc., dated September 24, 2007, as amended." The Form 8K stated as follows:

Arconic Inc. (the "Company") maintains a grantor trust relating to certain of the company's nonqualified deferred compensation and retirement benefit plans. The trust was established pursuant to a trust agreement entered into by the Company in 1993, which was amended and restated in 2007 (the "Trust Agreement"). The terms of the Trust Agreement, which is filed herewith as Exhibit 99.1, provide for funding of the trust by the Company in connection with a "change in control" (as defined in the Trust Agreement) under certain circumstances. The estimated aggregate amount of the required funding based upon the liabilities of the related plans is approximately \$500 million. While the assets of the trust would remain Company assets, following a change in control they would be available solely for purposes of paying benefits under the plans, other than in the case of the Company's insolvency.

On April 12, 2017, the Company delivered notice to the trustee that a "potential change in control" (as defined in the Trust Agreement) has occurred. As previously disclosed, Elliott Management Corporation is conducting a proxy solicitation to elect four new directors to replace four of the present directors of the Company. No determination has been made at this time as to whether there will be a change of control.⁴

The attached Trust Agreement describes its reason for existing, specifically that Arconic, beginning in 1993,

has established and maintains certain unfunded employee benefit plans ["Plans"] and arrangements for the benefit of a select group of management and/or highly compensated employees and former employees [of Arconic]; and

* * *

³ The May 16th meeting was subsequently cancelled by Arconic. It will apparently be rescheduled for the end of May.

⁴ Form 8K, p. 2. A copy of the Form 8K is attached as Exhibit A to defendants' Response to Motion for Preliminary Injunction.

has incurred and expects to continue to incur obligations pursuant to the terms of the Plans and wishes to establish the [Trust] to aid [Arconic] in meeting such obligations under the Plans[.]⁵

The Trust Agreement further provides that “After the occurrence of a Potential Change in Control and before the completion of a Change in Control, [Arconic] shall make a contribution to the Trust in an amount equal to 110% of the “Potential Liabilities.”⁶ This contribution is what Arconic implied, in its Form 8K, it would soon make, in the amount of \$500 million, due to a Potential Change in Control having occurred. Under the Trust Agreement,

[a] “Potential Change in Control” of the Company shall be deemed to have occurred upon the board of directors of the Company adopting a resolution to the effect that, for purposes of this Agreement, a Potential Change in Control has occurred and providing notice to the Trustee, or the Trustee having received notice from the Company’s Chief Executive Officer or its General Counsel that any of the following events have occurred:

- (a) the Company is negotiating an agreement, the consummation of which may result in the occurrence of a Change in Control;
- (b) the Company or any Entity states an intention to take or to consider taking actions which, if consummated, would constitute a Change in Control;
- (c) any Entity becomes the Beneficial Owner, directly or indirectly, of securities of the Company representing 5% or more of either the then outstanding shares of common stock of the Company or the combined voting power of the Company’s then outstanding securities with the purpose or with the effect of changing or influencing the control of the Company.⁷

According to Arconic’s own Proxy Statement, “on November 23, 2015, Elliott filed a Schedule 13D with the SEC reporting beneficial ownership of and combined economic exposure to approximately 5.1% and 6.4%, respectively, of Alcoa’s outstanding common stock.”⁸

⁵ Trust Agreement, p. 3. A copy of the Trust Agreement is attached as Exhibit B to defendants’ Response to Motion for Preliminary Injunction.

⁶ *Id.* at § 5.1(d)(3).

⁷ *Id.* at § 11.2.

⁸ Arconic’s Proxy Statement, p. 5.

Therefore, the third Potential Change of Control event, owning more than 5% of Arconic's shares, occurred over a year ago, but apparently the Board did not invoke the Trust provisions at that time.

The second event that constitutes a Potential Change in Control, the threat of an actual Change in Control, arguably occurred on March 13th when Elliott filed its Proxy Statement in support of its four candidates for director. An actual "Change in Control" is defined in the Trust Agreement as

(b) individuals who, as of the date hereof, constitute the board of directors of the Company cease for any reason to constitute a majority of the board; provided however, that any individual becoming a director whose election, or nomination for election by the Company's shareholders, was approved by a vote of at least 75% of the directors then comprising the Incumbent Board, but excluding, for this purpose, any such individual whose initial assumption of office occurs as a result of an actual or threatened solicitation of proxies by or on behalf of an Entity other than the board of directors (the "Incumbent Board") [.]⁹

Arconic's April 13th Form 8K cites Elliott's "proxy solicitation to elect four new directors" as a Potential Change in Control, i.e., the threat by Elliott of an actual Change in Control.

The Arconic Board is made up of 13 directors. Elliott previously selected three of the current directors of Arconic after threatening to solicit proxies during the 2016 board elections.¹⁰ If, after this election, Elliott adds four more of its hand-picked directors to the Arconic Board, it

⁹ Trust Agreement, § 11.1(b).

¹⁰ See Arconic's Proxy Statement, p. 5. ("On February 1, 2016, Alcoa and Elliott entered into an agreement pursuant to which Alcoa increased the size of its Board and appointed three individuals nominated by Elliott, Ulrich (Rick) Schmidt, Sean O. Mahoney and John C. Plant, to fill the vacancies resulting from such increase. Alcoa also agreed that each of these three Elliott nominees would be appointed to the board of directors of the value-add company (which later became Arconic) resulting from the previously announced separation. Under the agreement, Elliott agreed to refrain from engaging in solicitations of proxies, acquiring voting securities of Alcoa in excess of specified thresholds, or making disparaging statements regarding Alcoa and its directors and officers, in each case until a specified date. As contemplated by the agreement, Alcoa appointed Messrs. Schmidt, Plant and Mahoney to its Board effective as of February 5, 2016.")

will have chosen seven of the directors, which is a majority of the Board. Elliott would thereby control the Company, in theory at any rate.¹¹

On April 18, 2017, plaintiff commenced this action and subsequently filed an Emergency Motion for Entry of Preliminary or Special Injunction and Directing Expedited Discovery. In his Motion, plaintiff claims that the public filing of Arconic's Form 8K was fundamentally unfair, coming as it did approximately one month after the Proxy Statements were issued and one month before all the proxy cards were due and the voting ceased.¹² In plaintiff's view, the Form 8K constitutes a flagrant attempt to dissuade Arconic shareholders from voting for Elliott's director candidates, and to intimidate the shareholders into voting for the incumbents, by threatening to impose a \$500 million liability on Arconic if the Elliott directors are elected. In its Motion, plaintiff requests that the court enjoin Arconic and its current directors from enforcing the funding provisions of the Trust Agreement.

¹¹ The three existing Elliott directors apparently recently voted with the other non-Elliott directors in contravention of Elliott's expressed desires:

On January 31, 2017, Elliott delivered a notice to Arconic of its intention to nominate a slate of five nominees to stand for election at the 2017 Annual Meeting. Elliott also issued a press release and an investor presentation announcing its director nominations, calling for the Board to remove Mr. Kleinfeld as Chairman and Chief Executive Officer and suggesting that Larry Lawson should be installed as his replacement. Thereafter, between January 31, 2017 and February 3, 2017, Elliott made material revisions to its investor presentation and issued revised versions of its analysis on at least four occasions, and on February 3, 2017, Elliott filed the fifth version of its investor presentation with the SEC.

On January 31, 2017, Arconic issued a press release announcing that its 12 independent directors, three of whom had been nominated by Elliott, unanimously supported Arconic management and Mr. Kleinfeld as Chairman and Chief Executive Officer.

Arconic's Proxy Statement, pp. 7-8.

¹² In other words, plaintiff disputes only the timing of the filing of the Form 8K. There is apparently another Arconic shareholder action pending in the United States District Court for the Southern District of New York in which a different plaintiff disputes the accuracy of the statement in the Form 8K that a "potential change in control" has occurred. That claim is not before this court.

The court held a hearing on the Motion at which no shareholder or other witness testified in support of plaintiff's claims and only oral argument was heard.

In ruling on a preliminary injunction request, a trial court has apparently reasonable grounds for its denial of relief where it properly finds that any one of the following essential prerequisites for a preliminary injunction is not satisfied. First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.¹³

Plaintiff has failed to satisfy the first essential prerequisite for the preliminary injunction he seeks. While the timing of the Form 8K's release may have been strategic, there was no evidence presented that the Form 8K is causing immediate and irreparable harm, such as by chilling the votes of any of the shareholders, as alleged by plaintiff. Furthermore, it appears from the Trust Agreement that the \$500 million Arconic may pay into the Trust represents an existing liability that Arconic already owes to some of its current and future retired employees, and no new debt is contemplated. Therefore, an experienced or institutional investor is not likely to be intimidated into voting for the incumbent directors simply because the funds to pay this pre-existing debt are being put into a pre-existing trust.

Plaintiff has also failed to satisfy the second essential prerequisite for the preliminary injunction he seeks. The stated purpose of the Trust Agreement is to protect the interests "of a


¹³ Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 646–47, 828 A.2d 995, 1001 (2003).

select group of management and/or highly compensated employees and former employees [of Arconic]” in “certain unfunded employee benefit plans.”¹⁴ If the court were to enjoin the funding of the Trust, it could “substantially harm other interested parties in the proceedings,”¹⁵ namely the past and present employees who would benefit from the Trust and who were not all named as parties to this litigation.

The court is not convinced that plaintiff has satisfied the other essential prerequisites for a preliminary injunction either, but it is unnecessary to undertake any further analysis because plaintiff’s failure to satisfy the first two requirements is a sufficient basis for denying plaintiff’s requested injunction.

For all the foregoing reasons, plaintiff’s Emergency Motion for Entry of Preliminary or Special Injunction and Directing Expedited Discovery is denied.

BY THE COURT,


PATRICIA A. McINERNEY, J.

¹⁴ Trust Agreement, p. 3.

¹⁵ Summit Towne, 573 Pa. at 646, 828 A.2d at 1001.