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United Capital Urges Chancery To Ax Challenge To Buyout

By **Matt Chiappardi**

Law360, Wilmington (October 5, 2016, 7:06 PM EDT) -- Real estate investment and management firm United Capital Corp. urged the Delaware Chancery Court on Wednesday to throw out claims challenging chairman and CEO A.F. Petrocelli's buyout of the company, valued at nearly \$11.2 million, arguing suing shareholders should really be seeking appraisal if they're unhappy with the price.

During a hearing in Wilmington, United Capital attorney James M. Yoch Jr. of Young Conaway Stargatt & Taylor LLP argued that suing shareholders "have nothing but conclusory" allegations to back up their contentions the \$32-per-share price Petrocelli offered to buy up the roughly 6 percent of the company he didn't already own in a short-form merger was somehow undervalued.

Minority shareholders are alleging the deal price significantly undervalued their shares, and that they have no way of knowing what consideration went into the board's decision to OK the deal because they were kept in the dark about the details of the process.

Their original complaint targets alleged deficiencies in disclosures to stockholders that suing shareholders say were compounded by the fact that United Capital, which traded occasionally over the counter, hadn't filed periodic reports with the U.S. Securities and Exchange Commission for years, creating a dearth in publicly available information.

"Stockholders have not been given any information anyone would use to value a company as a going concern," the shareholders' attorney Donald J. Enright of Levi & Korsinsky LLP said in court. "It's not like there's a 10K of an election proxy."

Minority shareholders are seeking the rare remedy in Delaware of a so-called quasi-appraisal, a proceeding akin to judicial appraisal of an entity's value, but based on breach of fiduciary duty claims when stockholders show that they didn't have enough information to decide whether to file a petition for valuation of their shares.

The suing shareholders argue that not only did they not have enough information about the deal and how to decide if they wanted a full appraisal, but that there is evidence United Capital was worth "far more" than the transaction price.

The shareholders claim the company has assets worth \$342.4 million, nearly twice the value of the company implied by the deal, according to their original complaint.

What's more, the shareholders allege that a majority of the members of the special committee put together to vet the deal were not actually independent, raising even more questions about the transaction value, according to court records.

"There's cause for doubt there," Enright told Vice Chancellor Tamika Montgomery-Reeves.

United Capital fired back, arguing that the minority shareholders have no real legal basis for their complaint and that they are trying to subject the transaction to a standard of scrutiny to which it is immune.

Under Delaware law, short-form mergers are not subject to the state's strict "entire fairness" standard, which can flip the burden of proof to defendants to show a deal is on the level regarding both price and process, but suing shareholders appear to be trying to open the deal to that type of scrutiny with little to back such an allegation, United Capital argued.

Moreover, United Capital contends the real remedy the minority shareholders should be seeking is the typical Chancery Court stock appraisal process, and that the novel quasi-appraisal isn't available to them because they are purposefully avoiding the risk of the former type of proceeding.

In an appraisal action, the Chancery Court can rule that a stock price was actually worth less than the final deal price, potentially putting the petitioner on the hook to make up the difference.

United Capital also argued that the minority shareholders' claim they didn't have enough information to decide whether to seek appraisal is curious because they did have enough data to put together a lawsuit.

Even if the shareholders' claims could go forward, Yoch argued Wednesday that the scope of information they are seeking is much too broad and they are not entitled to "a play-by-play or picayune details" about the merger process.

Vice Chancellor Montgomery-Reeves took the matter under advisement Wednesday and said she'd likely issue an opinion in writing.

The minority shareholders are represented by Seth D. Rigrinsky, Brian D. Long, Gina M. Serra and Jeremy J. Riley of Rigrinsky & Long PA, and Donald J. Enright and Elizabeth K. Tripodi of Levi & Korsinsky LLP.

The United Capital defendants are represented by Bruce L. Silverstein and James M. Yoch Jr. of Young Conaway Stargatt & Taylor LLP.

The case is In re: United Capital Corp., Stockholders Litigation, case number 11619, in the Delaware Court of Chancery.

--Editing by Aaron Pelc.

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