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April 13, 2009

**BY E-FILING**

The Honorable William B. Chandler, III  
Chancellor  
Court of Chancery  
34 The Circle  
P. O. Box 424  
Georgetown, DE 19947

Re: *Kistefos AS v. Trico Marine Services, Inc. et al.*,  
C.A. No 4497-CC

Dear Chancellor Chandler:

I write on behalf of Trico Marine Services, Inc. ("Trico" or the "Company"), Richard Bachmann, Kenneth Burke, Joseph Compofelice, Edward Hutcheson, Jr., Myles Scoggins, Per Staehr and Ben Guill (collectively with Trico the "Defendants") in opposition to plaintiff's premature motion to expedite its declaratory judgment action addressing whether its proposed bylaw is valid under Delaware law.

**BACKGROUND**

Trico has recently announced April 17, 2009 as the record date for its upcoming annual meeting of stockholders and contemplates that its annual meeting will be held as early as late May, but no later than June 16, 2009. Among the issues to be voted upon at the annual meeting, two of Trico's directors are running unopposed for the two directorships up for election. Trico's board of directors is comprised of seven members, and is staggered into three classes. Pursuant to Trico's bylaws, directors are elected by a majority of the quorum present at the meeting. Further, both 8 *Del. C.* § 141(b) and Trico's charter provide that directors shall hold office until their successors shall have been elected and qualified or until their resignation or removal. Trico's charter also requires that the holders of two-thirds of the outstanding stock approve (i) changes to the board's size, (ii) removal of directors without cause, or (iii) approval of amendments to the bylaws.

Through these provisions, Trico has a governance regime in place at the statutory and charter level requiring that, in the event of a “failed election,” in which an incumbent director is not re-elected to a new three-year term by the required majority vote, the incumbent director will remain on the Board until he is succeeded, resigns or is removed. The proposed bylaw at issue in this case seeks to undo this regime.

The plaintiff is Kistefos AS, a Norwegian Limited Company and a 22-percent stockholder of Trico. On March 14, 2009, plaintiff sent a letter to the Company proposing for inclusion in the Company’s proxy materials eight stockholder proposals. On the same date, plaintiff announced in a press release that it intended to file a preliminary proxy statement and an accompanying proxy card to solicit proxies in connection with the annual meeting.

Of the eight proposals plaintiff submitted to the Company, seven will be presented for consideration at the Company’s annual meeting.<sup>1</sup> If these proposals are approved by the stockholders, in accordance with the voting requirements described above, the net effect will be to (i) increase the size of the board of directors from 7 to 9; (ii) fill the two vacancies thereby created with plaintiff’s nominees; (iii) remove one of the current directors from the board without cause; (iv) increase the quorum required for board action from a simple majority to seven directorships (six of whom must be US citizens); (v) adopt bylaw amendments regarding calling special meetings; and (vi) repeal board-adopted bylaws adopted after December 2008 (of which there are none).

Plaintiff’s eighth proposal (“Proposal 8”), which was rejected by the Company, provided that:

A person shall be ineligible to serve as a director if such person fails to receive the number of votes required to elect directors at any meeting of stockholders at which such person is to be elected (including any such meeting referred to in Article II and Article III hereof). The term of any existing director of the Corporation who fails to receive the number of votes required to re-elect such existing director at any meeting of stockholders at which such existing director is nominated to be re-elected (including any such meeting referred to in Article II and Article III hereof) shall immediately expire, and a vacancy in the Board of Directors shall be deemed to exist. This Section 7(C)(1) of Article II shall not be amended or repealed by the Board of Directors without a

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<sup>1</sup> Trico is a maritime company that is subject to the foreign ownership limitations prescribed through a series of related federal statutes and administrative regulations commonly referred to as the “Jones Act.” Trico has advised plaintiff that if Trico determines that the adoption of some or all of plaintiff’s proposals could cause Trico to lose the eligibility to conduct its business that is subject to the Jones Act, Trico will take all lawful steps to retain that eligibility, including disregarding some or all of plaintiff’s proposals if plaintiff presents them for stockholder action at the 2009 annual meeting.

unanimous vote of all of the directors then serving on the Board of Directors.

In a letter dated March 25, 2009, the Company rejected Proposal 8 stating:

Trico can only consider proposals at our stockholder meetings that comply with Delaware law and Trico's governing documents. The bylaw amendment set forth in Kistefos's "Proposal 8" would be invalid if adopted by Trico's stockholders because it is inconsistent with, among other things, Sections 141(b) and 141(k) of the Delaware General Corporation Law and Article FIVE, Sections 2 and 3 of Trico's charter. For this reason, Trico's Board has unanimously resolved to reject "Proposal 8" because it is not proper business that may be transacted by the stockholders at the 2009 annual meeting. Trico will disregard this proposal if Kistefos presents it for stockholder action at the 2009 annual meeting.

On April 8, 2009, plaintiff filed its complaint seeking declaratory judgment that the Company improperly rejected Proposal 8 and that Trico must permit Proposal 8 to be presented to Trico's stockholders for a vote at Trico's 2009 annual meeting. On the same day, plaintiff moved to expedite.

#### ARGUMENT

##### *I. The Relevant Standard On A Motion To Expedite A Determination Of The Validity Of A Proposed Bylaw.*

"This Court does not set matters for an expedited hearing ... unless there is a showing of good cause why that is necessary." *Greenfield v. Caporella*, 1986 Del. Ch. LEXIS 493, at \*5 (Del. Ch. Dec. 3, 1986) (Ex. A). With respect to a contested bylaw proposal, the test for expedited proceedings is difficult to meet and the Court is reluctant to improvidently intervene when the issues touch upon novel and important facets of Delaware corporation law. See, e.g., *Bebchuk v. CA, Inc.*, 902 A.2d 737 (Del. Ch. 2006) (hereafter "*Bebchuk*"). Instead, where "the Court is asked to adjudicate the validity of a proposed measure that has not been—and may never be—adopted, compelling reasons to justify judicial intervention must be shown." *Diceon Elec., Inc. v. Calvary Partners, Inc., L.P.*, 1990 Del. Ch. LEXIS 209 (Del. Ch. Dec. 27, 1990) (Ex. B). In all events, expedited proceedings will not be scheduled if the movant fails to show both that the claims are sufficiently colorable and that there is a sufficient possibility of threatened irreparable harm. See *Giammargo v. Snapple Beverage Corp.*, 1994 Del. Ch. LEXIS 199, at \*6 (Del. Ch. Nov. 15, 1994) (Ex. C); *In re W. Nat. Corp. S'holders Litig.*, 1998 Del. Ch. LEXIS 52, at \*2 (Del. Ch. Feb. 4, 1998) (Ex. D).

*II. Plaintiff Has Shown No Compelling Reason For An Expedited Declaratory Judgment.*

In support of its motion to expedite, plaintiff argues that “[t]here is no question that the stockholders of a Delaware corporation are entitled to amend the corporation’s bylaws.... [And] there is no dispute that Kistefos has complied with the advance notice provisions of Trico’s bylaws.” (Motion ¶ 6.) This single conclusory argument fails to set forth any compelling reason why expedited proceedings are warranted here.

As an initial matter, plaintiff’s proposed bylaw faces a challenging two-thirds of the outstanding vote required for approval, which increases the likelihood that plaintiff’s claim will become moot in the event the two-thirds approval is not obtained. The judicial intervention urged by the plaintiff at this premature stage would therefore be improvident. See *Bebchuk*, 902 A.2d at 741 (“the key event necessary to vest jurisdiction such that declaratory judgment is appropriate is the *adoption* of the proposed bylaw.”) (emphasis added); see also *Diceon Elec.*, 1990 Del. Ch. LEXIS 209 (preemptive judicial intervention may be appropriate if bylaw approval is certain).

Second, plaintiff has not—and cannot—demonstrate that the Company’s stockholders need an adjudication of the proposed bylaw’s validity to avoid confusion in deciding how to vote. See *Diceon Elec.*, 1990 Del. Ch. LEXIS 209 (identifying need to inform stockholders as a compelling reason for preemptive judicial action). To the contrary, the proxy soliciting machinery on both sides is being brought to bear to inform the stockholders of each side’s respective views concerning the proposed bylaw’s validity. That obviates any need for preemptive judicial intervention. See *General DataComm Indus. v. Wisconsin Inv. Bd.*, 731 A.2d 818, 821 (Del. Ch. 1999) (no compelling reason to expedite if “proxy materials disclose that there are differing views regarding the validity of the ... Bylaw.”); *Bebchuk*, 902 A.2d at 741 (same); cf. *Phelps Dodge Corp. v. McAllister*, 1999 Del. Ch. LEXIS 202, at \*6 (Del. Ch. Sept. 27, 1999) (“When the arsenals of all parties have been unleashed so as to fully and completely educate the shareholders of their choices, it is not for this Court to ride to the rescue.”) (Ex. E).

Finally, because plaintiff faces no threat of irreparable harm there is no compelling reason for this court to decide an unripe claim. Even if this Court were to decide the validity of the proposed bylaw, the party aggrieved by that decision will surely appeal to the Supreme Court and thus there will be no final relief prior to the annual meeting. See *Bally Total Fitness Holding Corp. v. Liberation Investments, L.P.*, et al., Del. Ch., C.A. No. 1820-CC, Chandler, C. (Transcript Ruling) at 26-27 (Dec. 7, 2005) (recognizing that court did not have to engage in the futile act of expediting a challenge to a bylaw when final relief would not be available before the meeting date). Further, assuming that the stockholders’ vote does not moot this case, this Court’s powers to remedy any harm after the meeting is held, and the facts become solidified, is broad. See *id.* at 27. In that circumstance, relief would be prompt because, as plaintiff concedes, its claim solely presents a legal issue, there will be no discovery and the

matter can be heard at the Court's convenience.<sup>2</sup> (*See* Motion ¶ 19.) Thus, plaintiff's interests are sufficiently protected such that there cannot be any showing of irreparable harm. *See id.* (holding that court's ability to render prompt relief post meeting negates showing of irreparable harm); *General DataComm*, 731 A.2d at 822 (same); *Diceon Elec.*, 1990 Del. Ch. LEXIS 209, at \*8 (same).

For each of these reasons, plaintiff fails to show that there are compelling reasons for this Court to rule on plaintiff's claim before it is ripe. Thus, an expedited declaratory judgment proceeding should not be scheduled.

### III. Plaintiff's Claims Are Not Colorable.

Independent from plaintiff's failure to demonstrate a compelling reason for a judicial ruling now, expedited proceedings should not be scheduled because plaintiff's claims are not colorable.

At bottom, plaintiff's proposed bylaw appears to be premised upon the novel concept that if a nominee does not receive the majority vote required for re-election, he is not "qualified" to serve as a director, his term will expire and his seat on the board would be deemed vacant. Thus, plaintiff seeks to displace via bylaw both 8 *Del. C.* § 141(b) and the Company's charter, which provide that each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. But because plaintiff's proposed bylaw is contrary in this regard to both Delaware law and the Company's charter, the proposed bylaw is invalid. *See* 8 *Del. C.* § 109(b); *Centaur Partners, IV, v. National Intergroup, Inc.*, 582 A.2d 923, 929 (Del. 1990) (relying in part on § 109(b) to invalidate a bylaw that was inconsistent with the law); *Frantz Manufacturing Co., v. EAC Industries*, 501 A.2d 401 (Del. 1985) ("A bylaw that is inconsistent with any statute ... is void..."); *Essential Enterprises Corp. v. Automatic Steel Products*, 159 A.2d 288, 289 (1960); ("A by-law, which is in conflict with a provision in a certificate of incorporation is invalid."); *Burr v. Burr Corp.*, 291 A.2d 409, 410 (Del. Ch. 1972) ("A by-law in conflict with the certificate of incorporation is a nullity.").

Plaintiff's contention that its proposed bylaw merely seeks to "animate Trico's chosen governance scheme" is nonsense. (Compl. ¶ 2.) First, the ability of a director to holdover in a failed election serves an important policy goal by ensuring that "the power of the board of directors to act continues uninterrupted even though an annual shareholders' meeting is not held or the shareholders are deadlocked and unable to elect directors at the meeting." Committee on Corporate Laws, ABA Section of Business Law, *Report of the Committee on Corporate Laws on Voting by Shareholders for the Election of Directors* at 9 (March 13, 2006) (quoting Model Bus. Corp. Act § 8.05 (Official Comment)). Indeed, in 2006, when the

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<sup>2</sup> Because, as plaintiff's concedes, the issue presented to this court solely raises legal issues, in the event expedited proceedings are scheduled, Defendants will promptly move to dismiss and enter into a briefing schedule that is consistent with the Court's scheduling of this matter.

Delaware General Assembly considered the means through which a corporation might give effect to majority voting policies, it did not alter the holdover rule, but instead chose to amend Section 141(b) to permit a director to submit an irrevocable resignation conditioned upon that director's failure to receive a specified vote for re-election. S. 322, 143d Gen. Assembly, 75 Del. Laws, c. 306, § 4 (2006) *reprinted in* FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 141.17.14, n.881 (2009).

Here, the Company has ordered its affairs through its charter such that majority voting is required for the election of directors, but the holdover rule still applies. Plaintiff's proposed bylaw is invalid because it impermissibly seeks to bypass the holdover rule embodied in the DGCL and the Company's charter.

A second reason why this proposed bylaw is invalid is because it purports to create a qualification beyond those that a stockholder is authorized to adopt via bylaw under the DGCL. For example, stockholders are permitted to adopt qualifications for directors under 8 *Del. C.* § 109(b), but that authority is limited to director qualifications that are meant to address a skill or an attribute making a person fit for office. *See, e.g.*, 1 DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 13.01[5] (2008) ("Valid qualifications could be either general, as, for example, a maximum age, or specific, as for example, a requirement of American citizenship for directors of a corporation engaged in the defense industry."). Here, the failure of a director to get a requisite vote for reelection is not a "qualification" contemplated under 8 *Del. C.* § 109(b) and is thus not an appropriate matter for stockholder action under Delaware law. *Cf.* L. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 *Tulane L. Rev.* 409, 483 (1998) (expressing doubt that a bylaw, styled as a qualification, could require commitment to a sale of the company as a condition to director election).

For at least these reasons, plaintiff cannot demonstrate that its claim for declaratory judgment is colorable. This failure is an independent basis to deny plaintiff's request to schedule an expedited declaratory judgment hearing.

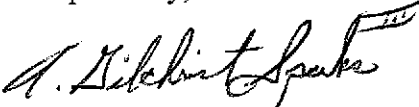
\* \* \*

One final consideration merits mention in considering why expedited proceedings should not be scheduled in this case. At a very minimum, the infirmities with respect to plaintiff's proposed bylaw, which are merely highlighted above, raise novel issues of Delaware corporation law that are "worthy of careful consideration." *Bebchuk*, 902 A.2d at 741. Thus, this Court's traditional reticence to prematurely adjudicate the validity of a bylaw is fully implicated here, and "prudence dictates that judicial action regarding whether the [bylaw] is valid should await an affirmative stockholder vote." *Id.* For this reason, independent from any other consideration, this Court should deny the motion to expedite and decline to schedule further proceedings in this matter until such time as a justiciable controversy arises. *Cf. Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 481 (finding that unripe claim raising issues "novel and important . . . to Delaware corporate law" should be dismissed).

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Counsel is available should Your Honor have any questions.

Respectfully,

A handwritten signature in cursive script, reading "A. Gilchrist Sparks, III". The signature is written in black ink and is positioned above the typed name.

A. Gilchrist Sparks, III (#467)

cc: Gregory V. Varallo, Esq. (by e-filing)  
Register in Chancery (by e-filing)