

[Securities Regulation Daily Wrap Up, MERGERS AND ACQUISITIONS—Del Ch.: Richards Layton attorney appointed to consult with SEC on reverse merger policy, \(Mar. 19, 2021\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [Joanne Cursinella, J.D.](#)

The Delaware Court of Chancery appointed attorney Mark J. Gentile as amicus curiae to consult with the SEC on whether allowing reverse merger into a defunct public company is permissible under the federal securities laws.

Citing public policy concerns under Delaware law, the Delaware Court of Chancery decided that consultation with the SEC through an amicus curiae would be beneficial in order to gauge whether a petition to revive a defunct company to serve as blank check company should be approved. The court has encountered similar requests in the past and so seeks advice as to whether to allow this practice, based on an understanding of the federal securities laws and SEC priorities ([In re Forum Mobile, Inc.](#), March 18, 2021, Laster, J.).

Unopposed petition. According to the court, the petitioner Synergy Management Group LLC seeks the appointment of its president, Benjamin Berry, as custodian of Forum Mobile, Inc. under Section 226(a)(3) of the Delaware General Corporation Law.

The respondent technically is Forum Mobile but Forum is a defunct entity whose only value lies in the fact that its shares continue to have a CUSIP number that allows them to trade over the counter. Synergy wants to revive Forum to use as a blank check entity. Through a reverse merger with Forum, a new business can access the public markets.

Forum. Forum was incorporated in Delaware on June 21, 1995. It obtained a public listing, but it failed to maintain current, publicly available information about itself and its operations as required by the federal securities laws. Forum's shares continue to trade on the over-the-counter quotation board, otherwise known as the "pink sheets," under the symbol "FRMB," the court noted. Forum has also failed to comply with Delaware law, the court noted. It has no registered agent in the state, has not filed required reports, nor has it held a shareholder's meeting, the court reported.

Synergy. Despite Forum's status as a defunct entity, the fact that its shares have a CUSIP number and over the counter trade gives the company value, the court said. Taking advantage of this, Synergy, a firm that specializes in "creative corporate funding solutions," acquired 494,530 shares of its stock. In the petition before the court, Synergy and Berry, in essence, are looking to use Forum as a blank check company. Synergy filed this particular petition on May 8, 2020, but the court noted that there are other situations in which the counsel for Synergy seeks similar permission for other defunct Delaware corporations. Synergy's petition implicates important questions of public policy, the court stated, including Delaware's interest in preventing the use of Delaware entities to circumvent the federal securities laws.

Applicable precedent. According to the court, Synergy's request is the latest instance of a recurring phenomenon. The court periodically confronts efforts by capital-markets entrepreneurs to revive otherwise defunct entities to use as blank check companies. *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913 (Del. Ch. 2002) was the first such case, the court said. Other instances followed, but *Clabault* is the seminal decision, the court stated. In that case, although the court agreed that the plaintiffs had made out a prima facie case under Delaware law, the requested relief was not granted. The vice chancellor explained at the time that the petition was part of a plan to make an "end run" around the federal rules and regulations governing the public trading of securities, and to avoid the burden or expense of complying with SEC disclosure requirements.

According to this court, Delaware courts have dealt with similar cases in subsequent years. This court said Synergy's petition "does not deal forthrightly with these authorities." Among other things, Synergy maintains that *Clabault* is distinguishable from the petition in this case due to the "procedural differences" in Delaware law, but, the court said, this ignores the reality that what is at issue are broader policy questions involving Delaware law's interactions with the federal regulatory regime, not "procedural niceties." Synergy also claimed that the SEC does not prohibit reverse mergers and pointed out that the Commission even issued an Investor Bulletin in 2011 that alerts investors about the risks of investing in reverse merger companies.

Need for an amicus curiae. The court said that the Delaware authorities addressing efforts to revive defunct entities for use as blank check companies reflect a consistent Delaware public policy against allowing capital-markets entrepreneurs to deploy Delaware law to bypass the federal securities laws that govern stock offerings, which, in turn, is based on the court's understanding of the federal securities laws and the SEC's priorities.

In the decision to be made here, the court said it would be "helpful" to have input from the SEC and the benefit of adversarial briefing on the petition. This will also provide a direct answer to the question of whether Delaware's concern about creating a state-law bypass around the federal securities laws governing stock offerings has become "stale," as Synergy argues, the court said. For these reasons, the court will benefit from the appointment of an amicus curiae who can consult with the SEC regarding the petition; informed by SEC consultation, the amicus curiae will provide an independent view regarding whether the petition should be granted.

In appointing Mark J. Gentile of Richards, Layton & Finger, P.A., to serve as amicus curiae, the court noted that he is a corporate practitioner who is knowledgeable in this area and has experience interacting with the SEC on these issues.

The case is [No. 2020-0346-JTL](#).

Attorneys: Jeremy D. Anderson (Fish & Richardson P.C.) for Synergy Management Group LLC. Mark J. Gentile (Richards, Layton & Finger, P.A.) as amicus curiae.

Companies: Synergy Management Group LLC; Forum Mobile, Inc.

LitigationEnforcement: CorporateFinance CorporateGovernance ExchangesMarketRegulation GCNNews
DelawareNews MergersAcquisitions