



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

VERNON A. MERCIER,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 2226-VCS
)	
INTER-TEL, INCORPORATED, INTER-)	
TEL (DELAWARE), INCORPORATED,)	
NORMAN STOUT, ALEXANDER)	
CAPPELLO, J. ROBERT ANDERSON,)	
JERRY W. CHAPMAN, GARY D.)	
EDENS, STEVEN E. KAROL, ROBERT)	
RODIN and AGNIESZKA WINKLER,)	
Defendants.)	

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT AND IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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Inter-Tel (Delaware), Incorporated

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PRELIMINARY STATEMENT

If it was not before, it is now clear upon the filing of Plaintiff's answering brief that the continued prosecution of this action has little or nothing to do with any interest Plaintiff or the class may have in securing redress for alleged wrongs done to them, and everything to do with Plaintiff staying in court to position himself first in line to vet any grievances that might arise in the future in connection with an eventual sale of Inter-Tel, as evidenced by his recent Supplement to the Second Amended Complaint challenging the conduct of the ongoing sale process and Plaintiff's June 21, 2007 letter to the Court "defending his turf" from interveners.

As a result, we now have such anomalies as Count II (challenging a consent provision which under Arizona law would be mandatory) and Count V seeking rescission of Inter-Tel's reincorporation to Delaware (the effect of which would be to validate the very consent provision which Plaintiff challenges in Count II). By the same token, Plaintiff challenges the pre-filing correction to Inter-Tel's certificate of incorporation to comply with Delaware law by specifying that Inter-Tel's common stock has a \$0.001 par value, notwithstanding that the only effect of invalidating that correction would be to impose a \$400,000 filing fee penalty upon Inter-Tel and preclude it from taking advantage of the alternative method for paying franchise taxes under 8 *Del. C.* § 503(a)(2), thereby also increasing its continuing franchise tax bill.

It takes nothing more than to read Section V of Plaintiff's opposition brief to realize how divorced Plaintiff's arguments have become from concepts of harm, equity and common sense. Further, as will become clear from a reading of this brief, a dominant technique utilized by Plaintiff in responding to defendants' opening brief was simply to ignore arguments made and cases cited to which there was no cogent response. Rather than burden the Court in every instance with a reiteration of arguments already made and not responded to, Defendants

point out and cross-reference to the opening brief in those instances where Plaintiff has simply ignored arguments previously made.

Plaintiff's opposition brief also makes a habit of citing cases to try to save his claims that, when examined, do not support his arguments at all.

On one point Plaintiff and Defendants appear to agree. This "gotcha" lawsuit, devoid of any equities, has gone on too long. For the reasons we will discuss hereafter, the time is now to dismiss each and every one of Plaintiff's claims. Plaintiff concedes that the facts are not in dispute and, therefore, the Court may dismiss all of his claims with prejudice and, at a minimum, deny his motion for summary judgment.

ARGUMENT

I. COUNT I AND PART OF COUNT III ARE NOT YET RIPE AND, THEREFORE, SHOULD BE DISMISSED.

Count I and the claims in Count III dealing with the BCCA and the so-called “Defensive Measures” should be dismissed because they are not ripe. (*See* Defs.’ Opening Brief at 11-12.) Plaintiff does not dispute that his claims must be ripe or they are subject to dismissal. (Pl.’s Opp. at 27 n.105.)¹ Instead, Plaintiff argues that Defendants should have raised the argument earlier. (Pl.’s Opp. at 27 n.105.) Ripeness, however, is jurisdictional in nature and may be raised at any time by any party or by the Court *sua sponte*. *See, e.g., Mendelson v. Delaware River & Bay Authority*, 112 F. Supp. 2d 386, 395 (D. Del. 2000) (“[W]hether an action presents a justiciable case or controversy that is ripe for decision, cannot be waived. They can be raised at any time by any party or, for that matter, by the court *sua sponte*.”).

Plaintiff cites a pair of related Delaware Supreme Court cases, *Stroud v. Milliken Enterprises* (“*Stroud I*”) 552 A.2d 476 (Del. 1989) and *Stroud v. Grace* (“*Stroud II*”), 606 A.2d 75 (Del. 1992), in support of his argument that his claims are ripe. Neither of the cases, however, supports Plaintiff’s argument and, instead, both support dismissal here.

In *Stroud I*, the Delaware Supreme Court raised *sua sponte* the issue of ripeness, for the first time on appeal. 552 A.2d at 477. Both plaintiffs and defendants argued that the case was ripe for decision. *Id.* at 479. The Delaware Supreme Court nonetheless dismissed the plaintiffs’ appeal, remanded, and directed the trial court to vacate its decisions and dismiss the proceedings below because, among other reasons, the parties had “inappropriately drawn the trial court into the granting of an advisory opinion upon a significant question of corporation law which, in our view, was clearly not ripe for judicial intervention.” *Id.* at 481.

¹ Since the pages of Plaintiff’s brief were not numbered, Defendants cite to page numbers handwritten by their counsel.

Similarly, in *Stroud II*, an appeal arising from the same series of disputes involving the same parties as *Stroud I*, the Delaware Supreme Court upheld the validity of a challenged by-law that was plaintiff's sole surviving claim after the Court of Chancery granted summary judgment for defendants on all other claims. 606 A.2d at 78. The trial court held that the by-law was "unreasonable and unfair, on its face" because it gave the Board unfettered discretion to disqualify the stockholders' candidates without recourse, and that this would "effectively disenfranchise proxy voters . . ." *Id.* at 95. The Delaware Supreme Court reversed, holding that plaintiff's claims about the by-law were not ripe, and reasoning that "[t]here was no basis to invalidate By-law 3 upon some hypothetical abuse." The Court went on to note that plaintiffs "totally failed" to show that the by-law, establishing a nomination procedure for candidates for the board of directors, "caused and will continue to cause injury" to the company's shareholders. *Id.* at 95. Instead, the Court reasoned that the board should have a reasonable opportunity to interpret the bylaw in a fair and proper manner. *Id.*

As in *Stroud I* and *II*, here Plaintiff has based his allegations on hypothetical abuse and has failed to show that the shareholder-approved provisions he seeks to invalidate "cause and will continue to cause injury." The very cases that Plaintiff cites reinforce the well-settled rule that "courts will not lend themselves 'to decide cases which have become moot, or to render advisory opinions'" on cases that are not yet ripe. *Stroud I*, 552 A.2d at 480 (internal citations omitted). Moreover, the board should have a reasonable opportunity to interpret the charter provisions in a fair and proper manner. *Stroud II*, 606 A.2d at 95.² Accordingly, Count I and the applicable portion of Count III should be dismissed.

² Indeed, the Board has done so here despite Plaintiff's hypotheticals. For example, the Board provided, as requested, reassurance that Mihaylo would not be treated differently from other potential bidders should he propose a business combination determined to be a superior proposal to the Mitel Merger. *See* Defs.' letter to Court dated May 11, 2007.

II. COUNT I SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE A CLAIM THAT THE BUSINESS COMBINATION CHARTER AMENDMENT IS INVALID.

Plaintiff's allegations about the Business Combination Charter Amendment ("BCCA"), referred to in Plaintiff's opposition brief as the "Section 203 Provision," fail to state a claim. Plaintiff ignores that Inter-Tel's shareholders, including Mihaylo who is the one allegedly harmed by the BCCA, voted in favor of it. Delaware General Corporation Law ("DGCL") Section 203 itself remains in effect and the BCCA is not invalid because it provides different, additional protections to stockholders. Contrary to Plaintiff's arguments that the BCCA is a "permanent" ban on business combinations, it is merely a voting provision and the events as they unfold have shown that the BCCA has not discouraged, let alone prevented, any potential business combination. Finally, the Board was not required to reaffirm the BCCA after the shareholder vote, as it had approved the BCCA to be added to the charter (in Arizona or Delaware) after shareholder approval.

A. Plaintiff Ignores That Inter-Tel's Shareholders, Including Mihaylo, Voted In Favor Of The BCCA.

Further emphasizing that this action has little or nothing to do with any interest Plaintiff or the class may have in securing redress for wrongs done to them, Plaintiff argues that the BCCA should be invalidated. Plaintiff, however, entirely ignores that *the BCCA was approved by a vote of Inter-Tel's shareholders*. (SAC ¶ 45, 61.) Moreover, Mihaylo—the one stockholder who is allegedly adversely affected by the provision³—*also voted in favor of the BCCA*. (Defs.' Opening Brief, Ex. E (Inter-Tel (Delaware), Inc., Soliciting Material (Schedule 14A), at 3 (May 5, 2006)).) If anything is "Kafkaesque," (Pl.'s Opp. at 3), it is Plaintiff continuing to assert his claim to invalidate the BCCA.

³ See, e.g., Pl.'s Opp. at 33 n.122 (arguing that the BCCA "severely limits, if not eliminates, the stockholders' opportunity for a competing proposal from Mihaylo").

B. DGCL Section 203 Remains In Effect.

Plaintiff further ignores that DGCL Section 203 remains in effect. As stated in the Proxy Statement, “[t]he Delaware Certificate does not opt out of [DGCL Section 203].” (Def.’ Opening Brief, Ex. B (INTL000683 (5/31/06 Proxy Statement))). Thus, all of Plaintiff’s arguments that the BCCA is invalid because it “eliminates” Section 203 (*see, e.g.*, Pl.’s Opp. at 31) lack merit because Section 203 remains in its full vigor.⁴ The BCCA merely provides different, additional protections for stockholders.

C. Plaintiff’s Arguments Are Based On The Faulty Premise That Section 203 Precludes All Charter Provisions That “Conflict.”

Plaintiff argues that, because Section 203 begins with the words “[n]otwithstanding any other provisions of this chapter,” any corporate governance actions that “conflict” with Section 203 are invalid. (Pl.’s Opp. at 34.) Plaintiff, however, misinterprets these words. They are intended to reflect the mandatory nature of Section 203, *i.e.*, that absent an opt-out, it applies to all public Delaware corporations as defined in Section 203(b)(4). It does not, however, preclude stockholders from voting for *different or additional protections* under

⁴ Similarly, as to Plaintiff’s argument that the BCCA would somehow preclude a stockholder from exercising the statutorily-conferred right to effect a short-form merger under DGCL Section 253 (Pl.’s Opp. at 32), nothing in the BCCA purports to trump the statutory scheme of Section 253 nor, under commonly understood principles of construction, could it be read to limit the rights conferred by the statute. *See Henley Group, Inc. v. Santa Fe S. Pac. Corp.*, 1988 WL 23945, at *18 (Del. Ch.) (construing certificate provision as valid under Sections 141 and 102 of the DGCL); *St. Stanislaus Kostka Church v. Mayor*, 105 A.2d 596, 598 (Del. Super. 1954) (harmonizing statute and city charter); *Loew’s Theatres, Inc. v. Commercial Credit Co.*, 243 A.2d 78, 81 (Del. Ch. 1968) (holding that charter provision that limited Section 220 rights was unenforceable). Simply put, any stockholder holding 90% or more of the outstanding shares has the right to effect a short-form merger under Section 253 and the BCCA does not and cannot purport to abrogate or limit that statutory right. Moreover, Plaintiff’s argument to the contrary is based on a hypothetical that is not ripe for declaratory relief. (*See supra* at 4.)

the broad authority of DGCL Section 102(b)(1), *e.g.*, those that the stockholders voted for in the BCCA.⁵

If Plaintiff were correct, Delaware corporate law would be turned on its head. All provisions that “conflicted” with Section 203—*e.g.*, “fair price provisions” and “poison pills” (*see* Defs.’ Opening Brief at 15-16)—would also be invalid. This is clearly not what the legislature intended.

Plaintiff cites *Jones Apparel Group, Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 847-48, for the proposition that the absence of a specific authorization in Section 203 to vary its terms in a company’s certificate of incorporation is a “strong indication that the legislature did not intend the statutory prohibition to be extended by the certificate.” (Pls.’ Opp. at 34.) *Jones*, however, provides no support for Plaintiff’s argument. To the contrary, in *Jones*, this Court rejected a party’s argument that because DGCL Section 213(b) did not include prefatory language such as “unless otherwise provided in the certificate of incorporation” that the company’s charter could not have a more restrictive provision than that in Section 213.⁶ 883 A.2d at 844-47. This Court reasoned, in part, that “Delaware’s corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations” *Id.* at 845. That concept is even more compelling here, where the charter provision in question does not purport

⁵ Contrary to Plaintiff’s arguments, Delaware’s public policy with respect to the content of charter amendments is to be found in DGCL Section 102(b)(1), which liberally permits “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation” Section 203 does not require a charter provision to be effective, and does not purport to state public policy regarding what may be contained in a charter provision.

⁶ The applicable charter provision provided that the record date of any consent provision shall be on the date on which the first consent is delivered to the company. *Jones*, 883 A.2d at 838. This is more restrictive than DGCL Section 213(b) which provides that the board of directors may also set the record date, in lieu of the above. *Id.* at 841-42.

to alter any portion of Section 203, but instead is a free-standing provision with its own terms and limitations.⁷

D. The BCCA Is A Voting Provision, Not A “Permanent Ban”
On Business Combinations.

Plaintiff argues that the BCCA “violates Section 203(a)” because the BCCA enacts a “permanent ban” on business combinations. (Pl.’s Opp. at 30.) However, the BCCA does not enact a permanent ban on anything—it is merely a voting provision requiring that the business combination be approved by the affirmative vote of at least a majority of the outstanding voting stock which is not owned by the interested stockholder. (Defs.’ Opening Brief, Ex. C (Inter-Tel (Delaware) Inc., Current Report (Form 8-K), Exhibit 3.1, at 5 (July 3, 2006)) (stating that in order for the Corporation to engage in a business combination, there must be “the affirmative vote of at least a majority of the outstanding voting stock which is not owned by the interested stockholder”).)

On a related note, Plaintiff complains that the BCCA’s omission of the various opt outs provided by Section 203(b) violates the DGCL because Section 109 authorizes stockholders to amend the bylaws and Section 203(b)(3) empowers the stockholders by a by-law amendment to eliminate the restrictions on business combinations imposed by Section 203 without board concurrence. (Pl.’s Opp. at 33.) Stockholders, however, cannot alone opt out of charter provisions and they voted in favor of the BCCA as discussed below.

⁷ Plaintiff does not allege that the BCCA runs afoul of DGCL Section 203(d)’s requirement that no certificate require a greater vote of stockholders. Indeed, the BCCA requires a *lesser* vote of stockholders: rather than requiring the approval of two-thirds of the disinterested stockholders to consummate a business transaction as required by Section 203, the BCCA requires the approval of only a majority of disinterested shareholders. Defs.’ Opening Brief, Ex. C (Inter-Tel (Delaware) Inc., Current Report (Form 8-K), Exhibit 3.1, at 5 (July 3, 2006)).

E. The Board Was Not Required To Reaffirm Its Earlier Vote In Favor Of The BCCA After Mihaylo Abandoned His Proxy Contest.

Plaintiff argues that the Board was required, after the shareholder approval of the BCCA, to reaffirm placing the BCCA in the Certificate. (Pl.'s Opp. at 35-36.) At its meeting on March 29, 2006, the Board resolved that the BCCA would be added to the Certificate "as promptly as practicable" after shareholder approval. (SAC ¶ 25; Defs.' Opening Brief, Ex. B (INTL000649A (3/29/06 Board minutes)).) On May 31, 2006, the BCCA was approved by shareholders. (SAC ¶ 45.) Accordingly, it was added to the Certificate. (Defs.' Opening Brief, Ex. C (Inter-Tel (Delaware) Inc., Current Report (Form 8-K), Exhibit 3.1, at 5-8 (July 3, 2006)).) Plaintiff cites to no authority that reaffirmation by the Board was required. It is not, especially where, as here, the Board's action was approved by shareholders. *Cf. Gerlach v. Gillam*, 139 A.2d 591, 593 (Del. Ch. 1958) ("[W]here a majority of fully informed stockholders ratify action of even interested directors, an attack on the ratified transaction normally must fail").⁸

III. COUNT II SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO STATE A CLAIM THAT HE WAS HARMED OR THAT THE CERTIFICATE SHOULD BE REFORMED.

Count II should be dismissed because Plaintiff fails to state a claim that he was harmed. Count II should further be dismissed because Plaintiff has not and can never meet his burden to reform the Certificate by showing, by clear and convincing evidence, that the intent of

⁸ Plaintiff alleges that changes were made to the BCCA after the vote of Inter-Tel Arizona Stockholders that were not approved by the Board or Special Committee. (Pl.'s Opp. at 36.) These changes, however, were not material as demonstrated by Plaintiff's failure to identify any of them. (Changes included using "stockholder" instead of "shareholder," capitalizing the word "corporation," removing parentheses from paragraph numbers and, because the reincorporation was approved by stockholders, noting the relevant section of the Delaware General Corporation Law rather than the Arizona Revised Statutes. (*Compare* Defs.' Opening Brief, Ex. B (INTL000742-744 (Proxy Statement Annex D) at D-1 to D-3) *with* Defs.' Opening Brief, Ex. C (Inter-Tel (Delaware) Inc., Current Report (Form 8-K), Exhibit 3.1, at 5-8 (July 3, 2006)).) Moreover, shareholders were told that the BCCA would be in "substantially the form" as that attached to the Proxy Statement, thereby expressly allowing non-material adjustments. (SAC ¶ 38.)

the parties was to have an ineffective Consent Provision and no par stock with an unnecessary \$400,000 filing fee.

A. Plaintiff Fails To State A Claim That He Was Harmed.

A claim for declaratory relief is untenable as a matter of law where a plaintiff has not alleged any harm. (*See* Defs.' Opening Brief at 18.) Plaintiff does not dispute this. (Pl.'s Opp. at 39-40.) Instead, Plaintiff argues that DGCL Section 251(d)(1) and the Reincorporation Agreement provide "absolute prohibitions" of any changes to a certificate after shareholder approval, and do not themselves require any showing of harm to shareholders. *Id.* at 39. Plaintiff, however, misses the point. A claim for declaratory relief cannot be sustained as a matter of law if a Plaintiff has not alleged harm, whether or not a contract is breached or a statutory provision violated. *See, e.g., Beck v. Brady*, 2004 WL 2158052, at *1 (Del. Ch.) (dismissing declaratory relief action because "[p]etitioner's pleading does not allege a single instance of actual harm or controversy" and therefore "deciding whether . . . a contract exists . . . would be a purely academic exercise"). Accordingly, Count II should be dismissed for this reason alone.

1. Plaintiff Fails To Allege Any Harm Regarding The Consent Provision.

Plaintiff attempts to allege adverse effects as a result of Defendants moving the Consent Provision from the draft Bylaws (where it was ineffective) to the Certificate (where it was effective). Plaintiff's arguments, however, amount to nothing more than a complaint that the Consent Provision is effective. (Pl.'s Opp. at 39-40.) Moreover, Plaintiff's argument that "[t]he insertion of the Consent Provision in the certificate eliminated the stockholder's right to remove or modify the unanimous written consent requirement unilaterally and without board approval" seeks a ruling on a hypothetical scenario because Plaintiff has not alleged that the requisite number of stockholders (or any stockholders for that matter) wish to remove or modify

the Consent Provision.⁹ Thus, “[t]hese are ‘hypothetical’ allegations for which declaratory judgment is inappropriate.” *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 1767529, at *9 (Del. Super.).

2. Plaintiff Fails To Allege Any Harm Regarding Par Value Stock.

Plaintiff argues, without citing any specific DGCL provision, that, “despite the numerous DGCL provisions requiring differentiation of no par and par stock, there is no difference” and that for the Court to so find would be “judicial legislation” not “judicial notice.” (Pl.’s Opp. at 40.) Plaintiff does not, however, allege any “difference” between no par and par stock, let alone a material difference or any harm. While Plaintiff argues in a footnote that “[d]amages based on conversion are not limited to the market price on the date of conversion but the highest price within a reasonable time after conversion . . . ,” (*id.*), Plaintiff has not alleged the highest price within a reasonable time after conversion, no doubt because Inter-Tel’s stock has steadily risen since June 28, 2006, the date of the reincorporation. Thus, even if Plaintiff had properly alleged a claim for conversion no stockholder would wish to convert their shares. Moreover, as Inter-Tel is publicly traded, any shareholder can sell shares now or could have at any point since the date of Inter-Tel’s reincorporation. Plaintiff has failed to allege harm and his claim for declaratory relief should be dismissed.¹⁰

⁹ Indeed, one would not expect this since the requirement for unanimous written consent for action absent a meeting of the shareholders was an unalterable statutory requirement for Inter-Tel (Arizona), and shareholders were promised it would be the rule for Inter-Tel (Delaware). (*See* Defs.’ Opening Brief at 21-22.) Moreover, shareholders voted in favor of the reincorporation with this promise.

¹⁰ Plaintiff’s argument that Defendants “expected a substantial increase in franchise taxes” and, therefore, they intended to pay a \$400,000 filing fee rather than \$2,000 to have no par rather than nominal par value stock, (Pl.’s Opp. at 40), is a *non sequitur* and does not show that stockholders were harmed by having nominal par value stock. To the contrary, about \$400,000 in filing fees were saved. Finally, the information about franchise taxes being greater in Delaware than in Arizona (Defs.’ Opening Brief, Ex. B (INTL000678 (5/31/06 Proxy

B. Plaintiff Cannot Satisfy His Burden To Show That The Certificate Should Be Reformed.

Plaintiff asks this Court to rewrite the Inter-Tel Delaware Certificate as filed with the Delaware Secretary of State to delete the Consent Provision and convert the Company's stock from a nominal par value to no par. It has long been recognized, however, that a request to delete a term from a certificate of incorporation or other contract is a request for reformation, just like adding or modifying a term. (*See* Defs.' Opening Brief at 20.)

1. In Order To Reform The Certificate, Plaintiff Must Show By Clear And Convincing Evidence That The Parties Intended His Proffered Language.

Plaintiff does not dispute that, in order to reform the Certificate, the party seeking reformation must show the intent of the parties by clear and convincing evidence. (Pl.'s Opp. at 45-46.) Instead, Plaintiff argues that it is Defendants who seek reformation of the Certificate. However, there is only one Inter-Tel (Delaware) Certificate—the one which includes the Consent Provision and a nominal par value stock. Defendants are not seeking to change the one and only Inter-Tel (Delaware) Certificate that has ever been in existence. Thus, it is Plaintiff who seeks its reformation. Plaintiff has not and cannot allege or prove facts sufficient to satisfy this burden as the documents, as discussed below, he references in his SAC and Opposition conclusively show that the intent of the parties was that the requirement for unanimous written consent continue to be the rule for Inter-Tel Delaware as it was for Inter-Tel Arizona, and that Inter-Tel's stock have a nominal par value.

Statement)) has nothing to do with whether Defendants intended to pay an unnecessary filing fee (separate and apart from franchise taxes). *See also, infra*, at 14-15.

2. The Parties Intended That Inter-Tel Have A Valid Requirement For Unanimous Written Consent And Stock With A Nominal Par Value.

Plaintiff cannot reasonably dispute that the intent of the parties was that the requirement for unanimous written consent continue to be the rule for Inter-Tel Delaware as it was for Inter-Tel Arizona. Indeed, the facts recited in Plaintiff's Opposition prove this point.

For example:

- In a February 25, 2007 e-mail, counsel for Inter-Tel observed that the plan was to “probably leave written consent as is which requires unanimity.” (Pl.’s Opp. at 5.)
- “At a March 16, 2006 meeting, the Inter-Tel board discussed . . . ‘the goal to maintain as closely as possible the substance of the Arizona charter documents.’” (*Id.* at 7.)
- “The Proxy Statement said that “[t]he Company is not seeking through this Proposal No. 2 [the reincorporation] to change the current charter and by-law provisions of the Company.” (*Id.* at 13.)
- “The Proxy Statement plainly and directly represented that the unanimous consent requirement would be in the Delaware bylaws” (*Id.*)
- “The Delaware By-laws attached to the Proxy Statement contained the Consent By-Law requiring unanimous written consent” (*Id.*)
- Counsel for Inter-Tel’s Special Committee asserted that “‘due to a drafting error the provision requiring unanimity for a consent, (sic) solicitation was put in the draft by-law and not the draft Delaware charter.’” (*Id.* at 17.)
- The consensus at the Special Committee meeting was that “[s]ince, (1) the current corporation had a unanimous written consent requirement, and (2) the proxy statement clearly stated that there would be such a requirement in either the charter or by-law, that the requirement of unanimity in connection with written consents should be put in the new Delaware charter before it is filed as that was the intent and the shareholders were so advised.” (*Id.* at 17-18.)

Plaintiff argues that “the record establishes that defendants intended to put the unanimous consent requirement into the by-laws, not the certificate” (Pl.’s Opp. at 46.) In other words, Plaintiff argues that the intent of the Board and Special Committee was to have an

ineffective consent provision while nonetheless telling shareholders that there would be unanimous written consent for Inter-Tel (Delaware) just as there was for its Arizona predecessor. In his myopic view, Plaintiff misses that the intent of the parties was to have an effective Consent Provision, rather than to place the provision in a particular place in the charter documents, *i.e.*, the Bylaws rather than the Certificate. Moreover, Plaintiff has no response to Defendants' argument that, if Plaintiff's view were correct, the Proxy Statement would have been required to inform the shareholders that, despite the Consent Provision being in the Bylaws, it would not be effective. In all events, Plaintiff cannot meet his burden to show by clear and convincing evidence that the intent of the parties was to have an ineffective Consent Provision.

Similarly, Plaintiff cannot meet his burden to reform the Certificate to change the par value of \$0.001 to no par by showing by clear and convincing evidence that the intent of the parties was to incur an unnecessary \$400,000 filing fee. Again, the facts recited by Plaintiff in his Opposition show that the intent was to have stock with a par value of \$0.001, and not to pay the unnecessary \$400,000 filing fee that accompanied no par stock:

- “Early drafts of the Delaware certificate provided for Inter-Tel Delaware to have common stock with \$0.001 par value.” (Pl.’s Opp. at 14.)
- While the directors were not informed of a \$400,000 filing fee, “[i]n a March 5, 2006 memorandum to the directors, Pillsbury Winthrop estimated that the additional cost of incorporation in Delaware would be \$165,000, substantially more than in Arizona.” (*Id.* at 15.)
- While the directors did not discuss a \$400,000 filing fee, “the directors had discussed that franchise fees would be greater in Delaware.” (*Id.*)
- While the Proxy Statement did not disclose a \$400,000 filing fee, “the Proxy Statement disclosed that franchise taxes would be greater in Delaware.” (*Id.*)
- On June 7, 2006, a filing service, CSC, “pointed out that the filing fee for the certificate [with no par stock] . . . would be \$402,317.” (*Id.* at 16-17.)

- After learning of this mistake, Inter-Tel's officers and counsel discussed the matter and changed the stock to \$0.001 before filing the Certificate. (*Id.* at 17.)

Indeed, as noted in Defendants' Opening Brief (and a fact for which Plaintiff has no response), the draft certificate of incorporation approved by the Board provided that Inter-Tel stockholders would receive stock with a par value of \$0.001. (Pl.'s Opp. at 14; Defs.' Opening Brief, Ex. B (INTL000619 (3/16/06 Board minutes)).) In light of the Board approving stock with a par value of \$0.001, it entirely makes sense that the \$400,000 filing fee that would accompany no par stock was not disclosed to the Board, discussed by the Board, or disclosed to shareholders in the Proxy Statement. Thus, the evidence shows that the parties' intent was to have stock with a par value of \$0.001 and not to incur an unnecessary \$400,000 filing fee accompanying no par stock.

Plaintiff has not and can never meet his burden to establish that this Court should reform the Certificate, *i.e.*, show by clear and convincing evidence that the intent of the parties was to have an ineffective Consent Provision and pay an unnecessary \$400,000 filing fee. Accordingly, the Court should grant Defendants' motion to dismiss Count II.

3. Defendants Properly Corrected The Draft Certificate.

Plaintiff alleges that the addition of the Consent Provision and nominal par value to the draft Certificate violated the terms of Section 4.5 of the draft Reincorporation Agreement and Sections 251(d) and 252 of the DGCL because those Sections provide "absolute prohibitions" of any changes to a Certificate after shareholder approval. (Pl.'s Opp. at 39.) However, DGCL Sections 251 and 252 do not apply to actions by the Arizona company and the draft Reincorporation Agreement must be read together with the Proxy Statement which provided that the draft Certificate was approved as just that—a draft—and that changes were

expressly allowed and, indeed, required. Finally, it cannot be, as Plaintiff suggests, that directors are precluded from correcting obvious errors in the formation documents.

a. The Addition Of The Consent Provision
And Par Value To The Draft Certificate Did
Not Violate The Draft Reincorporation
Agreement.

Plaintiff fails to state a claim that the addition of the Consent Provision and par value to the draft Certificate violated the draft Reincorporation Agreement because (i) changes were expressly allowed to the draft documents, (ii) they were required to be corrected, and (iii) the changes were not material.

(i) Changes Were Expressly Allowed
To The Draft Documents.

Although taking issue with the word “draft,” Plaintiff does not dispute that the shareholders approved a draft certificate recognizing that the filed Certificate would be in “substantially the form” attached to the Proxy Statement. (Pl.’s Opp. at 41-42.)

Instead, despite the common-sense reading of this provision that non-material changes were expressly allowed to the draft Certificate, Plaintiff argues that the Proxy Statement “does not alter the requirements” of DGCL Section 251(d) or Section 4.5 of the draft Reincorporation Agreement. Section 251(d), however, does not apply. (*See* Defs.’ Opening Brief at 26-27 and *infra* at 19.) Additionally, the Proxy Statement does in a sense “alter” Section 4.5 of the draft Reincorporation Agreement because, for a rational interpretation of the documents, the Proxy Statement and the draft Reincorporation Agreement must be read together. *See, e.g.*, 11 Williston on Contracts § 30:25 (4th ed. 2006) (“Generally, all writings which are part of the same transaction are interpreted together.”)

Moreover, that reading of the documents together is the only rational approach is bolstered by the fact that, if the BCCA were approved by the shareholders, it would need to be

added to the draft Certificate. In other words, Plaintiff's argument that the Reincorporation Agreement provides "absolute prohibition" of any change to the Certificate after shareholder approval,¹¹ despite the "substantially in the form" language from the Proxy Statement, simply cannot be correct because the BCCA was required to be added to the draft Certificate if approved. Furthermore, Plaintiff provides no support for his argument that that the terms of the draft Reincorporation Agreement are "controlling" over the terms in the Proxy Statement, (Pl.'s Opp. at 42), rather than the two being read together.

As to Plaintiff's arguments that definition of the word "substantially" would not allow the non-material changes made here, the very case which Plaintiff cites in support of his definition of "substantially," also provides that substantial means "being largely but not wholly that which is specified." *Hollinger v. Hollinger Int'l, Inc.*, 858 A.2d 342, 377 & n.47 (Del. Ch. 2004) (citing MERRIAM-WEBSTER ON-LINE DICTIONARY, <http://www.m-w.com>).¹²

Thus, Plaintiff's argument—that the language of Section 4.5 of the Reincorporation Agreement is absolute and does not allow any changes whatsoever to the draft Certificate after shareholder approval—does not withstand scrutiny.

¹¹ Pl.'s Opp. at 39.

¹² Additionally, in *Hollinger*, the Court noted that "the Supreme Court has long held that a determination of whether there is a sale of substantially all assets so as to trigger [DGCL] section 271," (the statute at issue in *Hollinger*), depended not upon a bright-line test in interpretation of the words "substantially all," but instead the inquiry "depends upon the particular qualitative and quantitative characteristics of the transaction at issue." 858 A.2d at 377. "Thus, the transaction must be viewed in terms of its overall effect on the corporation, and there is no necessary qualifying percentage." *Id.* In other words, the Court should not employ a bright-line test in interpretation of the words "substantially all" and instead do what makes sense in light of the big picture. Such should also be the case here when interpreting the phrase "substantially in the form."

- (ii) The Draft Certificate Was Required To Be Corrected To State A Par Value Or To Specify That The Shares Would Be No Par.

Plaintiff does not dispute that the draft Certificate was required to be corrected before filing to state a par value or that all shares were to be without par value. (*See* Pl.'s Opp. at 37-40. *See also* Defs.' Opening Brief at 27.)

- (iii) The Changes Were Not Material Because They Merely Corrected Scrivener's Errors.

Adding the Consent Provision and par value to the draft Certificate were not material changes because they merely corrected scrivener's errors and conformed the draft to the disclosures made to the shareholders in the Proxy Statement. Plaintiff points to no authority that correcting scrivener's errors would be a material change, but instead argues that "any change" is prohibited. (Pl.'s Opp. at 48.) However, if Plaintiff's theory were correct, then it would mean that a board is powerless to correct any mistakes. That, however, cannot be the law of Delaware.

In the alternative, Plaintiff argues that scrivener's errors are limited to typographical or clerical mistakes. (*Id.*) Other mistakes of counsel, however, are also scrivener's errors—including mistakenly putting a provision in the bylaws rather than the certificate of incorporation. *See In re Farm Indus., Inc.*, 196 A.2d 582, 592 (Del. Ch. 1963) (reforming certificate of incorporation to conform to the parties' intent where a technical error was made by attorneys who failed to include a provision regarding voting rights of stock in the certificate though it was subsequently in the bylaws). *See also Phil Bramsen Distrib., Inc. v. Mastroni*, 726 P.2d 610, 614-15 (Ariz. Ct. App. 1986) (holding that reformation of a contract was proper based on an "error of the scrivener," *i.e.*, the defendant's attorney who mistakenly drafted an unenforceable provision contrary to the parties' intent).

Here, Defendants properly corrected scrivener's errors prior to the filing of the Certificate. Adding the Consent Provision to the draft Certificate was not material because it merely moved the Consent Provision to the correct place in the charter documents to make it effective. Furthermore, there is no material difference to the Inter-Tel stockholders between no par stock and stock with a nominal par value. *See, e.g.,* A. Gilchrist Sparks, III & Frederick H. Alexander, *The Delaware Corporation: Legal Aspects of Organization and Operation*, at A-4 (BNA, Corporate Practice Series No. 1-4th, April, 2006). The designation of par stock, however, saved Inter-Tel Delaware from paying \$400,000 in otherwise unnecessary filing fees. Finally, the change from par to no par stock did not change the kind of stock that the stockholders received. It was common stock both before and after the correction.

b. Sections 251(d) and 252 Do Not Apply.

Addition of the Consent Provision and nominal par value to the draft Certificate did not violate Sections 251(d) or 252 of the DGCL because, as discussed in Defendants' Opening Brief, the Reincorporation Agreement was effective only after the Delaware Certificate, which had been corrected before filing to include the Consent Provision and par value, was filed with the Delaware Secretary of State. (*See* Defs.' Opening Brief at 26-27.)

IV. COUNT III SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO STATE A CLAIM THAT DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES.

While Plaintiff drops a footnote stating “[c]ontrary to defendants’ assertion . . . , most of the defensive measures were not approved by the stockholders but were unilateral actions by the defendant directors,” (Pl.’s Opp. at 50 n.167), the only defensive measures that Plaintiff continues to prosecute—the BCCA and the Consent Provision (*see id.* at 49-55)—were both approved by shareholders. The sole exception to this is the supposed “sterilization of

directors” which reflects nothing more than the Board properly excluding directors from decisions where they had a conflict or potential conflict of interest. (*Id.* at 54-55.) In fact, the settlement with Mihaylo recognized that he and his designees would be excluded from matters in which they had a conflict of interest.

A. Plaintiff’s Claims Regarding The BCCA And The Consent Provision Should Be Dismissed Because The Shareholders Approved Them.

Because the shareholders approved the Reincorporation, BCCA, and Consent Provision, Plaintiff’s challenges to them must be dismissed. As the Delaware Supreme Court explained in *Williams v. Geier*, 671 A.2d 1368, 1377 (Del. 1996), “[a] *Unocal* analysis should be used only when a board unilaterally (*i.e.*, without stockholder approval) adopts defensive measures in reaction to a perceived threat.” Here, the shareholders approved the BCCA and Consent Provision, and that fully informed vote of the shareholders effects a ratification of the directors’ actions. *See, e.g., Gerlach v. Gillam*, 139 A.2d 591, 593 (Del. Ch. 1958) (noting that “[i]t is contended and cannot be denied that where a majority of fully informed stockholders ratify action of even interested directors, an attack on the ratified transaction normally must fail.”).

Plaintiff attempts to avoid dismissal of his claim by arguing that the BCCA provision was not approved by shareholders and, instead, it was a “unilateral decision” by the Special Committee to insert the BCCA in the draft Certificate after its approval by shareholders. However, as discussed above, the Board had already resolved that the BCCA would be added to the draft Certificate “as promptly as practicable” after shareholder approval. (SAC ¶ 25; Defs.’ Opening Brief, Ex. B (INTL000649A (3/29/06 Board minutes)).) Thus, there was no Board decision required to be made—it was already resolved that the BCCA would be added upon shareholder approval.

Moreover, the BCCA and Consent Provision served a proper corporate purpose. (See Defs.' Opening Brief at 32-35.) As noted above, the BCCA is not a "perpetual prohibition on business combinations." (Pl.'s Opp. at 51.) Instead, it is merely a voting provision requiring that the business combination be approved by the affirmative vote of at least a majority of the outstanding voting stock which is not owned by the interested stockholder. (Defs.' Opening Brief, Ex. C (Inter-Tel (Delaware) Inc., Current Report (Form 8-K), Exhibit 3.1, at 5 (July 3, 2006)).) While Plaintiff has conjured up hypothetical scenarios and hyper-technical points about the BCCA's potential application, none of this is relevant to his claim that the Board breached its fiduciary duty with respect to the BCCA.¹³ Moreover, even accepting Plaintiff's argument that the BCCA is unreasonable to be true, this is immaterial in light of its approval by shareholders.

Similarly, Plaintiff's argument that the decision to place the Consent Provision in the Certificate, where it would be effective, was a violation of Defendants' fiduciary duties also does not withstand scrutiny. Plaintiff argues that "[t]he principal purpose of their action was to deprive the stockholders of . . . the right to act by written consent of a majority of the shares." (Pl.'s Opp. at 54.) This argument, however, is refuted by Plaintiff's own pleading. As discussed in detail above at 12-14 and Defendants' Opening Brief at 21-22, the intent of the parties was that the requirement for unanimous written consent continue to be the rule for Inter-Tel Delaware as it was for Inter-Tel Arizona. Thus, the Court should grant Defendants' motion to dismiss Plaintiff's claims in Count III for breach of fiduciary duty.

¹³ Plaintiff's "do you recall" line of questions to Norman Stout about the BCCA do not establish that Mr. Stout nor anyone else on the Board was poorly informed about the BCCA at the time they recommended it to the shareholders. (Pl.'s Opp. at 52 & n.174 (citing Stout Dep. 43-47, 72-73).) Mr. Stout testified that "I remember we had a lengthy discussion, but I can't remember the details." (Stout Dep. at 47:12-15.) Moreover, Mr. Stout's motivation—to protect shareholders from one large shareholder trying to take over Inter-Tel without paying a fair price to the rest of the shareholders—was certainly a reasonable one. (*Id.* at 40:4-41:5.)

B. Plaintiff Fails To Allege Facts To Support His Claim Of Director “Sterilization.”

Plaintiff argues that “Defendants have improperly used the Special Committee as a vehicle for excluding Mihaylo and his designees from effectively participating in the board’s management of the corporation.” (Pl.’s Opp. at 54.) Plaintiff, however, fails to recognize that boards often create special committees when directors have a conflict of interest, and Delaware law encourages them to do so. It is the right thing to do. (See Defs.’ Opening Brief at 37.)

The two cases cited by Plaintiff, *Carmody v. Toll Bros.*, 723 A.2d 1180, 1192-93 (Del. Ch. 1988) and *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126-1132 (Del. 2003), do not support his claim.

Plaintiff cites *Carmody* for the proposition that “defendants have improperly prevented three directors from completely discharging their fiduciary duties by systematically excluding them almost entirely from the board’s business.” (Pl.’s Opp. at 54-55 & n.177.) *Carmody*, however, does not support this proposition nor anything close to it. *Carmody* is a case about whether the so-called “dead hand” poison pill rights plan violated the DGCL or the fiduciary duties of the board of directors who adopted the plan. Furthermore, the Court rejected the defendants’ argument that the “dead hand” provision was tantamount to delegation to a special committee on the grounds that the defendants had not, in fact, created a special committee. *Carmody*, 723 A.2d at 1192. Indeed the Court tacitly endorsed creation of a special committee: “The creation of a special committee would not impose long term structural power-related distinctions between different groups of directors of the same board. The board that creates a special committee may abolish it at any time as could any successor board.” *Id.*

Similarly, Plaintiff cites *MM Companies* for the proposition that the “creation and use of the Special Committee has disenfranchised plaintiff and the Inter-Tel stockholders and

denied them full representation on the Board.” (Pl.’s Opp. at 55 & n.178.) Again, *MM Companies* does not support this proposition. In *MM Companies*, the court held that a board’s decision to increase the number of directors immediately prior to a shareholder vote, where “the primary purpose of the Director Defendants’ action was to interfere with and impede the effective exercise of the stockholder franchise in a contested election for directors,” was legally impermissible. 813 A.2d at 1132. Here, on the other hand, the size of the Board was not changed except to add Mihaylo and his two designees, and no attempt was made to disenfranchise anyone. Instead, the Board created a Special Committee to handle matters where the Mihaylo directors had an actual or potential conflict of interest. (SAC ¶ 110.)¹⁴

V. COUNT IV SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO STATE A CLAIM THAT DEFENDANTS BREACHED A DUTY OF DISCLOSURE.

In order to plead a viable disclosure claim, Plaintiff must “allege that facts are missing from the [Proxy] statement, identify those facts, state why they meet the materiality standard and how the omission caused injury.” *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1173 (Del. 2000). *See also Persky v. Turley*, 1991 WL 327434, at *3 (D. Ariz.) (noting that a fact is material if there is a substantial likelihood that its disclosure “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available”). Plaintiff fails to do so.

¹⁴ Moreover, as noted in Defendants’ Opening Brief, Mr. Mihaylo agreed, pursuant to the terms of his settlement agreement with the Company, that he and his nominees were to be excluded from all Board discussions concerning the Company’s value, strategic plan, and any proposal to acquire the Company. (SAC ¶ 30.) This settlement agreement was specifically referenced in the Proxy Statement and publicly available for any shareholder to review. (SAC ¶¶ 37, et seq.; Defs.’ Opening Brief, Ex. B (INTL000671 (5/31/06 Proxy Statement)). *See also* Defs.’ Opening Brief, Ex. E (Inter-Tel (Delaware), Inc., Soliciting Material (Schedule 14A), at 2 (May 5, 2006).)

A. The Proxy Statement Provides A Full And Accurate Description Of The Business Combination Charter Amendment.

In addition to Plaintiff's claim in Count I that it was illegal for the BCCA to differ from the text of DGCL Section 203, Plaintiff claims, in Count IV, that the Proxy Statement's description of the "principal differences" between Section 203 and the charter provision is a "misleadingly incomplete partial disclosure." (SAC ¶ 113. *See also* Pl.'s Opp. at 56.) The fallacy of Plaintiff's disclosure claim is that the shareholders were not asked to approve Section 203; they were asked to approve the BCCA, the complete text of which was provided to them (SAC ¶¶ 43-44; INTL 000688 (5/31/06 Proxy Statement)) and all discussions of it were "qualified in their entirety by reference" to the attached text. *See Coates v. Netro Corp.*, 2002 WL 31112340 (Del. Ch.) (dismissing disclosure claim challenging description of certificate of incorporation and bylaws in the proxy statement when they were attached in their entirety to the proxy statement). Plaintiff cannot, therefore, establish why each difference between Section 203 and the charter provision would be material to the shareholders' decision to approve the BCCA.

Plaintiff argues that the Proxy Statement's disclosure that the BCCA mirrored Section 203 "in many respects" and describing only two "principal differences" misleadingly implied that BCCA was not different from Section 203 in other important ways. (Pl.'s Opp. at 56.) Both of these disclosures in the Proxy Statement, however, make clear that the BCCA was not the same as Section 203 in "all respects" and that there were "other differences" besides the two described. Any shareholder who wished to determine other similarities and differences was free to compare the complete text of the BCCA with the publicly available DGCL Section 203. *See, e.g., In re General Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *17 (Del. Ch.) ("PanAm Sat's current stock price was information publicly available—a fact making it unlikely that additional disclosures would have altered the total mix of information already available")

(attached hereto as Exhibit A); *Wolf v. Assaf*, 1998 WL 326662, at *3 (Del. Ch.) (allegedly omitted information was disclosed in separate SEC filings and therefore would not have altered the total mix of information.)

Plaintiff cites *Arnold v. Soc'y for Savings Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994), for the proposition that, having made “partial disclosures” about the differences between the BCCA and Section 203, the Proxy Statement was required to describe all those differences which Plaintiff deems to be “significant differences.” (Pl.'s Opp. at 56.) In *Arnold*, however, a case regarding stockholder approval of a \$200 million bid by Norwest for Bancorp with Fidelity Acceptance Corporation (“FAC”) as one of Bancorp’s assets, the omitted fact was that “one subsidiary of Bancorp had been the subject of a genuine auction bid of \$275 million under contingent and explainable circumstances when the Merger transaction itself was valued at \$200 million, some 37 percent less than Norwest’s contingent bid for FAC.” *Id.* at 1281. In other words, a bidder offered \$75 million more for just *a part* of Bancorp. Bancorp’s proxy statement, however, merely provided that its board determined to pursue negotiations with Norwest further, without ever disclosing (anywhere in the Proxy Statement or its attachments) the existence of the \$275 million bid or its amount. *Id.* at 1280.

Conversely, here, the Proxy Statement does not omit such a material fact and, indeed, it does not omit any fact at all as the complete text of the BCCA was provided to shareholders. *See Coates*, 2002 WL 31112340, at *4 (dismissing disclosure claim challenging description of certificate of incorporation and bylaws in the proxy statement when they were attached in their entirety to the proxy statement). *See Defs.’ Opening Brief* at 39-40.

Plaintiff further argues that the disclosures in the Proxy Statement “imply” that the BCCA “is in place of or instead of” Section 203. (*Id.* at 58.) The Proxy Statement, however,

makes clear that “[t]he Delaware Certificate does not opt out of [DGCL Section 203].” (Defs.’ Opening Brief, Ex. B (INTL000683 (5/31/06 Proxy Statement)).)

B. Plaintiff Fails To State A Claim Regarding Amendment Of The Draft Documents.

Plaintiff argues that the Proxy Statement had misleading disclosures in connection with Defendants’ amendment of the draft Certificate to add the Consent Provision and a par value of \$0.001. Plaintiff complains that the Proxy Statement provided that Inter-Tel Arizona would re-solicit shareholders ““if the terms of the Reincorporation Agreement are changed in any material respects.”” (Pl.’s Opp. at 59.) However, as discussed above in Section III, none of the documents were changed in any material respects. (*See also* Defs.’ Opening Brief at 25-26.) In addition, it would have been nonsensical and a waste of Company resources to re-solicit shareholders before making non-material changes to correct scrivener’s errors in order to effectuate the parties’ intent.

C. Plaintiff Fails To State A Claim Regarding Director “Sterilization.”

Finally, Plaintiff fails to state a claim regarding Defendants’ purported failure to disclose their agreement with Mihaylo to exclude him and his designees from Board discussions. (Pl.’s Opp. at 60.) The Proxy Statement specifically referred shareholders who wanted to review the Mihaylo Settlement in more detail to the Schedule 14A filed on May 5, 2006 with the Securities and Exchange Commission, which included a complete copy of the settlement agreement reached with Mr. Mihaylo. (SAC ¶¶ 37, *et seq.*; Defs.’ Opening Brief, Ex. B (INTL000671 (5/31/06 Proxy Statement)). *See also* Defs.’ Opening Brief, Ex. E (Inter-Tel (Delaware), Inc., Soliciting Material (Schedule 14A), at 2 (May 5, 2006)).) Accordingly, any further description of the terms of the Mihaylo Settlement was not necessary. *See Wolf*, 1998

WL 326662, at *3 (allegedly omitted information was disclosed in separate SEC filings and therefore would not have altered the total mix of information.)

Furthermore, the stockholders were not being asked to approve the Board's creation of a Special Committee and, therefore, none of the alleged information could be material. Thus, for the reasons stated herein and in Defendants' Opening Brief, the Court should dismiss the disclosure claims asserted in Count IV.

VI. COUNT V SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO STATE A CLAIM THAT THE REINCORPORATION IS INVALID.

Count V should be dismissed because Plaintiff has not alleged any harm. Additionally, Plaintiff fails to allege facts sufficient to support a claim that Defendants violated either Arizona or Delaware law resulting in an invalid reincorporation.

A. Plaintiff's Claim Should Be Dismissed Because He Was Not Harmed By The Alleged "Conversion."

For the same reasons as discussed above in Section III, Count V should be dismissed because Plaintiff's only allegation of harm is for "conversion" of his shares of stock. Neither Plaintiff nor any other stockholder was damaged because the current Inter-Tel share price is in excess of \$3 dollars more than on the date of the alleged conversion. Moreover, as discussed above, Plaintiff and all other stockholders were free to trade their shares at any time on the open market. Thus, Count V should be dismissed for this independently sufficient reason. *See, e.g., Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1242 (Del.Ch. 1987) (dismissing declaratory relief claim because the plaintiff had not shown a current or imminent threat of harm).

B. Plaintiff's Allegations Fail To Support His Claim That Defendants Did Not Comply With Provisions Of The Arizona Business Corporation Act.

As described in Defendants' Opening Brief at page 42, under Arizona law, the board of directors of each corporation are required to adopt a "plan of merger." A.R.S. § 10-1101. Despite Plaintiff's attempts to equate the requisite "plan of merger" with the Reincorporation Agreement itself, (Pl.'s Opp at 64), that is simply not what Arizona law requires. *See* A.R.S. § 10-1101.

Plaintiff alleges that Defendants violated Arizona law because the "Board of Directors of Inter-Tel Arizona did not adopt the Reincorporation Agreement, which constituted the plan of merger." (SAC ¶ 138.) The fallacy in Plaintiff's argument is his attempt to equate the Reincorporation Agreement with the "plan of merger." Instead, A.R.S. § 10-1101(A) requires only that the board of directors of each corporation adopt a specifically-defined "plan of merger," not equated with the Reincorporation Agreement. (*See* Defs' Opening Brief at 43-44.)

The statute explicitly states that a "plan of merger" shall set forth the following:

- 1) The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge.
- 2) The terms and conditions of the merger.
- 3) The manner and basis of converting the shares of each corporation into shares, obligations or other securities of the surviving or any other corporation or into cash or other property in whole or part.

A.R.S. § 10-1101(B). At the March 16, 2006 meeting, the Board satisfied these requirements,¹⁵ and the Board was not required to adopt or approve any terms in addition to what is described in

¹⁵ The Board approved resolutions and a draft certificate including: (1) the names of each corporate entity (*see, e.g.*, Defs.' Opening Brief, Ex. B (INTL000618 (3/16/06 Board Minutes)) ("[t]he name of the corporation is Inter-Tel, Incorporated"); (2) the terms and conditions of the merger (*see, e.g., id.* at INTL000611 (Resolved "to effect the reincorporation of the Company into the State of Delaware by merging a newly-formed Delaware corporation and a

A.R.S. § 10-1101(B). Nor does the statute require the plan to be in any specific form. Thus, because Plaintiff is only able to allege that the Board did not adopt the Reincorporation Agreement but cannot allege that the Board did not adopt a “plan of merger,” as defined by A.R.S. § 10-1101, Plaintiff fails to plead that the Board violated A.R.S. § 10-1101.

Plaintiff’s argument that the Reincorporation Agreement was revised after Board approval and therefore the Board did not approve the “plan of merger” fails for the same reason, *i.e.*, that the Board approved the plan of merger under Arizona law which does not equate to the Reincorporation Agreement. Plaintiff does not allege that any changes were made to the plan of merger, instead only the Reincorporation Agreement. Moreover, the only change to the Reincorporation Agreement that Plaintiff identifies—changing the stock from no par to a nominal par value¹⁶—merely reflects what the Board had previously approved, as the Board approved stock with a par value of \$0.001. (Defs.’ Opening Brief, Ex. B (INTL000619 (3/16/06 Board Minutes)).)

C. Plaintiff’s Allegations As To The Timing Of Execution Of
Certain Documents Fail To Establish A Viable Claim
Under Delaware Law.

Plaintiff seeks to undo Inter-Tel’s reincorporation in Delaware by arguing that the manner in which the reincorporation documents were signed and dated was defective. (Pl.’s Opp. at 61-65.) Delaware law, read as whole, however, contemplates and endorses the actions taken by Inter-Tel to effectuate its reincorporation in Delaware and, as such, Plaintiff fails to state a claim that the reincorporation is invalid.

wholly owned subsidiary of the Company, with and into the Company, with the Delaware Company surviving the merger.”); and (3) the manner and basis of converting shares (*see, e.g., id.* (“one share of common stock of Delaware Company will be issued and exchanged for each share of Common Stock of the Company then outstanding.”)).

¹⁶ See Pl.’s Opp. at 64-65.

As described in Defendants' Opening Brief, the signed reincorporation documents are valid because they were held in escrow and dated to be effective by an authorized agent. (Defs.' Opening Brief at 44-45.) Plaintiff does not dispute that the documents were held in escrow to be dated by an authorized agent or that the documents were filed in the correct order. (Pl.'s Opp. at 61-65.) Instead, Plaintiff argues that various DGCL provisions were violated because the sole incorporator of the Delaware corporation, Mr. Stout, signed all the reincorporation documents at the same time and, therefore, did not have the capacity to take the actions when he signed the documents as the Delaware corporation was not yet formed. This ignores, however, that the documents were held in escrow to be dated by an authorized agent and filed in the correct order. Moreover, Plaintiff does not distinguish *Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2005 WL 578972, *1, 3 (Del. Ch.), which held that documents kept in escrow are not (yet) legally effective.¹⁷

The Court should reject Plaintiff's attempt to impose an unreasonable and draconian result based on the sole incorporator signing all the reincorporation documents while he was traveling out of the country, leaving his counsel to finalize and file them in the correct order. To find that Mr. Stout signed these documents intending to take action before the Delaware corporation existed instead of intending his agent to complete the execution of the reincorporation documents would be an "absurd result" that consideration of the DGCL, as a whole, prevents.¹⁸ *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).

¹⁷ As described in Defendants' Opening Brief, DGCL Section 228(c) was not violated here, (Defs.' Opening Brief at 46-47), and the policy reasons for its strict application are not applicable to a sole stockholder in a reincorporation merger. (*Id.* at 46 n.33.)

¹⁸ Plaintiff also does not dispute that the alleged errors are *de minimis* and immediately correctable. (*See* Defs.' Opening Brief at 47 n.34.)

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and dismiss Plaintiff's SAC with prejudice, and deny Plaintiff's motion for summary judgment.

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