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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CIGNA CORPORATION, Appellant, v. ANTHEM, INC. and ANTHEM MERGER SUB CORP., Appellees.	No. 364, 2020 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE CONSOLIDATED C.A. No. 2017-0114-JTL **PUBLIC VERSION** **Filed January 29, 2021**

APPELLEES' ANSWERING BRIEF

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MISCELLANEOUS

NATURE OF PROCEEDINGS

Anthem and Cigna entered into an Agreement and Plan of Merger (the "Agreement") to create a combined company that would have created the nation's largest health insurer (the "Merger"). The Merger would have provided Cigna stockholders with a $13 billion premium and was approved by 99% of stockholders casting votes. The Agreement included a best efforts covenant requiring the parties to take all actions necessary to avoid every impediment to regulatory clearance. When Cigna's CEO, David Cordani, became "frustrated" and "disappointed" with his post-closing role, however, he and his team "turned solidly against the Merger," and "saw the failure to obtain regulatory approval as their ticket out." Cigna secretly conscripted a cadre of advisors to embark on an unprecedented campaign to sabotage the Merger. After a two-week trial, the court issued a 306-page opinion ("Op.") ruling that Cigna "egregiously" and "willfully" breached the Agreement and materially contributed to the Merger's failure. The court also held that Cigna is not entitled to the $1.85 billion Reverse Termination Fee ("RTF") because Anthem validly terminated the Agreement based on Cigna's breaches under a provision that does not trigger the RTF.

Cigna does not appeal the court's findings that Cigna willfully breached the Agreement, entitling Anthem to terminate under a provision that does not trigger the RTF, nor could it given the voluminous evidence recording Cigna's willful

breaches. Rather, Cigna's appeal is based on the erroneous premise that the parties agreed that "Anthem would pay Cigna [the RTF] if regulatory approval was not obtained, unless Cigna's breach of contract caused the regulatory failure." The Agreement contains no such language. To the contrary, the Agreement is unambiguous that no RTF is due where Cigna breaches, without regard to causation. Cigna is not entitled to a $1.85 billion reward for attacking the Merger. The trial court's judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. Cigna states incorrectly that Section 7.3(e) required Anthem to pay the RTF "if regulatory approval was not obtained" and "Cigna did not cause the regulatory failure." Cigna does not, and cannot, quote any language to support its assertion because there is none. To the contrary, as the court correctly held, and Cigna does not dispute, Anthem had the right to terminate the Agreement under Section 7.1(i) because of Cigna's breaches, which does not trigger an RTF, without regard to causation.

Cigna advances a variety of novel and incorrect arguments, raised for the first time in its post-trial reply brief, to get to an alternative termination under Section 7.1: (i) it could terminate the Agreement after it had already been terminated, (ii) Anthem and Cigna's termination notices, received hours apart, were actually "simultaneous terminations," and (iii) Cigna's termination notices sent in breach of the Agreement and in violation of a temporary restraining order were effective. But a Section 7.1(b) termination does not trigger an RTF unless Cigna satisfies certain conditions, including its obligations under the Efforts Covenants. The court found that Cigna "willfully" and "egregiously" breached the Efforts Covenants, and Cigna did not appeal those findings. Consequently,

Cigna's creative arguments cannot result in an RTF even if it had terminated under Section 7.1(b).

Cigna's work to get to a Section 7.1(b) termination then turns to its sole argument for the RTF: that a proviso that has no application whatsoever where Cigna failed to satisfy its obligations under the Efforts Covenants, as it did here, should be read to infer that Cigna is owed an RTF, even though doing so would contradict the express conditions of Section 7.3(e) and even though the proviso does not provide for an RTF. Cigna's appeal is baseless.

a. The court did not err in finding that once Anthem terminated the Agreement, there no longer was an extant agreement for Cigna to terminate. Cigna cites nothing to support its novel and incorrect argument that it had a right to terminate the Agreement, a second time, after it had already been terminated. The fact that one party terminates before another is routine and is not a "commercially irrational" race. And, as the court correctly held, parties can avoid a race to termination by agreeing that a fee remains due even if the agreement is terminated on other grounds. The parties here included that provision for a termination fee where Cigna has not breached the Agreement, but not for the RTF, because no RTF is due where Cigna breaches. Cigna is correct that Section 7.3(e) survived to

allow for an RTF where one is due, but no RTF is due here because Cigna breached the Agreement.

b. The court did not err in finding that Anthem terminated the Agreement.

i. Cigna did not terminate first. Cigna's February Notice did not become effective on May 1 because there was a TRO in place enjoining Cigna from terminating before May 12. Cigna has not appealed the TRO, and cannot challenge it now. The court also correctly held that Cigna's February Notice was ineffective because Cigna had no right to terminate before April 30, and that it was sent to moot Anthem's appeal of the decision enjoining the Merger in further breach of the Agreement. Moreover, contrary to its assertion of "long standing case law," Cigna has not cited a single case holding that an ineffective notice sent in breach of an agreement becomes effective at a later date, much less where such termination was enjoined by an unappealed TRO.

ii. The court did not err in finding that Cigna's May 12 Notice was served after Anthem terminated. Cigna does not cite any authority to support its time-warping assertion that its May 12 Notice should be deemed delivered 11 days earlier on May 1. Cigna also omits that the unappealed TRO was extended to May 12 because *Cigna* asked for that extension. Further, the TRO merely

maintained the status quo of the Agreement and Anthem's right to terminate before Cigna. The court correctly found that Anthem had the right to terminate months before Cigna because of Cigna's breaches, but continued to pursue the Merger until the preliminary injunction ruling.

iii. The court did not err in finding that Section 8.2 of the Agreement does not provide for "simultaneous terminations" because it does not reference the concept or provide that two notices served at different times on the same day are deemed delivered at the exact same time.

c. Because Cigna did not terminate the Agreement under Section 7.1(b), there was no need for the trial court to address Cigna's incorrect interpretation of Section 7.3(e). But no RTF would be owed in the event of a Section 7.1(b) termination because Cigna failed to satisfy the conditions to the RTF by breaching the Efforts Covenants. Additionally, Anthem's interpretation of Section 7.3(e) does not render the proviso superfluous. The proviso applies to: (i) the regulatory conditions otherwise carved out from the conditions to an RTF in the event of a Section 7.1(b) termination, and (ii) a Section 7.1(g) termination. Further, Cigna cannot render meaningless the unambiguous conditions to the RTF by claiming that a proviso (which also does not provide for an RTF) would be rendered meaningless.

COUNTERSTATEMENT OF FACTS

A. The Merger

Anthem and Cigna executed the Agreement on July 23, 2015. The Agreement contained covenants obligating the parties to work to close the Merger, including the obligation that the parties use reasonable best efforts to satisfy all conditions to closing and take all actions necessary to obtain regulatory approval (collectively, the "Efforts Covenants").

B. Cigna Derails The Merger

Cordani was focused primarily on his "path to CEO" and controlling the combined company. (Op. 4) Cigna became increasingly adversarial after Cordani did not obtain sufficient assurances that he would be the next CEO, and "turned definitively against the Merger. . . . [B]y late March and early April 2016, the Cigna ELT wanted the transaction to fail so they could continue managing Cigna as an independent company . . . From this point on, Cigna's primary goal was to prevent the Merger from closing." (Op. 5, 87) "Rather than seeking to complete the Merger, Cigna sought to derail it." (Op. 3)

Cigna hired Wachtell, Lipton, Rosen & Katz ("Wachtell") to "escape" the Agreement. Wachtell suggested that Cigna retain Teneo, a strategic advisory firm "skilled in the darker arts of influencing the media and public discourse." (Op. 70, 205-210) Teneo launched a covert communications campaign to portray the

Merger as anticompetitive, advocating the grounds upon which the Department of Justice ("DOJ") was seeking to block the Merger, and leaking confidential letters to the press. (Op. 100-02)

In July 2016, the DOJ sued to enjoin the Merger (the "Antitrust Litigation") in the U.S. District Court for the District of Columbia ("District Court"). Cigna blocked Anthem's efforts to resolve the Antitrust Litigation by refusing to (i) sign NDAs with potential divestiture buyers, (ii) divest Cigna assets, or (iii) mediate with the DOJ. (Op. 242, 248) Cigna also supported the DOJ in litigation. "During his deposition and at trial, Cordani gave vivid testimony that was a boon to the DOJ . . . . It is clear that during the Antitrust Litigation, Cordani intentionally testified in a manner that would help the DOJ obtain a decision blocking the Merger." (Op. 5, 145-48).

Cigna notes that the District Court credited Cigna's testimony (attacking the Merger in breach of the Agreement) over Anthem's testimony (supporting the Merger, as required by the Agreement), suggesting that the District Court was in a better position to assess the credibility of the witnesses. (COB 22) Cigna has not appealed the trial court's findings, so its comments are irrelevant, but the District Court did not have the voluminous record demonstrating that Cigna witnesses were not telling the truth because they were trying to lose the Antitrust Litigation. (Op.

143, *see also* 253-59) The trial court relied on a large and clear record that Cigna's witnesses were not credible. (Op. 10-11, 36, 63, 72, 110, 211-12, 256-58)

C. The Merger Does Not Obtain Regulatory Approval

On February 8, 2017, the District Court enjoined the Merger. (A2711) The District Court described Cigna's opposition as the "elephant in the courtroom" and noted that Cigna joined the DOJ in "warning against" the Merger, citing "the doubt sown into the record by Cigna itself," and that Cordani "inflicted significant damage" to Anthem's defense. (Op. 6, 166) On April 28, 2017, the District Court's opinion was affirmed. (A2804)

D. The Trial Court Enjoins Cigna From Terminating The Agreement; Anthem Terminates

On January 18, 2017, while the Antitrust Litigation was pending, Anthem extended the Agreement's Termination Date to April 30, 2017. (Op. 154) On February 14, 2017, Cigna sent a termination notice in breach of the Agreement. (Op. 169) Cigna and Anthem each filed complaints, and Anthem sought a temporary restraining order "restraining Cigna from terminating the Agreement." (A291, A369, 422, A481) The court entered a temporary restraining order ("TRO") enjoining Cigna from terminating the Agreement "pending further order of this court." (A533)

On May 11, 2017, the trial court denied Anthem's motion for preliminary injunction. The next day, at 11:32am, Anthem terminated the Agreement. (A2855) Hours later, before the TRO lifted, Cigna tried to terminate the Agreement. (B137) "Because the TRO remained in effect when [this] notice was issued, Cigna violated the TRO by sending it." (Op. 187)

E. The Court Finds That Cigna "Egregiously" And "Willfully" Breached The Agreement

The parties litigated for nearly two years. A ten-day trial concluded on March 8, 2019, and the trial court issued its opinion on August 31, 2020. The court found that Anthem did not breach the Agreement: Anthem "sought at all times to complete the Merger" and "chose a sound strategy and took all of the actions necessary and appropriate to pursue it." (Op. 7)

The court found that Cigna breached the Agreement by:

- running a covert communications campaign attacking the Merger;
- withdrawing from integration planning;
- opposing potential divestitures to address the DOJ's concerns;
- refusing to mediate with the DOJ;
- undermining Anthem's defense in the Antitrust Litigation trial; and
- purporting to terminate on February 14 to moot Anthem's appeal of the District Court's decision, which violated Cigna's contractual obligation to 'vigorously pursu[e] all available avenues of administrative and judicial appeal.'"

(Op. 204-10, 212, 214-17, 234, 237-42, 246-48, 251-59, 304) The court found that Cigna's breaches of the Efforts Covenants were "strikingly egregious" and "willful." (Op. 7) The court also found that Cigna's witnesses were not credible. (Op. 10-11, 36, 63, 72, 110, 211-12, 256-58)

Cigna states the trial court determined that Cigna's breaches did not cause the Merger to fail, but omits the court's findings that Cigna's breaches materially contributed to the failure. (Op. 231-34, 242-45, 248-51, 259-63) The District Court relied heavily on Cigna's anti-Merger testimony. (A2723, A2770, A2781, A2783-2784, A2787-2788; Op. 259-61)

Cigna has not appealed the court's findings in this section.

F. The Court Finds That Anthem Validly Terminated The Agreement

The court found that only Anthem validly terminated the Agreement. (Op. 304) The Agreement grants Anthem a termination right, at any time, under the following conditions:

> if prior to the Closing Date there shall have been a breach of any . . . covenant or agreement on the part of Cigna contained in this Agreement . . . which breach . . .
>
> (A) would, individually or in the aggregate with all other such breaches . . . , give rise to the failure of a condition set forth in Section 6.2(a) or Section 6.2(b) and
>
> (B) is incapable of being cured prior to the Closing Date by Cigna or is not cured within 30 days of notice of such breach.

(A2088, § 7.1(i)) (the "Termination Right For A Cigna Breach") (formatting added).

Section 6.2(b) provides that "Cigna shall have performed or complied in all material respects with all agreements and covenants required to be performed by it under this Agreement at or prior to the Closing Date. (A2086, § 6.2(b)) (the "Cigna Compliance Condition"). Cigna's obligations under the Cigna Compliance Condition include its obligations under the Efforts Covenants. (Op. 297)

As the court found, and Cigna does not dispute, "Anthem proved in this litigation that Cigna failed to comply with its obligations under the Efforts Covenants, and the nature of those breaches meant that they could not be cured, so Anthem validly exercised the Termination Right For A Cigna Breach." (Op. 302) Cigna did not appeal that finding. As Cigna concedes, a Section 7.1(i) termination does not trigger a fee.

Section 7.1(b) grants each party a termination right after the Agreement's term passes, where that party's conduct did not proximately cause or result in the failure of the Merger to be consummated before the Termination Date (the "Temporal Termination Right"). The court found that Cigna did not validly exercise the Temporal Termination Right: "[w]hen Cigna delivered its notice on February 14, Anthem had extended the Termination Date until April 30, 2017."

(Op. 300) Cigna's May 11 notice also was ineffective because "[w]hile that TRO was in place, Cigna could not terminate the Merger Agreement." (Op. 301) And Cigna's May 12 notice was ineffective because "Anthem already had terminated the Merger Agreement by exercising the Termination Right For A Cigna Breach." (Op. 303)

G. The Court Finds That Cigna Is Not Entitled To The RTF

Based on its factual findings concerning termination, the court held that Cigna was not entitled to the RTF under the plain terms of Section 7.3(e) of the Agreement.

1. The RTF Provision

Section 7.3(e) governs Anthem's obligation to pay RTF (the "RTF Provision"). It states:

> In the event that this Agreement is terminated by either Anthem or Cigna
>
> > (i) pursuant to Section 7.1(g), but only if the applicable Legal Restraint constitutes a Regulatory Restraint, or
> >
> > (ii) pursuant to Section 7.1(b) and, in the case of this clause (ii), at the time of such termination, all of the conditions set forth in Section 6.1 and Section 6.2 have been satisfied (other than (x) Section 6.1(a) (but only if the applicable Legal Restraint constitutes a Regulatory Restraint) or Section 6.1(b) and (y) conditions that by their nature are to be satisfied at the Closing, but that are capable of being satisfied if the Closing were to occur on the date of such termination),

> then Anthem shall pay to Cigna a fee . . . in the amount of $1,850,000,000 (the "Reverse Termination Fee");
>
> provided, however, that no Reverse Termination Fee shall be payable pursuant to this Section 7.3(e) in the event that
>
> (A) the failure of the condition set forth in Section 6.1(a) (but only if the applicable Legal Restraint constitutes a Regulatory Restraint) or Section 6.1(b) to be satisfied is caused by Cigna's Willful Breach of Section 5.3 . . .

(A2091, § 7.3(e)) (formatting added)

"Anthem is obligated to pay the Reverse Termination Fee regardless of whether or not the No Injunction Condition or the Governmental Approval Condition are met, but Anthem is not obligated to pay the Reverse Termination Fee if other conditions remain unsatisfied, including the Cigna Compliance Condition." (Op. 297-298) Cigna did not satisfy its Efforts Covenants. (Op. 7)

2. The Court Finds That The RTF Is Not Due

The court found that the RTF is not due because Anthem terminated the Agreement under Section 7.1(i), a provision that does not trigger the RTF. (Op. 304) At trial, the parties disputed the meaning of the RTF Provision as to a Section 7.1(b) termination. The court did not resolve the parties' dispute because "Cigna failed to prove that it properly exercised the Temporal Termination Right." (Op. 299)

ARGUMENT

CIGNA WAS NOT ENTITLED TO THE REVERSE TERMINATION FEE

A. Question Presented

Whether the trial court properly ruled that Cigna was not entitled to the Reverse Termination Fee under the terms of the Agreement? The question was raised below (A1176-1178; A1270-A1278; B134-144) and considered by the court (Op. 294-305).

B. Scope of Review

Cigna challenges the trial court's findings that Anthem terminated the Agreement before Cigna and the court's interpretation of the Agreement. Thus, the standard of review is mixed – the trial court's factual findings are reviewed for clear error, while its legal determinations are subject to *de novo* review. *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of Argument

1. Cigna Is Not Owed An RTF Under The Agreement

The court's decision applying the plain and unambiguous terms of the Agreement is clear and simple. The court found that Cigna committed "willful" and "strikingly egregious" breaches of the Agreement. (Op. 7) Cigna has not appealed those findings. Thus, Anthem had the right to, and did, terminate the

Agreement under Section 7.1(i), which provides Anthem the right to terminate if Cigna breaches. (Op. 304; A2088) Section 7.3(e) is unambiguous that no RTF is owed in the event of a Section 7.1(i) termination. (A2091, § 7.3(e)) Thus, the court correctly ruled that Anthem owed no RTF: "Anthem validly terminated the Merger Agreement under the Termination Right For A Cigna Breach. By its plain terms, that termination right does not obligate Anthem to pay the Reverse Termination Fee." (Op. 304) These undisputed facts resolve the entire appeal.

2. Cigna's Arguments To Avoid The Unambiguous Terms Of The Agreement Are Meritless

Cigna raises a variety of belated, unsupported and incorrect challenges to the court's straightforward application of the unappealed findings to the unambiguous terms of the Agreement.

a. Cigna Had No Default Right To The RTF

Cigna's appeal is based on its often-repeated erroneous premise that an RTF was due "unless Cigna's breach of contract caused the regulatory failure." (COB 1, 3, 6, 11, 26, 39, 43, 44) Cigna urges that this Court interpret the Agreement according to this erroneous premise. Cigna does not, and cannot, quote any contract language to support its erroneous premise because there is none. There is no default right to an RTF. To the contrary, the Agreement allows for an RTF only

under limited circumstances that do not exist here. As addressed above, no RTF is due in the event of a Section 7.1(i) termination, without regard to causation. Cigna relies on Section 7.1(b), but no RTF is due under a Section 7.1(b) termination unless Cigna satisfies all of its conditions under Section 6.2(b), including satisfaction of its Efforts Covenants, also without regard to causation. *See infra* at 37.

Cigna's related argument that the Agreement should be read to provide it an RTF because the parties allocated the risk of regulatory approval to Anthem again misstates the Agreement. (COB 3, 25-26) The parties allocated the risk of regulatory approval to Anthem only where Cigna satisfied its conditions under the Agreement, including its obligation to use best efforts to achieve regulatory approval. The parties did not allocate to Anthem the risk that Cigna would breach those obligations. To the contrary, the Agreement memorialized the parties' agreement that a breaching party would not be rewarded for its misconduct with a $1.85 billion fee, as Cigna's CFO acknowledged: "the only way for CIGNA to guarantee receipt of a full payment of the breakup fee is to truly make best efforts to see the deal successfully completed." (B016)

b. The Agreement Does Not Provide For A Second Termination And Then An RTF

Cigna argues incorrectly that it could terminate the Agreement after Anthem had already done so, and its belated termination would then control over Anthem's, allowing for an RTF.

(i) The Parties Did Not Provide For An RTF If Anthem Terminated Under Section 7.1(i)

Initially, Cigna's argument is not actually about terminating an agreement that has already been terminated. Cigna is not seeking the opportunity to reconfirm the termination of obligations. Rather, what Cigna is actually arguing is that it should be entitled to collect an RTF regardless of whether Anthem terminated first.

There is a recognized model contract provision for exactly that construct. Where parties intend to allow for a termination fee regardless of how the agreement is terminated, they include established model language that: "The Company agrees to pay Parent . . . the 'Termination Fee' . . . if this Agreement is terminated [] by any Party at any time during which the Agreement was otherwise terminable in a circumstance in which Parent would be entitled to payment of the Termination Fee." *See* ABA, Model Merger Agreement for the Acquisition of a

Public Company ("Model Merger Agreement") §7.3(b)(iv) p.276-77 (2011). The model provision "clarifies that in the event that any party terminates the agreement, the buyer has a right to a termination fee if the triggering event giving rise to the termination fee exists." *Id*. p.289. As the court found, the parties could have provided "contractually that a [RTF] would remain due even if the [] Agreement is terminated on other grounds. The [] Agreement did not contain such a provision." (Op. 304-305)

Importantly, the parties did include the model provision implementing the construct Cigna argues for here for a different termination fee. Section 7.3(b) provides for the payment of a different termination fee if "Cigna would have had been permitted to terminate" under a provision that provided for the fee, regardless of how the Agreement was terminated. (A2090, § 7.3(b)(i)) Thus, the parties knew precisely how to fashion a provision to allow for a termination fee regardless of who terminated and when, and agreed to that construct for one type of termination fee, but not for the RTF at issue here. Under well-established law, there can be no dispute as to the parties' intent. *See John Hancock Life Ins. Co. v. Abbott Labs*, 863 F.3d 23, 39 (1st Cir. 2017) ("The inclusion of a [term] in one section of a contract but not in another creates a compelling basis for inferring that the parties

deliberately chose to omit [the term] from the latter provision."); *GRT, Inc. v. Marathon GTF Tech, Ltd.*, 2012 WL 2356489, *6 (Del. Ch. June 21, 2012).

(ii) Cigna's After-The-Fact Termination Theory Contradicts The Agreement

Cigna cites nothing to support its argument that a terminated contract somehow can be terminated a second time. Rather, under settled law, "termination results in an agreement becoming void[.]" *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *103 (Del. Ch. Nov. 30, 2020); *see also Termination*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining termination as "the end of something in time or existence; conclusion or discontinuance"). As the court held: "By the time that Cigna purported to terminate . . . Anthem already had terminated the Merger Agreement. When Cigna exercised its termination right, there was no longer a Merger Agreement in place . . . ." (Op. 305)

Unable to identify any authority for its construct, Cigna offers the semantical argument that the Agreement provides only for the termination of "obligations," not "rights." (COB 28-30) But there can be no rights under a contract without a corresponding obligation. Not a single witness testified as to any intent to have multiple terminations, nor does a single document reflect any such intent. Had the parties intended to adopt a provision allowing the terminated Agreement to be terminated a second time, then they would have included language specifying that

unusual construct. *See Statoil USA Onshore Props. Inc. v. Pine Resources, LLC,* 2018 WL 889229, at *6 (S.D. W.Va. Feb. 14, 2018) (noting provision was "far from standard," consequently, "one would expect such an unusual provision to be explicitly stated" in the agreement); *Demetree v. Commonwealth Trust Co.*, 1996 WL 494910, at *4 (Del. Ch. Aug. 27, 1996) ("[T]he interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract").

Moreover, the parties included a provision, Section 7.2, that specifically identifies the provisions that survive termination. Cigna relies heavily on Section 7.2 in its appeal. Section 7.2 does not preserve Section 7.1, the termination provision—for the obvious reason that a termination right cannot survive termination. Additionally, the Agreement references a single termination, not multiple terminations, in a number of sections. (A2089 § 7.2) ("In the *event* of *the termination* of this Agreement pursuant to Section 7.1 . . . .") (emphasis added); (A2090-91, § 7.3(c),(d),(e)) (any fees owed are all due "on the second Business Day immediately following *the date of termination* of this Agreement") (emphasis added) The reference in Section 7.2 to "the termination" references a single event. *Martin Marietta Mat'ls, Inc. v. Vulcan Mat'ls Co.*, 56 A.3d 1072, 1120 (Del. Ch. May 4, 2012) (use of "'The,' a definite article, makes clear" that a contract referred

to "only one transaction"); *De Jesus Rosa v. AG United States*, 950 F.3d 67, 77 (3d Cir. 2020) (same); *see also IBEW v. Democratic Nat'l Comm.*, 2018 WL 487831, at *8 (E.D. Pa. Jan. 19, 2018) (finding parties would have not used a word in plural form if it intended to use "jurisdiction" in the singular form). Section 7.3(b)(i) also confirms that there would be a single termination in allowing an (inapplicable) termination fee where "Cigna would have been permitted to terminate this Agreement," had it not already been terminated, rather than referencing a supposedly allowed second termination.

Cigna's argument also radically changes the fundamental structure of the Agreement as to termination and the RTF. Section 7.3(e) provides for a potential RTF in the limited circumstance of termination under only two of thirteen termination provisions. Consequently, the specific provision used for termination is critical. Cigna's argument that it could terminate after Anthem and receive an RTF would render the carefully structured provisions meaningless because Anthem could never actually terminate the Agreement under Section 7.1(i). And Section 7.3(e)'s limitation of the RTF to only certain terminations (subject to conditions) would be rendered meaningless because Cigna could receive an RTF even though the Agreement was terminated under a provision that does not give rise to one.

Cigna's assertion that Section 7.3(h) shows that the Agreement can be terminated multiple times is incorrect. (COB 31-32) Section 7.3(h) simply provides that no party can receive duplicative termination fees in the event multiple fees are triggered by one termination. (A2092) For example, if Anthem had materially breached the Agreement by soliciting an alternative transaction in violation of Section 5.4(b), Cigna could terminate under Section 7.1(j). (A2088) If, however, Cigna had validly terminated the Agreement under Section 7.1(b), Cigna potentially could be entitled to: (1) the Anthem Termination Fee, pursuant to 7.3(b)(i), and (2) the RTF, pursuant to Section 7.3(c). Section 7.3(h) provides that in such a situation, only one of the $1.85 billion fees would be due. (A2092) A provision limiting the parties to a single fee in no way suggests that the Agreement could be terminated a second time after it had already been terminated.

(iii) The Court Did Not Hold That Section 7.3(e) Was Terminated

Cigna repeatedly argues that Section 7.3(e) survives termination. The trial court never held otherwise, nor has Anthem ever argued that its termination of the Agreement "meant that 'all its obligations fell away' and '[t]hus there is nothing left to trigger the . . . Termination Fee.'" (COB 30) Indeed, Cigna repeatedly argues that Section 7.3(e) survives termination. Anthem agrees. Anthem has never argued that it had an obligation to pay the RTF that "fell away" when it

terminated. Rather, Anthem never had an obligation to pay an RTF because Cigna breached the Agreement.

c. The Agreement Does Not Provide For Simultaneous Terminations

Cigna also raised for the first time in its post-trial reply brief an argument that the Agreement provides for simultaneous terminations based on Section 8.2, a boilerplate notice provision. The Agreement includes no reference to simultaneous terminations, and Cigna does not cite a single authority or any evidence supporting "simultaneous terminations." Had the parties intended such a novel construct, they would have specified it. *See supra* at 20-21.

Additionally, Cigna misstates Section 8.2 in arguing that it provides for "simultaneous" terminations "because faxed notices are 'deemed duly given' on the 'date of delivery,' not at the specific time of delivery." (COB 39-40) Section 8.2 provides that faxed notices are "deemed duly given" "on the date of delivery . . . *upon confirmation of receipt*." (A2092) (emphasis added) Anthem's faxed termination notice was confirmed hours before Cigna's, as Cigna admits. (COB 21)

Moreover, providing that faxed notices are "deemed duly given" on the "date of delivery" does not address the *time* of a notice, so it does not override temporal reality to create some fabricated notion of "simultaneous terminations."

Cigna cites no contract language, negotiation history, authority or common sense to support its assertion that the boilerplate provision designating the *date* of the notice also designates the *time*, so that notices delivered hours apart are deemed to have been delivered at the exact same unidentified time.

The court correctly found that "the plain language of [Section 8.2] does not say . . . that notices which are delivered on the same day must be treated as having been delivered simultaneously." (Op. 303) "It rather appears designed to establish a set of timing rules for the effectiveness of notices that would eliminate uncertainty by displacing comparable common law doctrine such as the mailbox rule." *Id.* "Cigna has not offered any authority to support interpreting a provision like Section 8.2 as creating a rule that notices received on the same day are deemed to be delivered simultaneously. By the time that Cigna's notice arrived, Anthem already had terminated the Merger Agreement." *Id.*

Cigna is incorrect in claiming that the court's "speculation was raised by neither party." (COB 41) Although courts are permitted to interpret contracts themselves, Anthem raised that Section 8.2 is akin to the mailbox rule. (A1348-49) Cigna also misunderstands the court's reference to the mailbox rule in arguing that the rule "applies only if the fact of receipt is disputed." (COB 41) The court's reference was simply that the parties had specified the circumstances under which

notice is deemed effective, contracting around the mailbox rule. *See IBEW Local Union No. 654 Health & Welfare Fund v. Indus. Valley Controls, Inc.*, 2010 WL 4138565, at *6 (E.D. Pa. Oct. 20, 2010).

d. Cigna's Position That An RTF Is Owed In The Event Of A Later Or Simultaneous Termination Is Incorrect

As addressed, Cigna created the new concepts of second and simultaneous terminations to claim an RTF under a different termination provision, but Cigna is not entitled to an RTF under any provision. *See infra* at 37. Additionally, Cigna cites no language in the Agreement or other authority supporting its claim that it would be due an RTF in the event of a later or simultaneous termination, elevating its notice over Anthem's. To the contrary, as addressed above, there is a well-known contract term for providing a termination fee regardless of the circumstances of the termination and, although the parties agreed to that construct for certain termination fees, they did not agree to it for the RTF. *See supra* at 18-19.

e. Cigna Cannot Avoid The Contract Terms By Arguing That The Agreement Allows A Race To Termination

Cigna argues that the court's decision incorrectly created a "commercially irrational 'race to termination.'" (COB 4, 27-32) As addressed below, no RTF is due under either termination where Cigna breaches, as here, so there was no need for a race. *See infra* at 37. In any case, the fact that one party may terminate a contract before another does so is routine and not unreasonable or unenforceable, and Cigna cites nothing to the contrary. Many contracts have mutual termination provisions, and are terminated by one party or the other. *See, e.g.*, *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, 2019 WL 1223026, at *7, 11, 24 (Del. Ch. Mar. 14, 2019); *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *18, 47 (Del. Ch. Oct. 1, 2018); *Williams Cos., Inc. v. Energy Transfer LP*, 2020 WL 3581095, at *6-7 (Del. Ch. July 2, 2020).

Additionally, the customary provision addressed above for allowing a termination fee regardless of whether a counterparty terminated first is specifically intended to eliminate the race to termination that Cigna is trying to avoid here. "*This provision is intended to address the incentive that may otherwise exist for a target to race to terminate the agreement for a reason that does not trigger a fee and thereupon avoid a fee*." Model Merger Agreement, at p. 289 (emphasis

added). The parties specifically rejected the construct for avoiding the race that Cigna seeks to avoid here, by including this model provision for one termination fee, but not for the RTF at issue. *See supra* at 18-19.

Cigna's argument is further undercut by the fact that Cigna embraced a reading of the Agreement that created a race to terminate right up until it lost the race. Cigna first attempted to "get the jump on Anthem" by sending an ineffective termination notice in February 2017, which was itself a breach of Cigna's best efforts obligations. When that did not work, Cigna violated the TRO by sending a termination notice during the court's ruling on Anthem's motion for preliminary injunction, before the court had completed its ruling and before the TRO was lifted. Cigna represented to the court that its notice was sent "inadvertently" due to "a clerical error" (A749), but the court found that that was untrue and was just a second attempt to "get the jump" on Anthem. (Op. 187) Now, Cigna claims its fax transmission was "terminated," but that too is untrue. (COB 20, n.2) Cigna's cite confirms that the fax transmission was completed. (A749, A2846)

Cigna's real-time interpretation of the Agreement, as evidenced by its repeated attempts to "get the jump" on Anthem and terminate first, should be afforded more weight than the litigation-driven argument that terminating first was irrelevant, raised only after it lost. *See Balin v. Amerimar Realty Co.*, 1996 WL

684377, at *19-20 (Del. Ch. Nov. 15, 1996) (plaintiff should not be allowed to "assert[] claims that assume his past conduct never occurred").

f. Cigna Did Not Win The Race To Terminate The Agreement

Cigna also argues that it won the race to terminate the Agreement by sending notices on February 14, 2017 (the "February Notice") and May 12, 2017 (the "May 12 Notice"), which it claims were effective as of May 1, 2017, before Anthem terminated. Cigna is wrong.

(i) Cigna's February 14 Notice Was Premature, Ineffective, And Enjoined

Cigna could not have terminated effective on May 1 because there was a TRO in place that enjoined termination. The court did not lift the TRO until May 12, 2017. (A754) Cigna did not appeal the TRO, so it cannot challenge its terms now. Indeed, Cigna agreed with the court's decision to maintain the TRO through May 12. (A742-43)

Even absent the TRO, Cigna's February Notice was ineffective. Cigna had no right to invoke the Temporal Termination Right before May 1 because Anthem extended the Termination Date to April 30, 2017. (Op. 300; COB 33) Thus, the court correctly held that Cigna's delivery of the February Notice based on the Temporal Termination Right was ineffective and "breached [Cigna's] contractual

obligations by attempting to terminate the Merger Agreement on February [14] and moot Anthem's appeal. That attempt at preemptive termination failed to satisfy the Temporal Termination Right. It also violated the Regulatory Efforts Covenant[.]" (Op. 304) Cigna cites no authority that an ineffective termination notice *sent in breach of the Agreement* somehow became effective at a later point in time *when Cigna still was enjoined from terminating*. The law is to the contrary. *See Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 196 (2d Cir. 2008) (where the "notice of termination is ineffective," the "agreement remains in effect."); *Waterbury Twin, LLC v. Renal Treatment Ctrs.-Ne., Inc.*, 974 A.2d 626, 635 n.19 (Conn. 2009) ("[I]t is self-evident that if the notice is invalid, then the legal consequence of 'termination' arising from the service of a valid notice does not result.").

The court correctly rejected Cigna's reliance on the so-called "erroneous date" rule because those cases addressed situations where the party had the right to terminate, unlike here: "Cigna's cases . . . address contracts where a party had the power to terminate, but only after giving a certain amount of notice." (Op. 301) Cigna's Notice was not a valid notice sent on an "erroneous date," it was an ineffective notice sent in breach of the Agreement, trying to invoke in bad faith a termination right that did not then exist. Cigna does not cite a single case in

Delaware adopting the "erroneous date rule," or a single case anywhere applying the rule to render effective a termination notice delivered by a party that had no right to terminate, much less where the notice was sent in bad faith and was enjoined. Cigna's theory would incentivize parties to deliver ineffective termination notices in breach of agreements to gain new priority termination rights, at great cost to the stockholders that approved the deals, and penalize the non-breaching parties that continued using best efforts to consummate the deals. If Cigna's position were correct, one party to a merger agreement could issue an ineffective termination notice immediately after signing the agreement to lock in a right it did not then have to terminate first, effective the moment the party had a right to terminate.

Cigna raised another new argument post-trial that its February Notice merely provided the courtesy of more notice than required under the Agreement, which would "put Anthem in a better position than the contract anticipated." (COB 35) Cigna did not put Anthem "in a better position" when it tried to terminate in breach of the Agreement in a bad faith effort to moot Anthem's appeal of the District Court's injunction. Nor would Anthem be "in a better position" if Cigna's breaching notice ensured that Cigna could terminate first (even though the Agreement provided Cigna no such right) or eliminated Anthem's contractual right

to terminate before the drop-dead date based on Cigna's breaches. Cigna cannot rewrite the contract to provide itself with superior termination rights by claiming that its premature and breaching notices merely provided more notice to Anthem.

(ii) Cigna's May 12 Notice Was Ineffective

As the court correctly found, Cigna's May 12 Notice was ineffective because Anthem had already terminated the Agreement, so there was no extant agreement for Cigna to terminate. (Op. 8, 305) And although Cigna represents that it sent its notice "hours after the February 15, 2017 TRO enjoining it from terminating the Merger Agreement was lifted," Cigna delivered the May 12 Notice before the TRO lifted. (B137)

Cigna offers no authority to support its time-warping position that the termination notices sent on May 12 should be deemed to have been sent 11 days earlier on May 1 (while Cigna was enjoined from terminating). And Cigna's argument that the court "improvidently restrained [it] from terminating as of May 1, 2017" because it did more than "preserve the status quo" is frivolous. (COB 37-38)

One, Cigna cannot challenge the TRO because it did not appeal it. Cigna cannot avoid its decision to not appeal the TRO by claiming that the court "retroactively interpreted the TRO to override the words of Section 7.1(b)" by

extending past May 1. (COB 38) There was no retroactive interpretation. The TRO specifically provided that it was "[e]ffective immediately, pending further order of this court," and the hearing was set for May 8 at Cigna's request and with Anthem's agreement. (A533; B010) Cigna also cannot avoid the TRO's unambiguous language based on its (incorrect) view of the "legitimate purpose" of the unappealed TRO. The purpose and effect of the TRO was to enjoin Cigna from terminating pending further order, and that is what it did. *See Angiodynamics, Inc. v. Biolitec AG*, 946 F. Supp. 2d 205, 213 (D. Mass. 2013) ("The text of a court order determines its power over parties. To allow parties to independently deduce the purpose of a court order and determine what acts would be most in line with the purpose—regardless of the text—would make this court irrelevant."); *see also* A1526 ("[Counsel for Cigna]: Your Honor entered the TRO and no doubt would know far better than any of us what your intention was.").

Two, Cigna never argued to the trial court that it lacked authority to enjoin termination past May 1. To the contrary, Cigna consented to it by requesting and agreeing to have the hearing in May. (B010) Consequently, Cigna did not preserve the argument. *See Almond v. Glenhill Advisors, LLC*, 224 A.3d 200, n.1 (Del. 2019); *Chester Cty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 186 A.3d 798

(Del. 2018). Indeed, Cigna agreed to the extension of the TRO to May 12. (A742-43)

Three, the TRO did only maintain the status quo. The TRO maintained the Agreement while the court considered the parties' contentions about whether Cigna could terminate at all. (Op. 169-170) Anthem asked the court to resolve its motion before May 1, and the court then set the preliminary injunction hearing for the week of April 10, 2017, allowing for a decision long before May 1[1] and providing Anthem up to 21 days to terminate before Cigna could do so. (A528) Cigna, however, asked to adjourn the hearing, which was then set for May 8, 2017, along with the TRO enjoining Cigna from terminating "pending further order." Thus, the duration of the TRO past May 1 was caused by Cigna, not the court. Cigna cannot request an extension of the TRO past May 1 to accommodate its schedule, then challenge the TRO for lasting past May 1.[2] *See Capaldi v. Richards*, 2006 WL 3742603, at *2 (Del. Ch. Dec. 8 2006); *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 (Del. Ch. June 29, 2004). Furthermore, Cigna

[1] The court ruled on the motion for a preliminary injunction in three days.

[2] Cigna claims that the court extended the TRO at the hearing, but in fact the TRO remained in place "pending further order of this Court," and that further order was not issued until May 12.

agreed with the court's decision to maintain the TRO through May 12 after the court denied the preliminary injunction. (A742-43)

Four, the TRO also merely maintained the status quo of Anthem's right to terminate before Cigna. Cigna argues incorrectly that the court gave Anthem "a timing advantage over Cigna," but Anthem had "a timing advantage over Cigna" under the Agreement (and irrespective of the TRO) because Cigna's breaches of the Agreement gave Anthem a right to terminate prior to the drop dead date. Indeed, Anthem could have terminated months earlier. (Op. 305) Anthem's right to terminate months before the drop-dead date was based on Cigna's breaches of the Agreement, not the TRO.

> [T]he TRO was put in place because Cigna previously breached its contractual obligations by attempting to terminate the Merger Agreement on February [14] and moot Anthem's appeal. That attempt at preemptive termination failed to satisfy the Temporal Termination Right. It also violated the Regulatory Efforts Covenant, which required Cigna to "vigorously pursu[e] all available avenues of administrative and judicial appeal." MA § 5.3(b)(iii). Having previously sought to gain a timing advantage of its own in violation of the Merger Agreement, Cigna cannot now complain about the effects of a TRO that its own conduct made necessary.

(Op. 304) Anthem was always able to terminate first, and used all available time until the preliminary injunction decision to try to consummate the Merger.

> The possibility of a race only arose because Anthem continued to fulfill its obligations to seek to close the Merger, even after Cigna's breaches of the Efforts Covenants became obvious and gave rise to a

> termination right. Had Anthem not been committed to the Merger, Anthem could have exercised the Termination Right For A Cigna Breach long before Cigna's ability to exercise the Temporal Termination Right ripened. Under those circumstances, Cigna would not have been entitled to the Reverse Termination Fee. There is no injustice to Cigna in recognizing Anthem's prior exercise of a termination right that it could have exercised months before.

(Op. 305)

Thus, Cigna was not "deprived of valuable rights" because it was unable to eliminate Anthem's right to terminate first by delivering an ineffective notice of termination in bad faith and in breach of the Agreement, or by obtaining a consensual continuance of the hearing and TRO. Indeed, had Cigna not requested to move the hearing into May, Cigna would not even have an argument about losing a race to terminate because the hearing would have been held, and Anthem could have terminated, weeks before Cigna's Temporal Termination Right ripened.

g. No RTF Would Be Due Even If Cigna Terminated Under Section 7.1(b)

Even if Cigna could exercise a Section 7.1(b) termination right, Cigna would not be owed the RTF under Section 7.3(e) because of its "strikingly egregious" and "willful" breaches.

(i) Cigna Failed To Satisfy The RTF Conditions

As Cigna correctly notes, "the contract makes the obligation to pay each of [the termination] fees . . . contingent on satisfaction of carefully articulated conditions[.]" (COB 31) If the Agreement is terminated under Section 7.1(b), Section 7.3(e) unambiguously conditions payment of an RTF on satisfaction of "*all* of the conditions set forth in Section 6.1 and Section 6.2" *except for* the regulatory conditions in Section 6.1(a) and 6.1(b). (A2091, §7.3(e)) (emphasis added)

Section 6.2(b) includes the condition that "Cigna shall have performed or complied in all material respects with all agreements and covenants required to be performed by it under the Agreement at or prior to the Closing Date." (A2086, §6.2(b)) The Cigna Compliance Condition includes the Efforts Covenants. (Op. 297) The trial court found that Cigna willfully breached the Efforts Covenants. (Op. 7, 302) Cigna did not appeal those findings, nor could it given the extensive evidence recording Cigna's sabotage of the Merger. Thus, Cigna would not be entitled to an RTF even if it had terminated under Section 7.1(b).

Cigna asserts, without support or explanation, that upon a Section 7.1(b) termination, "the conditions of § 6.1 and § 6.2 have been satisfied, except for the conditions of § 6.1(a), § 6.1(b), and any conditions to be satisfied at closing." (COB 42) The Section 6.2(b) conditions are not satisfied by reason of a

termination. Indeed, Section 6.2(b) has nothing to do with termination. Rather, Section 6.2(b) required Cigna to comply with its Efforts Covenants, which Cigna failed to do.

Contrary to its incomprehensible position here that the RTF conditions are satisfied notwithstanding a breach, Cigna has repeatedly admitted that the conditions are *not* satisfied where there is a breach (in addressing the same language at issue in Section 6.3(b), the corresponding provision covering Anthem's performance). *See* A412 ("Anthem has materially breached its covenants and agreements under the merger agreement . . . [a]ccordingly, the condition in Section 6.3(b) is not satisfied, and it is not true that all conditions to Closing other than [regulatory approval conditions] are satisfied"); B004 ("the merger agreement allows a party to extend . . . only if 'all of the conditions to Closing shall have been satisfied or shall be then capable of being satisfied,' other than the regulatory conditions. Under Section 6.3(b) of the merger agreement, it is a condition to Cigna's obligation to effect the merger that 'Anthem and Merger Sub shall have performed or complied in all material respects with all agreements and covenants required to be performed by them under this Agreement at or prior to the Closing Date. Anthem is in material breach of its contractual obligations, meaning that the condition in Section 6.3(b) is not satisfied . . ."); *see also* A2802

(same). Cigna cannot avoid the unambiguous terms of the Agreement by ignoring them and its own prior admissions about them.

Cigna's argument that the RTF is payable if the Merger fails to obtain regulatory clearance by the Termination Date unless Cigna's willful breaches caused the failure is also wrong. (COB 43, A1527) Under the unambiguous language of Section 7.3(e), the RTF is *not* conditioned on regulatory failure. To the contrary, the regulatory conditions are explicitly *excluded* from the RTF conditions in the event of a Section 7.1(b) termination. There is customary language for a termination fee triggered by a failure of regulatory conditions, but that language was not adopted by the parties. For instance, the provision that Cigna tries to impose was agreed to in the Aetna-Humana agreement. (*See* Agreement and Plan of Merger between Aetna, Inc. and Humana, Inc. (July 2, 2015), §10.03(c), https://www.sec.gov/Archives/edgar/data/49071/000119312515285879/d67897dprem14a.htm#toc67897_105 ("Regulatory Termination Fee" payable where the conditions for regulatory approval were "not satisfied," unless the target's willful breaches caused the failure.)

(ii) Cigna's Position Deletes The RTF Conditions It Did Not Satisfy

Cigna's position requires a completely new agreement, modified as follows:

> In the event that this Agreement is terminated by either Anthem or Cigna
>
> > (i) pursuant to Section 7.1(g), but only if the applicable Legal Restraint constitutes a Regulatory Restraint, or
> >
> > (ii) pursuant to Section 7.1(b) and, in the case of this clause (ii), at the time of such termination, ~~all of the conditions set forth in Section 6.1 and Section 6.2 have been satisfied (other than (x)~~ Section 6.1(a) (but only if the applicable Legal Restraint constitutes a Regulatory Restraint) or Section 6.1(b) **are not satisfied** ~~and (y) conditions that by their nature are to be satisfied at the Closing, but that are capable of being satisfied if the Closing were to occur on the date of such termination~~),
>
> then Anthem shall pay to Cigna a fee . . . in the amount of $1,850,000,000 (the "Reverse Termination Fee");
>
> provided, however, that no Reverse Termination Fee shall be payable pursuant to this Section 7.3(e) in the event that (A) the failure of the condition set forth in Section 6.1(a) (but only if the applicable Legal Restraint constitutes a Regulatory Restraint) or Section 6.1(b) to be satisfied is caused by Cigna's Willful Breach of Section 5.3 . . .

(COB 11) "To delete [one term] and insert another. . . is a decision to re-write the contract." *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 890 (Del. 2015); *see also New Castle Cnty. v. Crescenzo*, 1985 WL 21130, at *2 (Del. Ch. Feb. 11, 1985).

h. The Proviso Is Irrelevant

Cigna's entire argument that the RTF is due in the event of a Section 7.1(b) termination is based on a proviso that does not provide for an RTF.

(i) The Proviso Is Inapplicable

Section 7.3 (e) conditions payment of the RTF on the satisfaction of the Section 6.1 and 6.2 conditions, but excludes the regulatory conditions of Sections 6.1(a) and 6.1(b). The proviso then eliminates that carve-out of the regulatory conditions by providing for no RTF if Cigna's breaches caused them to fail. (A2091, §7.3(e)) The regulatory conditions are irrelevant here. No RTF is due because Cigna failed to satisfy its *Section 6.2(b)* conditions, and there is no proviso to those conditions. So the proviso—which expressly applies to the regulatory conditions—never comes into play.

Moreover, the proviso only identifies circumstances where Cigna does *not* receive the RTF. Cigna cannot take operative language that provides no RTF and a proviso that also provides no RTF, and somehow end up with an RTF.

At best, Cigna argues that there is an inference of an RTF even where Cigna breaches the Agreement, but no inference can be made that contradicts the express operative language that conditions the RTF on the satisfaction of the Section 6.2(b) conditions, including the condition the Cigna comply with the Efforts Covenants. *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013); *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).

Cigna cites nothing to support its incorrect position that it can rewrite the

unambiguous RTF conditions to give inferential meaning to a proviso that does not provide for an RTF and that contradicts the express conditions. *See Optical Air Data Sys., LLC v. L-3 Commc'ns, Corp.*, 2019 WL 328429, at *6 (Del. Super. Ct. Jan. 23, 2019) ("Courts will not infer that an obligation exists, which contradicts a clear exercise of an express contractual right"); *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch. 2004) ("[T]he court cannot read the contracts as also including an implied covenant to grant the plaintiff additional unspecified rights" and "[t]o do so would be to grant the plaintiffs, by judicial fiat, contractual protections that they failed to secure for themselves at the bargaining table"); *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). "[Courts] must still interpret the contracts as written and not as hoped for by litigation-driven arguments." *Urdan v. WR Capital Partners, LLC*, 2020 WL 7223313, at *5 (Del. Dec. 8, 2020).

(ii) The RTF Conditions Do Not Render The Proviso Meaningless

Applying the unambiguous RTF conditions does not nullify the proviso. *One*, the proviso applies where Cigna's breaches caused the failure of the otherwise carved out Sections 6.1(a) and (b) regulatory conditions. *Two*, the proviso applies where Anthem terminates under Section 7.1(g). Subsection (g) permits termination "[b]y either Anthem or Cigna" after exhaustion of all appellate

rights, which Cigna failed to allow here. (A2088, § 7.3(g)) Thus, under Section 7.3(e), a Section 7.1(g) termination by Anthem would give rise to an RTF, except that the proviso would then relieve Anthem of its obligation to pay the RTF if Anthem could prove Cigna's willful breach and causation.

Moreover, a provision that Cigna is not due an RTF where it breaches does not "nullify" a proviso that Cigna is not owed an RTF. Delaware courts recognize that parties to a contract may include redundant terms for the sake of clarity. *See Phillips v. Hove*, 2011 WL 4404034, at *20 (Del. Ch. Sept. 22 2011); *E.I. du Pont de Nemours & Co. v. Bayer CropScience L.P.*, 958 A.2d 245, 257 n.52 (Del. Ch. 2008). A belt and suspenders, backstop protection is customary in the legal profession. *See United States v. Carona*, 630 F.3d 917, 927 (9th Cir. 2011) ("the common tendency of lawyers to use redundant terms to make sure that every possibility is covered."); *Ortega-Gamboa v. Holder*, 388 Fed. App'x 580, 582 (9th Cir. 2010) ("That some wear a belt and suspenders does not prove the inadequacy of either to hold up the pants, but only the cautious nature of the person wearing the pants."); *Leonard v. Exec. Risk Indem., Inc. (In re SRC Holding Corp.)*, 545 F.3d 661, 670 (8th Cir. 2008); *cf Cyan, Inc. v. Beaver Cty. Emps.' Ret. Fund*, 138 S. Ct. 1061, 1073-74 (2018) ("[t]his Court has encountered many examples of

Congress legislating in that hyper-vigilant way, to 'remov[e] any doubt' as to things not particularly doubtful in the first instance. . . .").

Cigna's assertion that the proviso to the condition is more specific than the condition to which it attaches is also incorrect. The express conditions to a contract right are always specific. Cigna does not cite a single case that a proviso is more specific than the conditions to which it attaches. Cigna also does not cite a single case elevating a proviso over the operative conditions to which it is attached. In any case, the proviso is specific to Sections 6.1(a) and 6.1(b)'s regulatory conditions, and those conditions do not apply here because the condition that Cigna failed to satisfy was the Efforts Covenants under Section 6.2(b).

i. Cigna's Position Creates A Contractual Conflict

Courts interpret contracts so as to harmonize provisions and not create inconsistencies. *See GRT*, 2012 WL 2356489, at *4; *Coughlan v. NXP B.V.*, 2011 WL 5299491, at *11 (Del. Ch. Nov. 4, 2011). Anthem's interpretation of Section 7.3(e) harmonizes the Agreement with the consistency that Cigna does not receive the $1.85 billion RTF if it breaches regardless of whether the Agreement is terminated under either Section 7.1(i) or Section 7.1(b). Neither contains a requirement that the breaches caused regulatory failure.

Cigna's interpretation, on the other hand, creates a conflict where the same conduct of Cigna's breaches would result in opposite consequences: If Cigna breaches and Anthem terminates under Section 7.1 (i), then Cigna does not receive the $1.85 billion RTF. But if Cigna commits the same breaches and terminates under Section 7.1(b), then Cigna does receive a $1.85 billion RTF. Cigna introduced no evidence that the parties intended this unnatural result. Cigna offers no logical explanation for why the parties would have provided for no RTF in the event of a Section 7.1(i) Termination For a Cigna Breach, if Cigna could obtain a fee even it breached. Cigna offers no explanation for why an RTF is subject to satisfaction of the Section 6.2(b) conditions in the event of a Section 7.1(b) termination, meaning that Cigna did not breach the Agreement, if Cigna could receive an RTF even if it breached.

Cigna's argument that its interpretation is the commercially reasonable one is also wrong. (COB 44) It is not commercially reasonable that sophisticated parties would agree to conflicting results in the event of the same event of Cigna's breach. *See Falcon Steel Co. v. Weber Eng'g Co.*, 517 A.2d 281, 286 (Del. Ch. 1986). Additionally, it would not be commercially reasonable for sophisticated parties to agree to reward Cigna with a $1.85 billion RTF if Cigna rampantly breached its best efforts obligations and materially contributed to the Merger's

failure. *See Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2018 WL 1791995, at *5 (Del. Ch. Apr. 16, 2018). Rather, the Agreement is commercially reasonable in following blackletter law that a party in material breach of a contract cannot enforce its terms. *See Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, 2013 WL 3934992, at *21 (Del. Ch. July 24, 2013).

CONCLUSION

For the reasons set forth above, the trial court's decision should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2021, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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