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Case No. 2226-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

VERNON A. MERCIER, Plaintiff, v. 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.	)	Civil Action No. 2226-VCS

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

A. Gilchrist Sparks, III (#467)
S. Mark Hurd (#3297)
Jay N. Moffit (#4742)
Kevin M. Coen (#4775)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Individual Defendants

OF COUNSEL:

Stephen D. Alexander
J. Warren Rissier
Mark K. Arimoto
BINGHAM McCUTCHEN LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
(213) 680-6400

POTTER ANDERSON & CORROON LLP

Stephen C. Norman (#2686)
John F. Grossbauer (#2479)
Hercules Plaza
1313 N. Market Street
Wilmington, DE 19899
(302) 984-6000
Attorneys for Defendants Inter-Tel, Incorporated,
And Inter-Tel (Delaware), Incorporated

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INTRODUCTION

This case is about a single stockholder's attempt to change the terms of the governing documents of Inter-Tel (Delaware), Incorporated ("Inter-Tel" or "Inter-Tel Delaware"), contrary to the clear intent of its directors and shareholders. Apparently unhappy with the results of the shareholders' vote, Plaintiff Vernon Mercier argues that certain provisions in Inter-Tel's governing documents should be invalidated. He characterizes the reincorporation of a single company as a conspiracy of "corporate time bandits,"[1] and seeks to undo Inter-Tel's reincorporation from Arizona to Delaware. Stranger still, Plaintiff argues that alleged technical defects in the process of reincorporation allow him to pick and choose which substantive provisions should be deleted from Inter-Tel's governing documents. All of Plaintiff's arguments, in Counts I to V of his Second Amended Complaint ("SAC"), are without merit and should be dismissed.[2]

In Count I, Plaintiff objects to the Board's approval of a proposal for a business combination provision, similar in some respects to Section 203 of the Delaware General Corporation Law (the "DGCL"), designed to protect against certain takeover related abuses (the "Business Combination Charter Amendment" or "BCCA"). Plaintiff asks this Court to rewrite Inter-Tel's certificate of incorporation ("Certificate") to delete the BCCA, despite its approval by Inter-Tel's shareholders, based on the faulty premise that because it is different than Section 203,

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1 Pl.'s Opening Brief on Mot. for Summ. J. at 16.

2 In addition, all of Plaintiff's claims will be rendered moot if the recently announced merger of Mitel Networks Corporation ("Mitel") and Inter-Tel is approved by shareholders and consummated. (*See* Ex. A (Inter-Tel (Delaware), Inc., Current Report (Form 8-K), at 2 (April 27, 2007).) *See also, e.g., In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 355 (Del. 1993), *disapproved on other grounds*, (affirming Court of Chancery's determination that because a merger occurring after the filing of a lawsuit resulted in the elimination of a challenged article from the surviving corporation's certificate, the plaintiffs' challenge to the article was moot).

it is impermissible. Section 203, however, continues to apply in full force to Inter-Tel and does not "occupy the field" to the exclusion of other charter provisions.

Similarly, in Count II, Plaintiff asks this Court to rewrite Inter-Tel's Certificate to delete the provision requiring unanimous written consent of stockholders for action taken without a stockholder meeting ("Consent Provision"), despite the promise to shareholders[3] that this Consent Provision would be effective for Inter-Tel after its reincorporation in Delaware just as it was for its Arizona predecessor ("Inter-Tel Arizona"). Plaintiff attempts to seize upon a scrivener's error in the *draft* documents—placing the Consent Provision in the bylaws instead of the certificate of incorporation as required by Delaware law—to achieve a result contrary to the parties' intent. Indeed, Plaintiff cannot reasonably dispute that the parties intended for the Consent Provision to be effective for Inter-Tel Delaware, just as it was for Inter-Tel Arizona, and acknowledges that the draft Certificate was corrected prior to its filing in Delaware to effectuate the parties' intent.

In Count III, Plaintiff asks this Court to declare that Defendants breached their fiduciary duties through a variety of actions that Plaintiff alleges were for purposes of entrenchment. The claims he lists in his SAC, however, should be dismissed because several of the challenged actions were approved by shareholders, and Plaintiff cannot overcome the presumptions afforded by the business judgment rule. Moreover, the SAC does not contain allegations of fact to establish that the actions had the effect of entrenching the Board and that the Board's primary motivation was entrenchment.

In Count IV, Plaintiff again asks this Court to delete certain provisions from the Certificate based on his allegations that Defendants breached their duty of disclosure regarding

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[3] This brief generally refers to Delaware "stockholders," and Arizona "shareholders" although the terms may be used interchangeably.

descriptions of the Business Combination Charter Amendment, amendments to the reincorporation documents, and a settlement with one of Inter-Tel Arizona's directors. The BCCA and the settlement, however, were disclosed in full to the shareholders and the amendments to the reincorporation documents 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.

Finally, in Count V, Plaintiff alleges that the entire reincorporation is invalid under Arizona and Delaware law because of alleged defects in the process. The process was not defective and the result that Plaintiff advocates would be draconian and cannot be justified by the facts alleged. Thus, all of Plaintiff's claims should be dismissed without leave to amend.

NATURE AND STAGE OF THE PROCEEDINGS

This is Plaintiff's third bite at the apple. Plaintiff already filed a Complaint and an Amended Complaint. Now, Plaintiff has filed his SAC, attempting yet again to recast his still meritless allegations—this time after reading Defendants' motion to dismiss and cross-motion for summary judgment, and taking written discovery and depositions.

On June 15, 2006, Plaintiff filed his Complaint in this action, and on July 14, 2006, and filed an Amended Complaint. On August 10, 2006, Plaintiff filed a Motion for Partial Summary Judgment on Count II of the Amended Complaint. On August 22, 2006, Defendants filed a Motion for Judgment on the Pleadings (with respect to Counts I, III and IV) and Cross-Motion for Partial Summary Judgment (with respect to Count II). Plaintiff thereafter conducted written discovery and depositions.

On March 27, 2007, Plaintiff filed his SAC, adding Count V and providing certain additional allegations and citations to documents, among other changes. This is Defendants' Opening Brief in Support of their Motion to Dismiss the SAC.

FACTUAL BACKGROUND

As alleged in the SAC, Steven Mihaylo, the founder of Inter-Tel Arizona, served as the Company's Chief Executive Officer from its formation in July 1969 until February 2006. (SAC ¶ 11.) In February 2006, the Board of Directors of Inter-Tel Arizona (the "Board") requested that Mr. Mihaylo resign. (SAC ¶ 11.) He resigned as CEO on February 22, 2006 and from the Board on March 6, 2006. (SAC ¶ 11.) In the spring of 2006, Messrs. Stout, Rodin and Karol were appointed to the Board (the "Board Appointments") and, according to the SAC, the Board authorized new indemnification agreements for directors and officers (the "Indemnification Agreements"). (SAC ¶ 26.) Thereafter, Mr. Mihaylo, the beneficial owner of approximately 19.6% of the outstanding stock of Inter-Tel Arizona, indicated that he, or an entity affiliated with him, might seek to acquire the remaining outstanding shares. (SAC ¶¶ 12, 27.)

On March 16, 2006, the Board met and approved a proposal to change the state of incorporation of the Company from Arizona to Delaware. (SAC ¶ 21.) As part of the proposed reincorporation, the Board approved a draft certificate of incorporation providing that Inter-Tel Delaware stockholders would receive stock with a par value of $0.001. (SAC ¶ 21, INTL000619 (3/16/06 Board minutes).)[4] The Proxy Statement indicated that the Company desired to maintain the substance of Inter-Tel Arizona's charter documents, and to benefit from Delaware corporate law including the greater predictability of Delaware law regarding measures designed

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[4] All of the documents referenced herein labeled INTL_____ are attached at Exhibit B, in numerical order. They also are all referenced throughout Plaintiff's SAC, and many are quoted in the SAC; indeed, most of the cites are to the Proxy Statement which Plaintiff quotes extensively in the SAC. The Court, therefore may consider the entire documents in connection with this Motion to Dismiss. *See, e.g., In re General Motors S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) ("When a complaint partially quotes or characterizes what a disclosure document says, a defendant is entitled to show the trial court the actual language or the complete context in which it was used.").

to protect stockholder interests in the event of a hostile takeover attempt against the Company. (SAC ¶¶ 37, *et seq.*; INTL000677-679 (Proxy Statement).)

The Board also approved a proposal for the Business Combination Charter Amendment, designed to protect against certain takeover related abuses. (SAC ¶ 25.) If the reincorporation and the BCCA were approved by the shareholders, then the Amendment would be added to the Inter-Tel Delaware Certificate. (SAC ¶ 38.) If only the BCCA was approved, then it would be added to the Inter-Tel Arizona Articles. (SAC ¶ 44; INTL000688 (Proxy Statement).)

Both the reincorporation and the BCCA were to be presented for shareholder approval at the Company's May 31, 2006 annual meeting of Inter-Tel Arizona. (SAC ¶ 37.) On May 10, 2006, the definitive proxy statement ("Proxy Statement") was filed with the U.S. Securities and Exchange Commission and mailed to Inter-Tel Arizona shareholders. (SAC ¶ 37.)

The Proxy Statement requested that the shareholders approve the reincorporation, and listed reasons why the Board believed that reincorporation in Delaware was in the best interests of the Inter-Tel Arizona shareholders. Among the three "Principal Reasons" for the reincorporation was "Takeover Response," e.g., benefiting from aspects of Delaware Law "intended both to prevent any potential acquirers of control of the Company from using coercive or abusive takeover-related tactics and to encourage such acquirers to negotiate directly with the Board." (SAC ¶¶ 37, *et seq.*; INTL000678 (Proxy Statement).)

The Proxy Statement stated that Inter-Tel Arizona had a limited number of measures designed to protect against a hostile takeover. It further stated that the charter and bylaws of Inter-Tel Delaware would include protective measures, specifically including the requirement that actions by written consent of shareholders be unanimous, similar to those of Inter-Tel Arizona. In full, the relevant section told shareholders that:

> The Company currently has in place a limited number of measures designed to protect shareholder interests in the event of a hostile takeover attempt against the Company. The Company proposes to include similar measures **in the charter and bylaws of the Delaware Company**. These measures include a requirement that holders of a substantial percentage of voting stock act together to call a special meeting of shareholders, advance notice provisions for shareholder proposals or director nominations at an annual meeting of shareholders, and **the requirement that actions by written consent of shareholders be unanimous**.

(SAC ¶¶ 37, *et seq.*; INTL000678 (Proxy Statement) (emphasis added).) This was clearly a representation to shareholders that the requirement for unanimous written consent would appropriately be included in the governing documents of Inter-Tel Delaware.

Moreover, the Proxy Statement stated that one of the reasons for reincorporation in Delaware was that Delaware law afforded "greater certainty" that these measures would be effective: "Many of these measures have not been as fully tested in the Arizona courts as in Delaware courts. As a result, Delaware law affords greater certainty that these measures will be interpreted, sustained and applied in accordance with the intent of the Board." (SAC ¶¶ 37, *et seq.*; INTL000678 (Proxy Statement).) Thus, one of the express reasons to reincorporate in Delaware was so that the aforementioned measures, including the requirement for unanimous written consent for shareholder action, would more likely be effective.

In a separate section, describing the "Differences Between the Corporation Laws of Arizona and Delaware," the Proxy Statement made clear the intent that the requirement of unanimous written consent be the rule for Inter-Tel Delaware as it was currently the rule for Inter-Tel Arizona:

> Under Arizona Law and Delaware Law, shareholders may execute an action by written consent in lieu of a shareholder meeting. Arizona law provides that action by written consent is permitted so long as all of the shares outstanding and entitled to vote on the matter provide consent in writing. Delaware permits a corporation to eliminate actions by written consent in its certificate of incorporation.

> Both the Arizona Bylaws and Delaware Bylaws provide that written consent is permitted if signed by the holders of all of the shares of outstanding stock entitled to vote with respect to the subject matter of the action.

(SAC ¶¶ 37, *et seq.*; INTL000682 (Proxy Statement).) Moreover, the Proxy Statement also noted that the reincorporation proposed "does not seek to alter the rights of the Company's shareholders or the rules by which the Company operates or by which its affairs are governed." (SAC ¶¶ 37, *et seq.*; INTL000678 (Proxy Statement).)

The Proxy Statement also requested that the shareholders approve the Business Combination Charter Amendment. The Proxy Statement explained that this would have the effect of requiring a potential acquirer "to seek significant agreement from other shareholders, helping to deflect abusive takeover tactics . . . ." (SAC ¶ 44; INTL000688 (Proxy Statement).)

Finally, the Proxy Statement provided that the reincorporation agreement and Inter-Tel Delaware's Certificate would be "in substantially the form" as those attached to the Proxy Statement, allowing non-material corrections and for addition of the BCCA. (SAC ¶ 38.)

Inter-Tel Arizona shareholders approved the reincorporation and the BCCA on May 31, 2006. (SAC ¶ 45.) However, prior to filing the Certificate and adopting bylaws for Inter-Tel Delaware, it was discovered due to a scrivener's error that the draft bylaws contained a Consent Provision but that the draft Delaware Certificate did not. Because such a provision was required to be included in the certificate to be effective under Delaware law, it was added prior to filing in order to effectuate the intent of both the Board and the Company's shareholders in approving the merger and reincorporation in Delaware. (*See* Ex. C (Inter-Tel (Delaware) Inc., Current Report (Form 8-K), Exhibit 3.1 at 2 (July 3, 2006)).)[5]

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[5] The Court may take judicial notice of facts publicly available in SEC filings. *See, e.g., Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999) ("[I]t is well settled that where certain facts are not specifically alleged (or in dispute) a Court may take judicial notice of facts

In addition, it was discovered that, even though the Board had approved stock with a par value of $0.001,[6] this was not specified in the draft Certificate attached to the proxy materials (which failed to state, as required by DGCL Section 102, whether the stock would be par or no par), or the draft reincorporation agreement attached to the proxy materials (which indicated that the stock would be no par). There was and is no material difference to Inter-Tel or its stockholders between no-par stock and stock with a small par value.[7] A designation of no-par stock, however, would have required Inter-Tel Delaware to pay an additional $400,000 in otherwise unnecessary filing fees,[8] to the detriment of Inter-Tel Delaware and its stockholders. (SAC ¶ 50.) Accordingly, the draft Certificate was corrected prior to its filing. (SAC ¶ 54.)[9]

On June 26, 2006, Stephen Wurzburg, Esq. of Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") sent via email the various reincorporation documents for signature of the CEO, Norman Stout. (SAC ¶ 56.) As Mr. Stout was traveling out of the country, Mr. Wurzburg also faxed the signature pages for the reincorporation documents to Mr. Stout for his signature with the instruction not to date the documents. (SAC ¶ 57.) Mr. Stout faxed the signature pages back to Pillsbury for them to be held in escrow until they were finalized and dated. (SAC ¶ 57.)

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publicly available in filings with the SEC.").

6 SAC ¶ 21; INTL000619 (3/16/06 Board minutes).

7 *See, e.g.*, A. Gilchrist Sparks, III & Frederick H. Alexander, *The Delaware Corporation: Legal Aspects of Organization and Operation*, A-4 (BNA, Corporate Practice Series No. 1-4th, April, 2006) ("[s]ince Delaware imposes no minimum capitalization requirement and par value has largely lost any significance as a protection for creditors, the selection of a par value or the assignment of no par value is in almost every case purely a matter of personal choice.").

8 Under the DGCL's fee provision, the fee in connection with authorizing no-par shares is computed strictly on the number of shares authorized. Sparks & Alexander, *The Delaware Corporation: Legal Aspects of* Organization *and Operation* at A-4. For par-value stock, on the other hand, the statute treats each $100 unit of authorized capital stock as one share. *Id.*

9 The Business Combination Charter Amendment was also added to the draft Certificate. (*See* Ex. C (Inter-Tel (Delaware) Inc., Current Report (Form 8-K), Exhibit 3.1 at 5-6 (July 3, 2006)).)

The Certificate of Incorporation and Certificate of Merger were filed with the Delaware Secretary of State on June 28, 2006, and the reincorporation agreement became effective on the same day ("Reincorporation Agreement").[10] (SAC ¶ 59.)

[10] The Certificate was filed with the Delaware Secretary of State on June 28, 2006 and the Bylaws were duly adopted on that same date. Inter-Tel Delaware filed an 8-K with the U.S. Securities and Exchange Commission on July 3, 2006, attaching both the Certificate and Bylaws.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS AND GOVERNING LAW.

Pursuant to Rule 12(b)(6), when assessing a motion to dismiss, the Court should accept all well-pled allegations of fact as true, and draw all reasonable inferences in Plaintiff's favor. However, the Court need not accept as true conclusory assertions unsupported by specific factual allegations. *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) (citations omitted); *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006). While the Court should draw all reasonable inferences in favor of the non-moving party, the Court "need not blindly accept as true all allegations, nor must it draw all inferences from them in [the non-moving party's] favor unless they are reasonable inferences." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) (internal quotation omitted).

With the exception of his challenge to the legal validity of the BCCA in Count I and challenges to certain actions taken to reincorporate in Delaware in Count V, Plaintiff's claims relate to actions of the directors during the time that he was a shareholder of an Arizona corporation and before the incorporation of Inter-Tel Delaware. The substantive law of Arizona governs such claims. *Berger v. Intelident Solutions, Inc.*, 911 A.2d 1164, 1167-1170 (Del. Ch. 2006) (concluding that Florida substantive law governed freeze-out merger involving Florida corporation.) Like the business judgment rule in Delaware, Arizona law "precludes judicial inquiry into actions taken by a director in good faith and in the exercise of honest judgment in the legitimate and lawful furtherance of a corporate purpose." *See Shoen v. Shoen*, 804 P.2d 787, 794 (Ariz. Ct. App. 1990). Similarly, a "director does not breach his fiduciary duty so long as he acts honestly and in good faith and breaches no specific duty owing to the corporation. . . ." *Atkinson v. Marquart*, 541 P.2d 556, 558 (Ariz. 1975). Because of their substantive similarities, Defendants rely upon the law of Arizona, as well as cases decided under Delaware law.

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

The requirement that a controversy be ripe for adjudication ensures that judicial opinions will not be premised upon supposition and hypothetical facts. *See Stroud v. Milliken Enters.*, 552 A.2d 476, 480 (Del. 1989) (quoting *State v. Mancari,* 223 A.2d 81, 82-83 (Del. 1966)). To grant relief, the Court must be "convinced that litigation sooner or later appears to be unavoidable, . . . that the material facts are static and that the rights of the parties are presently defined rather than future or contingent." *Id.* at 481. Indeed, the Court's "central concern is to avoid hypothetical questions." *Schick Inc. v. Amalgamated Clothing & Textile Workers Union,* 533 A.2d 1235, 1239 (Del. Ch. 1987). Because it may never be necessary to consider Count I and the claims in Count III dealing with the Business Combination Charter Amendment and the so-called "Defensive Measures," those claims should be dismissed.

Although Plaintiff boldly alleges that the BCCA "will" prevent the Company from being acquired (SAC ¶ 83), Plaintiff does not, and cannot, allege that any potential acquirer has been prevented from acquiring the Company.[11] The SAC instead deals only with hypothetical potential acquirers and hypothetical situations in which the BCCA ***might*** supposedly hinder an acquisition of Inter-Tel. This Court, however, does not render opinions on hypothetical facts.

Plaintiff also alleges that because of the BCCA, "if Inter-Tel needed to sell a 20% equity stake in the Company quickly in order to raise funds to avoid a financial crisis, it could not do so without subjecting the purchaser to restrictions on Business Combinations." (SAC ¶ 83.) Plaintiff, however, does not (and cannot) allege that Inter-Tel currently needs to sell a 20% equity stake in the Company. Thus, Count I is not ripe and should be dismissed.

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[11] To the contrary, as noted above, a merger of Mitel and Inter-Tel was recently announced. (*See* Ex. A (Inter-Tel (Delaware), Inc., Current Report (Form 8-K), at 2 (April 27, 2007)).)

Similarly, Count III at least partially focuses on certain alleged "Defensive Measures" (including the BCCA), which Plaintiff alleges will allow the individual defendants to "entrench themselves in office." (SAC ¶ 98.) Plaintiff, however, does not (and cannot) allege that there is currently any challenge to the individual defendants' office, either by way of a proxy contest or hostile offer for the Company, or that the so-called "Defensive Measures" have in fact had the effect of entrenching the Board. For example, Plaintiff alleges that the amendment to Section 2.4 of the Revised Bylaws will allow for successive adjournments of a stockholder meeting "far beyond 30 days from the original meeting date without any written notice being given to the shareholders." (SAC ¶ 73.) Although Plaintiff does not explicitly say so, he presumably believes that successive adjournments will allow the individual defendants to retain their offices by avoiding an actual vote at a meeting. Plaintiff has not, however, alleged that the individual defendants have in fact used Section 2.4 in this manner or even that they plan to use Section 2.4 in this manner. Thus, like Count I, the claims in Count III referring to the BCCA and the so-called "Defensive Measures" should be dismissed because they are not ripe.

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

In Count I of his SAC, Plaintiff challenges the shareholders' approval of a special resolution authorizing a provision in the Company's Certificate that requires the approval of a majority of disinterested stockholders to effect certain business combination transactions involving interested parties—the Business Combination Charter Amendment. Plaintiff acknowledges, as he must, that the Proxy Statement accurately described the BCCA merely as "mirror[ing] in many respects Section 203" and does not challenge the disclosure that the provision would "provide wider protections against takeover abuses by Interested Shareholders than those afforded by statute. . . ." (SAC ¶ 44.) Simply put, the shareholders were accurately

told that the proposed charter amendment was not, and did not purport to be, identical to Section 203.

Plaintiff nonetheless requests that the Court declare that the BCCA is "invalid and unenforceable under Delaware law" because, according to Plaintiff, it "conflicts with and is contrary to 8 *Del. C.* § 203 . . . and the public policy of Delaware." (SAC ¶¶ 2, 82; Wherefore Clause C.) Count I should be dismissed because it fails to recognize the broad contractual freedom accorded by Section 141 of the DGCL and because it is predicated upon the false premise that Section 203 somehow "occupies the field" with respect to the subject of business combinations with significant stockholders such that the stockholders are precluded from adopting protections beyond those provided by Section 203.

A. The Business Combination Charter Amendment Is Not Contrary To Delaware's Public Policy.

Plaintiff alleges in Count I that the BCCA "circumscribes the directors' ability to fulfill their fiduciary duties" and is therefore "invalid." (SAC ¶ 83.) In a related argument, Plaintiff claims that the charter provision is invalid because it does not include a "Prior Board Approval Exclusion" that is included in the language of Section 203. (SAC ¶ 82.) Although Count I expressly cites to Section 141(a) of the DGCL, Plaintiff's public policy arguments simply ignore the express language and implications of that statute. Section 141(a) provides:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, ***except as may be otherwise provided*** in this chapter or ***in its certificate of incorporation***. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed ***to such extent*** and by such person or persons as shall be provided in the certificate of incorporation.

8 *Del. C.* § 141(a) (emphasis added); *cf. Symposium: Contractual Freedom in Corporate Law*, 89 Colum. L. Rev. 1395 (1989); *Grimes v. Alteon, Inc.*, 804 A.2d 256, 266 (Del. 2002) (describing the

"statutory scheme of our Corporation Law" as permitting the "freedom to enter into new and different forms of transactions.")

Section 102(b)(1) of the DGCL similarly "confers, in the most general language, the right to include in a certificate of incorporation any provision deemed appropriate for the conduct of the corporate affairs." *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 117 (Del. 1952). As this Court recently observed, the DGCL provides "wide room for private ordering . . . when such private ordering is reflected in the corporate charter." *Jones Apparel Group, Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 838 (Del. Ch. 2004). Accordingly, a charter provision will be enforced unless it conflicts with "a mandatory aspect of Delaware corporate law." *Id.*

Here, it is not disputed that the BCCA appears in the Certificate. By the plain terms of Section 141, the powers and duties imposed upon the Board must be exercised to such extent "as shall be provided in the certificate of incorporation." 8 *Del. C.* § 141(a). Accordingly, Plaintiff's claim that the charter provision violates Delaware law and public policy because the Board is precluded from "waiving" its provisions or because it is a "perpetual prohibition" which does not include a "prior board approval exemption" included in Section 203, fails to state a claim under the plain language of Section 141(a). (SAC ¶¶ 80, 82.) Nor has Plaintiff identified any mandatory aspect of Delaware corporate law with which the charter provision conflicts and it is, therefore, permitted by Section 102 of the DGCL.

B. The Business Combination Charter Amendment Is Not Invalid Because Its Terms Differ From Section 203.

In addition to challenging the BCCA as "circumscribing" the directors' fiduciary duties, Count I also challenges the charter provision on the grounds that it is different than Section 203. According to Plaintiff, Section 203 requires that the charter provision include an 85% exclusion, makes it illegal to reduce the shareholder vote required to approve an exclusion

from the charter provision, and requires the inclusion of certain "opt outs" that can be found in the text of Section 203. (SAC ¶¶ 80, 84, 86-87.) The fundamental flaw with these allegations is that they improperly confuse a charter provision that has effects that are *similar* to the statutory framework of Section 203 with Section 203 itself. It is not the case, as Plaintiff assumes in Count I of his SAC, that any certificate provision that has effects similar to those of Section 203, but which does not adopt Section 203 *in haec verba,* necessarily violates Delaware law and is therefore invalid.

Nothing in Section 203 precludes Delaware corporations from taking actions (whether by charter amendment, agreement or otherwise) that have effects similar to those of Section 203. For example, a corporate charter may include a "fair price provision" which generally "requires supermajority approval for certain business combinations and sets minimum price criteria for mergers." *See Moran v. Household Int'l, Inc.,* 500 A.2d 1346, 1349 n.3 (Del. 1985); *AC Acquisitions Corp. v. Anderson, Clayton & Co.,* 519 A.2d 103, 115 (Del. Ch. 1986) ("Article Eleventh provides a mechanism for "Continuing Directors" to approve a proposed merger and thereby avoid the economic consequence that failure to get approval of 80% of the companies shareholders might otherwise have.") Although the effects of a fair price provision in a charter are in some ways similar to the operation of Section 203, that fact does not render fair price provisions in charters illegal.

Similarly, shareholder rights plans or "poison pills" have effects that are in many respects similar to the operation of Section 203. Nothing about the existence of Section 203, however, makes a rights plan "invalid"—even when the plan has a trigger (for example 10% or 20%) that differs from the 15% "interested stockholder" provision of Section 203.[12] Simply put,

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[12] Examples of Delaware corporations with a 10% status flip-in rights plan include: Abbott Laboratories, Comcast Corporation and Prudential Financial, Inc. Delaware corporations with a

nothing in Section 203 mandates that a charter provision which has effects similar to those of Section 203 include an 85% exclusion from the restrictions on business combinations.[13]

Equally flawed is Plaintiff's argument that the BCCA is invalid because it impermissibly reduces the stockholder vote required to approve an exclusion from *its* operation from the vote required to approve an exclusion from the operation of Section 203. (SAC ¶ 80.) Section 203(d) provides that "[n]o provision of a certificate of incorporation or bylaw shall require, for any vote of stockholders *required by this section*, a greater vote of stockholders than that specified in this section." 8 *Del. C.* § 203(d) (emphasis added). The vote required under the charter provision is *not* a vote required by Section 203.

Finally, Plaintiff's argument that the charter provision is invalid because it does not include certain "opt outs" provided in Section 203, (SAC ¶¶ 80, 84, 86-87), fails because the charter provision is not, and does not purport to be, Section 203. There is no requirement, in Section 203 or otherwise, that a duly-adopted charter provision that the shareholders voted to create and that addresses the subject of business combinations with significant stockholders contain each of the "opt outs" set forth in Section 203.

20% status flip-in rights plan include: Briggs & Stratton Corporation, Forest Oil Corporation and Schering-Plough Corporation.

[13] Plaintiff also claims that the charter provision would somehow preclude a stockholder from exercising the statutorily-conferred right to effect a short-form merger under 8 *Del. C.* § 253. *See* SAC ¶ 85. Nothing in the charter provision 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 charter provision Plaintiff challenges does not and cannot purport to abrogate or limit that statutory right.

C. The Board Approved Adding The Business Combination Charter Amendment To The Certificate.

Plaintiff's allegation that the BCCA is invalid because the Board did not approve its inclusion in the Certificate is proven wrong based on the same document Plaintiff quotes in his SAC. At the Board meeting on March 29, 2006, the minutes of which Plaintiff quotes extensively in Paragraph 25 of his SAC, the Board resolved that the BCCA would be added to the Certificate "as promptly as practicable" after shareholder approval:[14]

> RESOLVED: that the Board believes it is advisable and in the best interests of the Company to have the protection provided by the charter amendment attached hereto as Exhibit B (the "Charter Amendment"), and that a special resolution related to such Charter Amendment shall be submitted for approval by the Company's shareholders in connection with the Company's upcoming annual meeting of shareholders.
>
> RESOLVED FURTHER: that subject to the shareholders' approval of the special resolution related to the proposed Charter Amendment, the Board hereby authorizes and directs that the Company's Articles of Incorporation in Arizona or **Certificate of Incorporation in Delaware shall be amended (and restated if necessary) as promptly as practicable to include the Charter Amendment.**
>
> RESOLVED FURTHER: that the officers of the Company are hereby authorized and directed to execute all documents and to take all actions which they deem necessary or advisable to carry out and to perform the purposes and intent of these resolutions and any and all prior actions taken by the officers in connection therewith are hereby ratified and approved.

(SAC ¶ 25; INTL000649A (3/29/06 Board minutes) (emphasis added).) Thus, Plaintiff's allegation that "[t]he Board never made such a determination" fails because it is simply not true.

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[14] As noted above, the BCCA was approved by shareholders on May 31, 2006. (SAC ¶ 45.)

IV. 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 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, 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"); *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 1767529, at *9 (Del. Super. Ct.) (dismissing a declaratory relief claim because it was based on "mere assertions of wrongdoing" and "plaintiff [] alleged no injury"); *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1242 (Del. Ch. 1987) (dismissing a declaratory relief claim because the plaintiff had not shown current or imminent threat of harm).

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

Although 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), his attempts fall short.

First, Plaintiff fails to provide any rational explanation why moving the Consent Provision from the draft Bylaws to the Certificate in order to effectuate the promise made to shareholders—that there would be a requirement for unanimous written consent (*see* Section

IV.B.2., below)—harms the shareholders. To the contrary, shareholders would have been harmed had Defendants disregarded the disclosures made in the Proxy Statement that the same consent regime would apply after reincorporation in Delaware.

The fallacy of Plaintiff's allegation of harm in Count II is highlighted by his claim, in Count V, that the reincorporation was invalid because, if meritorious, it would result in the Company being an Arizona corporation where unanimous written consent is mandated by statute. *See* A.R.S. § 10-704 (requiring unanimous written consent for action by shareholders without a meeting.) Thus, Plaintiff fails to allege any harm regarding the Consent Provision and his claims regarding it should be dismissed.

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

In his first Amended Complaint, Plaintiff failed to allege any harm or propose any remedy regarding the par value of Inter-Tel's stock. (Am. Compl. ¶ 102 (no alleged harm or requested remedy); Pls. Opening Brief at 33 (asking for this Court to declare the change to par value of $0.001 to be "violative," without any claimed harm or proposed remedy.)) In his SAC, Plaintiff adds a short, conclusory allegation to his prayer for relief, asking for damages as a result of Defendants alleged wrongful conduct "and the conversion of their stock." (SAC, Wherefore Clause C.) Plaintiff, however, disavows that this allegation applies to Count II. (Pls.' Opp. To Defs.' Mot. to Resolve Dispute Regarding Briefing Schedule at 5-6 (arguing that Count II could be adjudicated despite Plaintiff's SAC, because this request for relief is solely as to Count V, not Count II.)

Additionally, the Court may take judicial notice that there is no harm to Inter-Tel's stockholders from having stock with a nominal par value versus no par value stock. *See, e.g., The Delaware Corporation: Legal Aspects of Organization and Operation* at A-4.

Indeed, Inter-Tel's stockholders would have been harmed if they had no par stock as the Company would have been required to pay an unnecessary $400,000 filing fee.[15]

Moreover, even if Plaintiff had properly alleged a claim for conversion and it applied to Count II, "[t]he ordinary measure of damages for conversion is the value of the converted stock on the date of conversion." *Tansey v. Trade Show News Networks, Inc.*, 2001 WL 1526306, *1 (Del. Ch.). Here, no stockholder would wish to convert their shares because Inter-Tel's stock is trading more than $4 higher today than on the date of the alleged conversion, i.e. the Reincorporation on June 28, 2006. (*See* Ex. D (Bloomberg) (shares closed at $21.10 on June 28, 2006 and were trading at $25.20 as of May 9, 2007).) *See also Tansey*, 2001 WL 152606 at *8 ("[t]o the extent that stock is traded on a recognized market, the court therefore can derive the value from the trading price at the date of conversion").

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 Arcturus Radio Tube Co. v. Radio Corp. of Am.*, 177 A. 899, 900 (Del. Ch. 1935) (seeking reformation of a license agreement to eliminate a clause in the agreement); *Prestancia Mgmt. Group, Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *4 (Del. Ch.) (seeking reformation of an assignment agreement to delete a reversion clause).

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[15] More specifically, if the shares were designated as no par, the Company would have needed to pay over $400,000 to file the Certificate, which amount was reduced to less than $2,000 by providing for the par value of the authorized stock to be $0.001 per share. (SAC ¶ 50.)

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

To reform the Certificate, it is Plaintiff's burden to show the intent of the parties by clear and convincing evidence. *See Amstel Assocs., L.L.C. v. Brinsfield-Cavall Assocs.*, 2002 WL 1009457, at *5 n.13 (Del. Ch.) (citing *Collins v. Burke*, 418 A.2d 999, 1002 (Del. 1980)) ("[T]he party seeking to reform the contract must present clear and convincing evidence that the written agreement as executed does not reflect the parties' true intent."). Plaintiff has not and cannot allege or prove facts sufficient to satisfy this burden as the documents he references in his SAC 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.

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. The Board minutes and Proxy Statement, quoted extensively in the SAC, clearly illustrate the parties' intent. For example:

- "The Board discussed the draft certificate of incorporation and bylaws for the Delaware corporation, and discussed the goal to maintain as closely as possible the substance of the Company's current Arizona charter documents . . . ." (SAC ¶ 20; INTL000610 (3/16/06 Board Minutes).)
- "The Company currently has in place a limited number of measures designed to protect shareholder interests in the event of a hostile takeover attempt against the Company. The Company proposes to include similar measures in the charter and

bylaws of the Delaware Company. These measures include . . . the requirement that actions by written consent of shareholders be unanimous." (SAC ¶¶ 37, *et seq.*; INTL000678) (Proxy Statement).)

- The reincorporation proposed "does not seek to alter the rights of the Company's shareholders or the rules by which the Company operates or by which its affairs are governed." (*Id.*)

Conversely, the Proxy Statement never stated that stockholders would be able to act, absent an annual or special meeting, with anything less than unanimous written consent. These contemporaneous writings are conclusive evidence that the failure to include the Consent Provision in the draft Certificate was simply a mistake. *See, e.g., Siegman v. Palomar Medical Tech., Inc.*, 1998 WL 118201, at *4 (Del. Ch.) ("To be sure, a contemporaneous writing documenting an error in a certificate of incorporation would be helpful, as it would provide highly persuasive, if not conclusive, evidence of the mistake.")

In a desperate attempt to save his claim, Plaintiff alleges that because the Consent Provision language appeared in the various draft Bylaws rather than the draft Certificates, that Defendants must have deliberately placed the Consent Provision in the bylaws rather than the certificate and the omission could, therefore, not have been the result of a "scrivener's error." (SAC ¶ 22.) This is nonsense, and merely reflects the timing of catching the error rather than the intent of the parties. Moreover, this argument is refuted by the provision in the Proxy Statement which states that the Consent Provision would be "in the charter and the bylaws." (SAC ¶¶ 37, *et seq.*; INTL000678 (Proxy Statement).) Plaintiff's argument is further untenable because the Proxy Statement would have been required to inform the shareholders that if the provision was only in the Bylaws it would not be effective, an "unreasonable inference" that the Court may reject. *See In re Lukens Inc. S'holders Litig.*, 757 A.2d at 727.

Similarly, Inter-Tel properly filed the Certificate with a par value of $0.001 to conform to the intent of the parties and avoid an unnecessary $400,000 filing fee. The draft Reincorporation Agreement mistakenly indicated that the stock would be no par and the draft Certificate was silent as to whether the stock would be par or no par. This was simply an error. The version of the certificate of incorporation approved by the Inter-Tel Arizona Board provided for $0.001 par value stock. (SAC ¶ 21; INTL000619 (3/16/06 Board minutes).) Upon realizing this mistake, it was corrected, and the draft Reincorporation Agreement and Certificate were revised to state a par value of $0.001 prior to its filing with the Delaware Secretary of State. Plaintiff does not and cannot dispute that the parties did not intend to incur an unnecessary $400,000 fee associated with no par stock when there is no material difference to shareholders between no par stock and stock with a nominal par value.

Thus, Plaintiff 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.[16]

3. Defendants Properly Corrected The Draft Certificate.

Plaintiff alleges that the addition of the Consent Provision 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 Section 4.5(ii) and Section 251(d)(2) prohibit any changes to a certificate of incorporation after shareholder approval, and because Section 4.5(iii) and Section

[16] Plaintiff also demands that the Consent Bylaw be declared invalid and removed from the Bylaws of Inter-Tel Delaware. While there is nothing prohibiting a company from having a provision in its bylaws that matches a valid provision in its certificate of incorporation (*see* 8 *Del. C.* § 109(b)), this issue is moot because the Consent Bylaw has already been deleted. Indeed, Plaintiff alleges that Inter-Tel's restated Bylaws adopted on March 6, 2007, "deleted the Consent Bylaw" (SAC ¶¶ 3 n.1, 70), yet still asks that the now non-existent Consent Bylaw be declared invalid and removed from the Bylaws. (SAC, Wherefore Clause C.)

251(d)(3) prohibit changes to a reincorporation agreement that would adversely affect shareholders. Plaintiff's rigid approach would allow for no change whatsoever to the draft Certificate. The same Proxy Statement quoted throughout Plaintiff's SAC, however, establishes that the draft Certificate was approved as just that—a draft—and that changes were expressly allowed and, indeed, required. Furthermore, Plaintiff has no valid argument that conforming the draft Certificate to the intent of the parties was adverse to stockholder interests.

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 (1) changes were expressly allowed to the draft documents, (2) they were required to be corrected, and (3) the changes were not material.

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

Plaintiff attempts to pluck a single provision out of the draft Reincorporation Agreement, read it in isolation, and claim that the draft Certificate, therefore, could not be corrected or changed in any way, regardless of the intent of the parties.

The allegations in Plaintiff's SAC, however, establish that the shareholders approved a draft Certificate recognizing that the filed certificate would be in "substantially the form" attached to the Proxy Statement, thereby expressly allowing changes to the draft. (SAC ¶ 38.) 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.") Additionally, Plaintiff's argument that the terms of Section 4.5(ii) of the draft

reincorporation agreement were absolute and that, therefore, no change whatsoever could be made to the draft Certificate is belied by the fact that, if the BCCA were approved by the shareholders, it would need to be added to the draft Certificate. Finally, as noted above, all of the draft Agreements—not just the draft Certificate where the BCCA was referenced—noted that the drafts would be in "substantially the form" attached to the Proxy Statement, thereby expressly allowing changes to all of the draft documents. (SAC ¶ 38.)

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

As Plaintiff points out in Paragraph 23 of his SAC, the draft Certificate attached to the Proxy Statement failed to indicate whether the shares would have a par value. This scrivener's error was in violation of Section 102(a)(4) of the DGCL, which requires a certificate of incorporation to state whether the shares would have a par value. The draft Certificate only stated that there would be one class of stock and identified the total number of shares. (SAC ¶¶ 37, *et seq.*; INTL000724 (Proxy Statement).) Thus, by Plaintiff's own admission, 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.

(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 precluding correction of scrivener's errors. To the contrary, it is just these types of errors that courts will fix in the reformation of a contract if the parties fail to catch it. *See,e. g.*, *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); *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, the Company caught the errors before the Certificate was filed with the Delaware Secretary of State and properly corrected them.

Similarly, Plaintiff argues that the change of Inter-Tel Delaware's stock from no par to par value of $0.001 per share violated Section 4.5 of the Reincorporation Agreement because its terms "were changed in material respects." (SAC ¶ 94.) This change of $0.001, however, is not material to the kind of shares delivered to Inter-Tel Delaware stockholders.

As discussed above, there is no material difference to the Inter-Tel stockholders between no-par stock and stock with a nominal par value. *See, e.g., The Delaware Corporation: Legal Aspects of Organization and Operation*, at A-4. The designation of par stock, however, saved Inter-Tel Delaware from paying $400,000 in otherwise unnecessary filing fees, to the benefit of Inter-Tel and its stockholders.

The provision of the draft Reincorporation Agreement stating that there could be no change in the kind of shares was obviously meant to prevent a shareholder from receiving a form of shares that was less valuable than they bargained for. Here, however, there was no change in the kind of shares received. The only change was for no par common stock to $0.001 par common stock, clearly an immaterial change in the terms of the common stock.

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 these statutes does not apply. The

sole shareholder of Inter-Tel Delaware was Inter-Tel Arizona, whose action pursuant to Section 228 to approve the Reincorporation Agreement was effective only *after* the Delaware Certificate, which already had been corrected to include the Consent Provision and par value, was filed with the Delaware Secretary of State. In other words, no Delaware corporation party to an executed merger agreement existed prior to filing the Certificate in Delaware such that Sections 251(d) and 252 do not apply.[17]

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

In Count III, Plaintiff lists, *seriatim*, a variety of actions he claims were undertaken for entrenchment purposes and in breach of the directors' fiduciary duties, including specifically: (i) the Indemnification Agreements; (ii) the Advance Notice Bylaws; (iii) the Board Appointments; (iv) the New Compensation Arrangements; (v) an alleged failure to seek a full and fair offer from Mihaylo; (vi) the Reincorporation; (vii) adoption of the Business Combination Charter Amendment; (viii) the Mihaylo Settlement; (ix) the Consent Bylaw and Consent Provision; (x) the amendments reflected in the Restated Bylaws; (xi) misleading and incomplete disclosure; and (xii) the Board's alleged failure to pursue a value-maximizing plan for the stockholders.[18] (SAC ¶ 98.) Plaintiff also complains about "sterilization" of the Board by creation of a Special Committee resulting in exclusion of directors from decisions where they had an actual or potential conflicts of interest.

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[17] Plaintiff does not allege that Inter-Tel Arizona violated any Arizona law by conforming the draft Certificate to the intent of the parties. Nor, as discussed above, has Plaintiff shown how designation of a par or no-par value is a material change. To the contrary, it is just this type of error that Arizona courts will correct if the parties fail to catch it. *See, e.g., Phil Bramsen Distrib.*, 726 P.2d at 614-15.

[18] Plaintiff's disclosure claims are discussed in connection with the other counts.

Plaintiff's claims should be dismissed because certain of the actions he challenges were approved by shareholders, and because he fails to make a demand or to allege particularized facts sufficient to demonstrate that demand is excused. Furthermore, Plaintiff fails to allege facts sufficient to rebut the presumption of the business judgment rule and all the actions complained of served a proper corporate purpose. Nor does the SAC contain allegations of fact to establish that the actions had the effect of entrenching the Board and that the Board's primary motivation was entrenchment.

A. Plaintiff's Claims Regarding The Reincorporation, Business Combination Charter Amendment, And Consent Provision Should Be Dismissed Because The Shareholders Approved Them.

Because the shareholders approved of the Reincorporation, Business Combination Charter Amendment, and Consent Provision, Plaintiff's challenges to them must be dismissed. As the Delaware Supreme Court has explained in *Williams v. Geier*, "[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." 671 A.2d 1368, 1377 (Del. 1996). Here, the shareholders approved the Reincorporation, 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."). Here, the Reincorporation, BCCA, and Consent Provision were all approved by the shareholders and Plaintiff's claims relating to them fail as a matter of law.

B. Plaintiff's Claims Should Be Dismissed Because He Failed To Make A Demand Or To Allege Particularized Facts Sufficient To Demonstrate That Demand Is Excused.

Plaintiff's breach of fiduciary duty claims should be dismissed because these claims are derivative and Plaintiff failed to make pre-suit demand or allege facts sufficient to show that demand would have been futile. Plaintiff challenges the actions enumerated in Count III on the grounds that they were designed to entrench the Board. (SAC ¶ 98, 144.) Such claims are derivative. *See Albers v. Edelson Tech. Partners, L.P.*, 31 P.3d 821, 826 (Ariz. Ct. App. 2001) ("[A]n action is derivative rather than direct if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.") (internal quotation omitted)).

This Court similarly has observed that "claims arising from transactions which operate to deter or defeat offers to purchase the subject company's stock, i.e., entrenchment claims, are generally found to be derivative in nature." *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004) (quoting *In re First Interstate Bancorp Litig.*, 729 A.2d 851 (Del. Ch. 1998), and applying the principles of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004)). The Court in *Dieterich* observed that the claims plaintiff asserted, like those asserted in Count III, implicated "the directors' normal duty to manage the affairs of the corporation, albeit in the context of a corporation searching for alternatives. That duty is owed to the corporation and not separately or independently to the stockholders." *Id.* The Court similarly concluded that any recovery for the alleged breaches of duty "would properly belong to the corporation, rather than to the stockholders personally or any ill-defined subset of them." *Id.* at 1028. Accordingly, the entrenchment claims in Count III are derivative.

The Court should dismiss Plaintiff's claims under either Arizona or Delaware law because Plaintiff did not make a pre-suit demand and also fails to allege particularized facts necessary to satisfy the requirements for demand futility. To the extent Arizona law applies, Plaintiff was required by statute to make a demand before commencing a derivative proceeding. A.R.S. § 10-742. This statutory requirement "is clear and admits of no exception. It requires a pre-suit demand." *Albers,* 31 P.3d at 829 (holding that demand futility is not a viable argument under Arizona law).

Under Delaware law, in order to establish demand futility, Plaintiff must create a reasonable doubt that: "(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson v. Lewis*,473 A. 2d 805, 814 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (holding that the standard of review should be de novo). Plaintiff is not permitted to rely on conclusory allegations, but instead must plead particularized facts. *Id.* at 817. The SAC, however, provides only conclusory allegations that the actions were taken for the "primary purpose of entrenchment" and that "there is a reasonable doubt as to whether the defendant directors exercised reasonable business judgment in approving the challenged measures." (SAC ¶ 146.)

Plaintiff's entrenchment allegations do not meet the first prong of *Aronson* because "the mere allegation that directors have taken action to entrench themselves without an allegation that the directors believed themselves vulnerable to removal from office, will not excuse demand." *Greenwald v. Batterson*, 1999 WL 596276, at *5 (Del. Ch.). *See also In re Paxson Comm. Corp. S'holders Litig.*, 2001 WL 812028, at *9 (Del. Ch.) ([I]t is well-established that a successful claim of demand futility requires the existence of an *actual threat* to the directors' positions on the board.") (emphasis in original). Similarly, a "mere allegation that

the board decided not to pursue a sale or merger is not enough to show that the individual directors were not independent or were interested." *See A.R. DeMarco Enter., Inc., v. Ocean Spray Cranberries, Inc.*, 2002 WL 31820970, at *5 (Del. Ch.). Accordingly, the conclusory allegations of the SAC are insufficient to satisfy the first prong of *Aronson.*

Plaintiff's conclusory allegation that "there is a reasonable doubt as to whether the defendant directors exercised reasonable business judgment in approving the challenged measures" is likewise insufficient to satisfy the second prong of *Aronson.* (SAC ¶ 146.) *See A.R. DeMarco*, 2002 WL 31820970, at *5 ("[T]he naked allegation that management is entrenched is not enough to meet *Aronson's* second prong."). Therefore, because the SAC fails to establish that demand is excused, the Court should grant defendants' motion to dismiss as to Count III.

C. Plaintiff Fails To Allege Facts Sufficient To Rebut The Presumption Of The Business Judgment Rule.

Plaintiff alleges that the laundry list of business activities identified above breached the defendants' fiduciary duty because they were designed to entrench the Board. Under Arizona law, which governs Plaintiff's challenges to actions that occurred before consummation of the reincorporation into Delaware, even if a challenged action "entrenches the board, it is permissible if it also serves a proper corporate purpose." *Shoen*, 804 P.2d at 795. Similarly, to rebut the presumptions of the business judgment rule under Delaware law, "a successful claim of entrenchment requires plaintiffs to prove that the defendant directors engaged in actions which had the effect of protecting their tenure and that the 'action was motivated primarily or solely for the purpose of achieving that effect.'" *In re Fuqua Indus. S'holders Litig.*, 1997 WL 257460, at *10 (Del. Ch.) (quoting *Heineman v. Datapoint*, 1990 WL 154149, at *1-2 (Del. Ch.)). The Court should dismiss these claims because all of the challenged actions served a

proper corporate purpose. Moreover, the SAC does not contain allegations of fact to establish that the actions had the effect of entrenching the Board and that the Board's primary motivation was entrenchment.

1. The Indemnification Agreements, Board Appointments, Advance Notice Bylaws, New Compensation Arrangements, Reincorporation, Business Combination Charter Amendment, And Consent Provision All Served A Proper Corporate Purpose.

In support of his claim that the Board breached its fiduciary duty by adopting the Indemnification Agreements, Plaintiff alleges only that they were entered into (SAC ¶ 26), without even describing the terms of the agreements or how they have entrenching effects. Indemnification Agreements for directors and officers are common, and are in fact an important part of corporate law. *See* 8 *Del. C.* § 145*; Homestore v. Tafeen,* 888 A.2d 204, 211 (Del. 2005) (noting that "[i]ndemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service."). Because they serve a proper corporate purpose, the Indemnification Agreements are not actionable, even if Plaintiff had alleged facts sufficient to establish an entrenching effect. *See Shoen*, 804 P.2d at 795. Nor has Plaintiff alleged any non-conclusory facts showing that the Board's primary motivation for adopting the Indemnification Agreements was entrenchment and, accordingly, such a claim is not actionable.

With respect to the Board Appointments, the SAC only notes that new directors were appointed, yet fails to state why appointment of additional directors breached any fiduciary duty.[19] Furthermore, the timing of the Board Appointments undermines any entrenchment claim.

[19] Plaintiff's previous complaint at least alleged, albeit in a conclusory fashion, a reason as to why new appointments might be a breach of fiduciary duty: that the Board Appointments were "designed to frustrate Mihaylo's chance of winning a proxy contest and to minimize the

See Moran, 500 A.2d at 1350 (stating that when reviewing a pre-planned defensive measure, as opposed to one taken in response to an actual threat, "it seems even more appropriate to apply the business judgment rule"). Moreover, even if the sequence of events could support Plaintiff's claim, and even assuming the Board Appointments had the effect of entrenching the Board, "[a]n entrenchment effect alone . . . is not enough to demonstrate a primary or sole purpose to entrench." *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 190 (Del. Ch. 2005). Accordingly, Plaintiff's challenge to the Board Appointments fails as a matter of law.

Plaintiff's challenge to the adoption of the Advance Notice Bylaws likewise fails to allege facts necessary to support an actionable claim for entrenchment. To the contrary, advance notice bylaws are commonly used and are not presumptively invalid. *See Linton v. Everett*, 1997 WL 441189, at *10 (Del. Ch.) (stating that an advance notice provision is not inequitable per se.) Thus, by simply alleging that the Board adopted the Advance Notice Bylaws, Plaintiff has not shown that the primary purpose in doing so was entrenchment or that adopting the Advance Notice Bylaws actually had the effect of entrenching the Board.

With respect to the New Compensation Arrangements, Plaintiff alleges only that the compensation for directors and officers was a defensive measure (SAC ¶ 26), and makes the conclusory allegation that this somehow violates a fiduciary duty.[20] (SAC ¶ 98.) This is plainly

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number of directors that Mihaylo and other stockholders might elect through the use of cumulative voting." (Am. Compl. ¶ 11.) This conclusory allegation, however, is contradicted by the allegations that the Board Appointments were made in February 2006, *before* Mihaylo filed a Schedule 13-D on March 6, 2006, before his legal advisors contacted the Company on March 31, 2006 and well before Mihaylo's April 3, 2006 letter informing the Board of his interest in a possible all-cash acquisition of the Company. (*Id.* at ¶ 13.) Now, in his SAC, Plaintiff kept the bare allegation, yet removed any attempt to support it.

[20] Here again, Plaintiff removes the alleged factual support discredited in previous pleadings. In his previous complaint, Plaintiff alleged that the Board raised compensation. Defendants noted in their motion to dismiss that a bare allegation that the Board raised compensation does not carry with it a presumption that the compensation was raised for the purpose of entrenchment or that it actually had the effect of entrenching the Board. *See*

insufficient. Similarly, Plaintiff lists reincorporation in Delaware as a breach of fiduciary duty, yet fails to allege how the reincorporation would constitute such a breach or how it serves to entrench the Board. (SAC ¶ 98.) The Proxy Statement cited and quoted throughout the SAC explained the reincorporation's proper corporate purpose in a detailed section titled "Principal Reasons for the Reincorporation: Recommendation." (SAC ¶¶ 37, *et seq.*; INTL000677-678 (Proxy Statement).) Indeed, Defendants are not alone in asserting that reincorporation serves a proper corporate purpose: companies reincorporate in Delaware all the time.

Plaintiff claims that the decision to include the Business Combination Charter Amendment in the Delaware Certificate breached Defendants' fiduciary duty, alleging that it is an unreasonable action. However, as noted with Plaintiff's other conclusory allegations, such conclusory allegations of unreasonableness will not preempt the business judgment rule; nor should they thwart the expressed intent of the shareholders who voted in favor of the BCCA. Again, the Proxy Statement contained a detailed statement as to the proper corporate purpose served by the Amendment, including to help ensure that the shareholders and the Board have the means and opportunity to obtain the best price and the most favorable terms for any proposed takeover of the Company. (SAC ¶ 44; INTL000688 (Proxy Statement).) Indeed, the DGCL contains a similar provision, Section 203, demonstrating that business combination provisions serve a proper corporate purpose.

Finally, as Plaintiff himself notes, the Consent Provision served the corporate purpose to "maintain as closely as possible the substance of the Company's current Arizona charter documents," (SAC ¶ 20), as the requirement for unanimous written consent was effective for Inter-Tel Arizona by its bylaw provision and applicable Arizona law. Thus, the Consent

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Benihana, 891 A.2d at 175 ("[T]he fact that directors receive fees for their services does not establish an entrenchment motive on their part.") Realizing that his alleged factual support was meritless, Plaintiff kept the bare allegation but omitted the attempt at factual support.

Provision was not implemented for the purpose of entrenchment, but instead to maintain as closely as possible the substance of the Company's Arizona charter documents. Moreover, the fact that such a provision is mandated by law in Arizona further goes to show its proper corporate purpose. *See* A.R.S. § 10-704. As stated by an Arizona practice guide: "The requirement of unanimity . . . ensures that taking an action without a meeting does not deprive a shareholder opposing the action of the opportunity to persuade fellow investors." Brent A. Olson & Lisa C. Thompson, *Corporations*, in 9 Ariz. Prac. § 2:40 (2006-2007 ed.).

Because Plaintiff fails sufficiently to allege that the Indemnification Agreements, Board Appointments, Advance Notice Bylaws, New Compensation Arrangements Reincorporation, Business Combination Charter Amendment, and Consent Provision lacked a proper corporate purpose or were for the primary purpose of entrenchment and actually had the effect of entrenching the Board, Defendants' motion to dismiss should be granted with respect to these actions.

2. Plaintiff Fails To Allege Facts To Support A Claim That The Board Breached Its Fiduciary Duty In Its Dealings With Mihaylo.

Plaintiff's claim that the Board entrenched itself by entering into the Mihaylo Settlement is not supported by the facts pled. To the contrary, the pleadings show that the Mihaylo Settlement had the exact opposite effect: it provided Mihaylo Board representation, a requirement that any proposal Mihaylo made be reviewed by a special committee of the Board in a timely manner, a right to call a special meeting of the stockholders if any acquisition proposal he submitted meeting certain criteria was rejected by the Board or not acted on in a timely manner, and an agreement to postpone the adoption of a bylaw or certificate provision that would prevent Mihaylo from calling a special stockholders meeting so long as Mihaylo owned more than 10% of Company's outstanding stock. (SAC ¶ 30.) Contrary to Plaintiff's conclusory

allegation, the terms of the Mihaylo Settlement cannot be deemed to be entrenching.[21] The Mihaylo Settlement has proper purposes, and there are no well-pled factual allegations that the directors were actually motivated by entrenchment.[22]

Plaintiff's claim that the Board acted to entrench itself because it expanded the size of the Board to 11 to accommodate Mihaylo's three nominees (SAC ¶ 31) is unsupported. By Plaintiff's logic, a shareholder's desire for board representation can never be accommodated by expanding the size of the board, for doing so constitutes a breach of fiduciary duty. Under Arizona law, even if the decision to expand the board had an entrenching effect, it is not actionable if it "also serves a proper corporate purpose." *Shoen*, 804 P.2d at 795. The proper purpose is obvious as the Board expansion permitted the Company to continue to receive the services of qualified directors and execute a settlement in the Company's interest. The SAC is devoid of facts showing that the Board's decision to expand the Board to 11 was anything other than the product of the Board's business judgment and, therefore, Defendants' motion to dismiss should be granted with respect to the Mihaylo Settlement and Board appointment claims.

Plaintiff also claims, without support, that the Board breached its fiduciary duty by failing to seek a "full and fair offer" from Mihaylo. (SAC ¶ 98.) In Plaintiff's previous complaint, the sole "factual" support for this claim was the allegation that in response to Mihaylo's June 15, 2006 offer, "rather than seeking to maximize value for the Inter-Tel stockholders, the defendants exchanged charges as to whether Inter-Tel or Mihaylo and Vector

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21 The absence of an entrenchment effect is perhaps best evidenced by the fact that Mihaylo voluntarily entered into the Settlement.

22 Plaintiff's allegation that Defendants have impeded the Mihaylo Offer and formulated a plan to disenfranchise Inter-Tel's stockholders is equally without merit. (SAC ¶ 98.) Plaintiff does not dispute that the Mihaylo Settlement required that due diligence on the Company be completed before an offer was made. (SAC ¶ 52.) Essentially, Plaintiff argues that holding Mihaylo to the terms of a negotiated settlement agreement is a breach of the Defendants' fiduciary duty; this simply is not the law.

had breached the Mihaylo Agreement." (Am. Compl. ¶ 41.) Seeking to enforce contractual rights of a corporation, in this case under the Mihaylo Settlement, does not constitute a breach of duty.[23] In short, Plaintiff's claim that the Board somehow breached its fiduciary duty by failing to seek a full and fair offer from Mihaylo is not only unsupported, but it is actually contradicted by facts alleged. Accordingly, the Court should dismiss such claims.

3. Plaintiff Fails To Allege Facts To Support His Claim That The Board Failed To Pursue A Value-Maximizing Plan.

In support of his allegation that the Board breached its fiduciary duty by failing to pursue a value maximizing plan for the shareholders, Plaintiff offers nothing more than a conclusory statement to that effect. (SAC ¶ 98.) Plaintiff completely fails to support his claim that the Board's actions lacked a proper corporate purpose or were designed to, and had the effect of, entrenching the Board and preventing the sale of the Company.[24] Defendants' motion to dismiss should, therefore, be granted with respect to Plaintiff's claim that the Board breached its fiduciary duty by failing to pursue a value-maximizing plan for the shareholders.

4. Plaintiff Fails To Allege Facts To Support His Claim Of Director "Sterilization."

Plaintiff alleges that the Mihaylo nominees were "sterilized" because the Board created a Special Committee to handle matters where the Mihaylo directors had an actual or potential conflict. (SAC ¶ 110.) However, 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, e.g., Kahn v. Lynch Commc'n Sys.*, 669 A.2d 79, 82 (Del. 1995) ("an independent negotiating committee which approximated an arm's-length bargaining process is

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[23] Again, Plaintiff removed an allegation discredited in a previous pleading, leaving only an unsupported accusation.

[24] Moreover, as noted above in footnote 2, Inter-Tel has announced a plan to sell the Company.

strong evidence of fairness"); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709-10 n.7 (Del. 1983) (indicating that an independent negotiating committee could have changed the outcome since "fairness in this context can be equated to conduct by a theoretical, wholly independent, board of directors"); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 938 n.7 (Del. 1985) (characterizing use of a special committee as "strong evidence of fairness.")[25] Under Plaintiff's reasoning, in order not to breach their fiduciary duty, Defendants must allow directors with potential conflicts of interest to participate in transactions on behalf of the Company.[26] This argument, however, is contrary to established principles of corporate governance and should be rejected by the Court.

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

In Count IV, Plaintiff claims that certain disclosures contained in the Proxy Statement are incomplete or misleading. It is unclear whether Arizona law includes a fiduciary duty of disclosure like Delaware law, but to the extent it does, Arizona law generally provides 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." *See Persky v. Turley*, 1991 WL 327434, at *3 (D. Ariz.); *accord Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000) (applying the same standard.) In other words,

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[25] Moreover, 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.) As noted above, this settlement agreement was specifically referenced in the Proxy Statement and publicly available for any shareholder to review. (SAC ¶¶ 37, et seq.; INTL000671 (Proxy Statement); Ex. E (Inter-Tel (Delaware), Inc., Soliciting Material (Schedule 14A), at 2 (May 5, 2006).)

[26] Plaintiff's related argument, that the phrase "conflicting financial interests and/or loyalties" is impermissibly vague, strains credulity. Nor is the Special Committee's authorizing resolution "invalid as applied" because the full Board, at a time when Mihaylo and his designees were not members, approved the Reincorporation and Consent Provision. (SAC ¶ 21; INTL000611 (3/16/06 Board minutes).)

a fact is material if it "would have assumed actual significance in the deliberations of the reasonable shareholder." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

Directors are "not required to disclose all available information" just because that information might be helpful. *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992); *Skeen*, 750 A.2d at 1174 (noting that "[o]mitted facts are not material simply because they might be helpful"). *See also Solomon v. Armstrong*, 747 A.2d 1098, 1128 (Del. Ch. 1999) (directors are not required to disclose information that is "somewhat more informative"). Accordingly, the law has rejected "the fallacy that increasingly detailed disclosure is always material and beneficial disclosure" because "[i]n some instances the opposite will be true." *Zirn v. VLI Corp.*, 1995 WL 362616, at *4 (Del. Ch.), *aff'd*, 681 A.2d 1050 (Del. 1996). In order to plead a viable disclosure claim, Plaintiff must "allege facts that are missing from the [Proxy] statement, identify those facts, state why they meet the materiality standard and how the omission caused injury." *Skeen*, 750 A.2d at 1173. Plaintiff fails to do so.[27]

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 Business Combination Charter Amendment to differ from the text of Section 203 of the DGCL, 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.) The fallacy of Plaintiff's disclosure claim is that the shareholders were not asked

[27] Plaintiff's allegations that the Proxy Statement had misleading disclosures regarding amendment of the draft documents, including the draft Reincorporation Agreement, and that there should have been a re-solicitation of shareholder votes, fails to state a claim for the same reasons discussed above at Section IV.B.—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 and effectuate the parties' intent.

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 (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, at *4 (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[28] and the charter provision would be material to the shareholders' decision to approve the BCCA.

The descriptions included in the Proxy Statement of the differences between the BCCA and Section 203, moreover, are accurate and complete. The differences discussed in the Proxy Statement focus on the features that are common to both the BCCA and Section 203, including the concept of an "Interested Shareholder" and how that term is defined, and the stockholder voting requirements to approve a business transaction with an "Interested Shareholder." The "numerous other differences" that Plaintiff claims were omitted from the Proxy Statement involve features of Section 203 that are not part of the BCCA. (SAC ¶ 44.) Nor would description of the "numerous other differences" between Section 203 and the BCCA have altered the total mix of information available to a reasonable investor where the Proxy Statement explicitly disclosed that the BCCA would provide "wider protections against takeover abuses" than those afforded by Section 203. (SAC ¶ 117.)

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[28] The text of Section 203 is publicly available and any shareholder who, for reasons the SAC does not explain, wanted to compare the charter provision with the text of Section 203, was free to do so.

B. Plaintiff's Claim Challenging The Proxy Statement's Description Of The Mihaylo Settlement Fails As A Matter Of Law.

Plaintiff also alleges that the Proxy Statement should have disclosed certain details regarding the Mihaylo Settlement, including that the three directors appointed to Inter-Tel Board as part of the Mihaylo Settlement "would be excluded from discussions and receipt of materials regarding Inter-Tel's value and strategic plan and from consideration of any proposal to acquire the Company." (SAC ¶ 122.) The SAC, however, fails to explain how such alleged "disclosures" would have been material to any matter placed before the shareholders. The shareholders were not asked to approve the terms of the Mihaylo Settlement.

The Proxy Statement, moreover, 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 settlement agreement reached with Mr. Mihaylo. (SAC ¶¶ 37, *et seq.*; INTL000671 (Proxy Statement); 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 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.) The Court, therefore, should dismiss the disclosure claims asserted in Count IV.[29]

[29] To the extent Plaintiff seeks damages based on his disclosure claims, those claims are subject to dismissal. *See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146-47 (Del. 1997); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006); *Brown v. Perrette*, 1999 WL 342340, at *6 (Del. Ch.).

VII. 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 IV.A.2., 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 $4 dollars more than on the date of the alleged conversion. Moreover, 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.*, 533 A.2d at 1242 (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.

Under Arizona law, the board of directors of each corporation are required to adopt a "plan of merger." A.R.S. § 10-1101. Arizona statutes explicitly state what the "plan of merger" is required to contain. *Id.* Following this adoption, a board is required to recommend the plan to shareholders for their vote, send shareholders notice of the vote that either contains or is accompanied by a copy or summary of the plan, and the shareholders must approve the plan. A.R.S. § 10-1103. Plaintiff did not, and cannot, plead facts that show Defendants did not comply with these requirements. In addition, Plaintiff cannot point to a provision that Defendants

violated when they made non-material changes to the Reincorporation Agreement to conform to the parties' intent.

1. Plaintiff Fails To Plead That A "Plan Of Merger" Was Not Properly Approved By The Board.

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." 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. 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). A board of directors is not required to adopt or approve any terms in addition to what is described in A.R.S. § 10-1101(B).[30] Nor does the statute require the plan to be in any specific form.

While the Reincorporation Agreement may contain the "plan of merger" within its terms, the Reincorporation Agreement itself is not what is required to be adopted by a board

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[30] Plaintiff incorrectly states that "Arizona law (...Ariz. Rev. Stat. ¶ 10-1101C1) require[s] that the merger agreement indicate the certificate of incorporation terms that will govern the surviving corporation." (SAC ¶ 125.) This is clearly contradicted by the language of A.R.S. § 10-1101(B-C.) While Section B sets out the terms that "***shall*** be set forth" in the plan of merger, Section C states only that "[t]he plan of merger ***may*** set forth..." (emphasis added). Plaintiff is incorrect in stating that terms described in Section C are required to be included in the plan of merger.

under Arizona law. 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 and his claim fails as a matter of law.

2. Arizona Merger Law Does Not Prohibit Changes To Be Made To A Reincorporation Agreement.

Regardless of whether "the Arizona merger statutes do not contain any provision authorizing amendment of the "plan of merger" by the board of directors after stockholder approval has been obtained," (SAC ¶¶ 136, 139), the SAC only alleges that changes were made to the Reincorporation Agreement, not the "plan of merger." Furthermore, Chapter 11 of the Arizona Business Corporation Act does not contain a provision that prohibits amendments to even a "plan of merger."[31] Moreover, Arizona law is not violated by making non-material changes to conform governing documents to the parties' intent. Because Plaintiff cannot point to a provision of Arizona law that Defendants violated, Plaintiff's claim fails as a matter of law.

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. 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.

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[31] The Arizona Business Corporation Act, enacted in 1994, was based on the ABA's third revision of the Model Business Corporation Act released in 1984. *See* Terence W. Thompson et al., *Corporate Practice*, in 6 Ariz. Prac. § 1.11 and Appendix B (2006-2007 ed.) Arizona has notably not adopted § 11.02(e) of the current Model Business Corporation Act, which lists the kinds of amendments to a plan of merger prohibited after shareholder approval has been obtained. *See* ABA, *Model Business Corporation Act Annotated*, 2005 Supplement (3d ed.), §11.02.

1. The Signed Reincorporation Documents Are Valid Because They Were Held In Escrow And Dated To Be Effective By An Authorized Agent.

Stephen Wurzburg, Esq. of Pillsbury sent via e-mail the certificate of incorporation and, later that day, the action by sole incorporator of Inter-Tel (Delaware), actions by sole director, the stock purchase agreement, certificate of merger, the articles of merger, the Agreement and Plan of Merger, the bylaws of Inter-Tel (Delaware), and the action by the sole stockholder of Inter-Tel (Delaware) (collectively the "reincorporation documents"). (SAC ¶ 56-57.) As Mr. Stout was traveling out of the country, Mr. Wurzburg also faxed the signature pages for the reincorporation documents to Mr. Stout for his signature with the instruction not to date the documents. (SAC ¶ 57.) Mr. Wurzburg's instructions make clear that counsel, i.e. Pillsbury, would hold the reincorporation documents signed by Norman Stout in escrow until they could be completed at the appropriate time—once the Delaware corporation came into existence.

The Delaware corporation was formed by filing the Certificate of Incorporation with the Delaware Secretary of State on June 28, 2006. (SAC ¶ 59.) Although Mr. Stout put pen to paper on all the reincorporation documents on June 27, 2006, he sent them to Pillsbury to hold in escrow for dating to make the documents effective in the correct order. (SAC ¶ 57.) Plaintiff's allegations that all the documents were signed on June 27 and, therefore, cannot be effective, fail to recognize that corporate documents can be held in escrow by authorized agents. Indeed, Delaware courts have recognized that documents held in escrow are not operative until such contingent events occur that make them effective. *See Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2005 WL 578972, *1, 3 (Del. Ch.) (noting that documents held in escrow were not legally effective, and the plaintiff could not rely on them to assert a claim against the signatories).

2. DGCL Section 228 Was Not Violated.

Plaintiff seeks to have the reincorporation declared invalid by alleging that Mr. Stout's execution of the Action by Written Consent of the Sole Stockholder of Inter-Tel (Delaware), Incorporated violated DGCL Section 228(c). (SAC ¶ 133.) Plaintiff argues that the consent could not be dated June 28 when signed on June 27, that the consent could not say "as of June 28, 2006," and that Mr. Stout himself was required to have dated the consent when he signed the document in order to comply with § 228(c).

The dating of written consents under DGCL Section 228, which Plaintiff alleges was violated, is important for the purpose of calculating the sixty-day delivery period[32] required by Section 228(c). *See H-M Wexford v. Encorp, Inc.*, 832 A.2d 129 (Del. Ch. 2003). Here, however, the policy reason behind Section 228(c)'s dating requirement—this 60-day delivery period—is not applicable because the dispute involves a reincorporation merger with a wholly-owned subsidiary in which Norman Stout was the sole stockholder.[33] Plaintiff fails to cite any authority for his contention that Mr. Stout himself had to date the document. (SAC ¶ 133.)

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[32] DGCL Section 228(c) states that ". . . no written consent shall be effective to take the corporate action referred to therein unless, within 60 days of the earliest dated consent delivered in the manner required by this section to the corporation . . . "

[33] In *H-M Wexford*, the court found that a pre-printed date did not comply with Section 228(c)'s requirement that written consents bear the date of signature when there was extrinsic evidence indicating that some of the consents were not signed on the pre-printed date. *H-M Wexford*, 832 A.2d at 152. The court noted that "the technical requirement of Section 228(c) is imposed in order to facilitate Section 228(c)'s sixty-day time limit for returning consents." *Id.* The Court held that, even though "it may be possible to discern whether the sixty-day requirement was fulfilled in the present case be examining extraneous factors, such is not always the case" and, therefore, it must strictly enforce Section 228(c)'s dating requirement. *Id.* While in *Wexford* there were multiple stockholders who signed the consents (*see id.* at 138, 151) thereby making the sixty-day time period relevant, here there is only a sole stockholder in a reincorporation merger making the policy reason for a strict application of Section 228(c)—a sixty-day time period for returning consents—inapplicable.

Section 228 does not specify the format of the date on the document, nor does it require that the person signing a unanimous written consent to also date it by their own hand.

Moreover, the DGCL envisions situations in which agents or employees will sign on behalf of an incorporator. DGCL Section 103(a)(1) allows for an instrument to be signed by an agent or employee if an incorporator is unavailable, and the DGCL should be read as a whole. *See e.g.*, *Hartford Acc. & Indem. Co. v. W. S. Dickey Clay Mfg. Co.*, 24 A.2d 315 (Del. 1942). If there is uncertainty when interpreting a statute, the statute "must be construed as a whole in a manner that avoids absurd results." *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000). Indeed, the Delaware Supreme Court has recently noted that "the 'golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among possible interpretations . . . is reason for rejecting that interpretation in favor of another which would produce a reasonable result.'" *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 652 (Del. 2006) (internal citation omitted).

Here, Plaintiff attempts 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.[34]

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[34] The errors that Plaintiff has alleged are de minimis and are immediately correctable. Although Defendants contest the need to do so, Norman Stout could re-sign the reincorporation documents today, dating them himself with today's date, satisfying Plaintiff's objections to the manner in which the reincorporation documents were executed.

CONCLUSION

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

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Jay N. Moffitt

A. Gilchrist Sparks, III (#467)
S. Mark Hurd (#3297)
Jay N. Moffit (#4742)
Kevin M. Coen (#4775)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Individual Defendants

OF COUNSEL:

Stephen D. Alexander
J. Warren Rissier
Mark K. Arimoto
BINGHAM McCUTCHEN LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071-3106
(213) 680-6400

POTTER ANDERSON & CORROON LLP

/s/ Stephen C. Norman

Stephen C. Norman (#2686)
John F. Grossbauer (#2479)
Hercules Plaza
1313 N. Market Street
Wilmington, DE 19899
(302) 984-6000
Attorneys for Defendants Inter-Tel, Incorporated,
And Inter-Tel (Delaware), Incorporated

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825335