

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: April 14, 2009
Decided: April 14, 2009

Gregory V. Varallo
Ethan A. Shaner
Scott W. Perkins
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

A. Gilchrist Sparks, III
John P. DiTomo
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

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

Dear Counsel:

In this action for declaratory relief, plaintiff Kistefos AS (“Kistefos”), a substantial minority stockholder of Trico Marine Services, Inc. (“Trico” or the “Company”), seeks a declaration that the Company improperly rejected a proposed bylaw on grounds that the proposed bylaw, if adopted, would be inconsistent with Delaware law and the Company’s certificate of incorporation.¹ Trico recently announced that April 17, 2009 is the record date for the upcoming annual meeting, which is scheduled to take place as early as late May, but must occur no later than

¹ Defendants are Trico and seven individuals alleged to have been members of Trico’s board at all times relevant to this action.

June 16, 2009. Plaintiff moved for expedited proceedings, and seeks a schedule that would allow the Court to grant relief before the annual meeting. On April 14, the court heard oral argument on the motion to expedite via teleconference. On the conditions set forth below, including that a stockholder vote on the proposal will be held at Trico's 2009 annual meeting, the motion to expedite is denied.

Trico is a Delaware corporation that provides marine support vessels to the global offshore oil and gas industry and operates primarily in international markets. Kistefos, a Norwegian limited company, owns approximately 22.2% of Trico's issued and outstanding common stock, and is Trico's largest stockholder. On March 14, Kistefos sent a letter to Trico's board that included several proposals to be put before Trico's stockholders for a vote at the 2009 annual meeting. Among these proposals are: (1) a proposal to amend the bylaws to change the number of directors on the board from seven to nine; (2) a proposal to amend the bylaws to change the number of directors required to constitute a quorum from a majority to seven, six of whom must be United States citizens; (3) a proposal to remove a current director from the board; and (4) if the three previous proposals are adopted, the nomination of two persons for election as directors.² Also included in the March 14 letter was the proposal at issue in this case, the so-called "Proposal 8," which provides, in part, 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 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 . . . shall immediately expire, and a vacancy in the Board of Directors shall be deemed to exist.

Trico's bylaws currently provide that directors are elected by a majority vote of stockholders. Under Trico's governing documents, however, an incumbent director who receives only a plurality of votes can continue to serve as a

² According to defendants, Trico is subject to the Merchant Marine Act of 1920, commonly referred to as the Jones Act, which imposes foreign ownership limitations on certain maritime companies. The proposals in the March 14 letter were in part a response to Trico's claims that plaintiff's previous proposals would have put Trico in danger of violating the ownership limitations of the Jones Act.

“holdover” director until a successor has been elected or until the director’s resignation or removal. Plaintiff asserts that it submitted “Proposal 8 to give ‘teeth’ to the Company’s otherwise illusory majority voting requirement.”³

In a letter dated March 25, the Company rejected Proposal 8 on the grounds that the bylaw would be invalid if adopted because it is inconsistent with, among other things, the provisions of Trico’s certificate of incorporation and §§ 141(b) and (k) of the Delaware General Corporation Law (“DGCL”). The letter further stated that:

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.

Plaintiff initiated this action by filing the Verified Complaint and motion to expedite on April 8. The complaint alleges that Proposal 8 is consistent with Trico’s certificate of incorporation, bylaws, and Delaware law. The motion to expedite seeks a prompt final disposition of plaintiff’s claims so that Kistefos will be able to solicit stockholders to vote in favor of Proposal 8 at the annual meeting.

During a teleconference with the Court on April 14, the parties, through their attorneys, each represented their positions with respect to expedition and the status of Proposal 8 with regard to the 2009 annual meeting. Plaintiff, while arguing that the case warrants expedition, represented to the Court that such expedition would not be necessary if the stockholders were permitted to vote on Proposal 8 at the 2009 annual meeting. Trico argued that, in order to preserve its legal position that Proposal 8 was invalid because it violates Trico’s certificate of incorporation and Delaware law, it must “disregard” the proposal if it is presented at the meeting. Trico offered, however, to collect and preserve the proxies submitted for and against Proposal 8, so that it could later be determined if the proposal received the required vote. Plaintiff agreed in principle with that result, but argued that it should be allowed to present Proposal 8 at the annual meeting in the same manner as other proposals. In response, Trico again took the position that it must, in order to preserve its legal position, “disregard” Proposal 8 at the meeting and prevent it from being presented to the stockholders as a valid proposal for a vote.

³ Pl.’s Mot. for Expedited Proceedings ¶ 2.

This remaining disagreement between the parties can be easily remedied as follows: the defendants' legal position—that Proposal 8 would be invalid if adopted because it is inconsistent with, among other things, Trico's certificate of incorporation and DGCL §§ 141(b) and (k)—is hereby noted and preserved. Proposal 8 will be presented for a stockholder vote at the 2009 annual meeting in the same manner as other proposals are presented to the stockholders for a vote. Because its legal position has been preserved, Trico has no reason to prevent a stockholder vote on Proposal 8. Accordingly, Kistefos will be permitted to solicit proxies and present arguments at the annual meeting regarding Proposal 8 in the same manner that it is permitted to do with respect to other proposed bylaws. In other words, the stockholders will be permitted to vote on Proposal 8 at the annual meeting in the same manner as they are permitted to vote on other proposed bylaws.

The resolution described above obviates the need for expedited proceedings. In deciding whether to expedite proceedings, the Court must determine whether “the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury,” such that the additional costs of proceeding on an expedited basis are justified.⁴ In light of the now pending stockholder vote on Proposal 8, plaintiff faces no irreparable injury. The stockholders will vote on Proposal 8 at the annual meeting, and if the proposal receives the required number of votes, then the issue will be preserved and ripe for judicial review. Additionally, pending the stockholder vote on Proposal 8 at Trico's 2009 annual meeting, the issue of the legal validity of Proposal 8 is not ripe because the relevant events that must occur before the issue requires adjudication—namely, the approval of Proposal 8 by Trico's stockholders—may never occur.⁵ Absent some compelling reason to do otherwise, this Court should refrain from rendering an advisory opinion where adjudication of the issue is not needed for there to be an informed stockholder vote on the proposal.⁶

⁴ *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

⁵ See *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479-80 (Del. 1989); *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740-45 (Del. Ch. 2006); *Gen. Datacomm Indus., Inc. v. Wis. Inv. Bd.*, 731 A.2d 818, 820-22 (Del. Ch. 1999); *Diceon Elecs., Inc. v. Calvary Partners, L.P.*, 1990 WL 237089, at *3 (Del. Ch. Dec. 27, 1990).

⁶ See *Bebchuk*, 902 A.2d at 741-44; *Datacomm*, 731 A.2d at 820 (“As in *Diceon*, the stockholders can cast an informed vote if the proxy materials disclose that there are differing views regarding the validity of the Repricing Bylaw.”); *Diceon*, 1990 WL 237089, at *3

For the foregoing reasons, and on the conditions described above, the motion to expedite is denied. If Proposal 8 is approved by the stockholders at the 2009 annual meeting, and the parties believe that there are remaining issues that require judicial intervention, then the parties should contact the Court to set a schedule.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink on a light-colored background.

William B. Chandler III

WBCIII:jmb

(“Despite Diceon’s contrary assertion, its shareholders do not need an adjudication of the by-law proposal’s validity in order to cast an informed vote.”).