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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** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, CONSOLIDATED C.A. No. 2017-0114-JTL **PUBLIC VERSION FILED:** February 15, 2021

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Cigna/Anthem merger was enjoined as a violation of federal antitrust law. Cigna did not cause the injunction. The question presented is whether Anthem must pay the reverse termination fee. The answer should be yes—because Anthem agreed to pay the fee if regulatory approval was not obtained, unless Cigna's breach of contract caused the regulatory failure.

None of the arguments Anthem advances to avoid the fee are consistent with the terms of the contract. In Anthem's telling, the contract is internally inconsistent and fails its essential risk-allocation function; some words matter, some do not; nothing fits. Cigna, by contrast, offers an interpretation where the contract's provisions harmonize, none are redundant, and all serve a coherent commercial purpose.

Nor does Anthem overcome Cigna's showing that Anthem took advantage of a TRO to gain a timing advantage in a race to termination that it now claims determined the parties' ultimate rights. Anthem supplies no authority to support this outcome; none exists. Nor does Anthem explain why the parties would leave their rights and obligations to the happenstance of a race to termination, or identify any contractual language suggesting they did.

Instead, referencing what it calls Cigna's "egregious" breaches, Anthem asserts that Cigna should not be "rewarded" with the fee. This argument

misapprehends the contract's design. Anthem's remedy for a Cigna breach is an award of damages. Anthem pursued a damages claim below and lost, because, as the trial court held, Cigna's actions caused Anthem no harm. Nor is the reverse termination fee a "reward"—it is rather the compensation Cigna bargained for in the event it suffered the cost and lost opportunities resulting from years spent pursuing a merger that could not be approved. Cigna has not appealed the trial court's breach findings—not because they are immune from challenge, but because addressing those findings is unnecessary to resolution of this appeal.

Section 7.3(e) sets out the parties' entirely conventional bargain: Anthem must pay the fee unless Cigna caused the regulatory failure. Cigna did not cause the failure, as a matter of now-adjudicated fact. If the words, structure, and purpose of the contract matter, nothing more is needed to resolve this appeal in Cigna's favor.

ARGUMENT

I. ANTHEM MUST PAY THE REVERSE TERMINATION FEE BECAUSE CIGNA DID NOT CAUSE THE REGULATORY FAILURE

The sole issue on appeal is whether Cigna is entitled to the reverse termination fee. The key contractual language is § 7.3(e), which governs when the fee is due. Under § 7.3(e)'s two romanette clauses, the fee is triggered by a termination upon a regulatory failure:

> 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");

A2091 § 7.3(e).

Section 7.3(e)(i) provides that Anthem must pay the fee if either party terminates because a non-appealable injunction blocks the merger, but only if the injunction is a regulatory injunction. *See* A2088 § 7.1(g), A2085 § 6.1(a). Section 7.3(e)(ii) provides that Anthem must pay the fee if either party terminates after the

drop-dead date, but only if a regulatory injunction (appealable or not) blocks the merger or necessary regulatory consents have not been obtained. *See* A2087 § 7.1(b), A2085 § 6.1(a), (b).

The proviso of § 7.3(e) then instructs that even if the fee is triggered under (i) or (ii), the fee is not due if the regulatory failure "is caused by Cigna's Willful Breach" of § 5.3, the regulatory efforts provision:

> 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).

Section 7.3(e) thus serves the commonsense function of a regulatory fee—allocating regulatory risk to the acquirer, unless the target caused the regulatory failure.

A. Anthem's reading of § 7.3(e) is internally inconsistent and contradicted by its own statements

Anthem does not deny that only Cigna's interpretation serves the risk-allocation function of a regulatory fee. Instead, Anthem contends that the reverse termination fee in this contract is *not* a regulatory fee. AAB 39. Anthem maintains that "no RTF is due where Cigna breaches, without regard to causation," AAB 2, because "[t]he parties did not allocate to Anthem the risk that Cigna would

breach [its regulatory efforts] obligations." AAB 17. Anthem even insists that "it would not be commercially reasonable" to agree "to reward" a party with a fee if that party "breached its [regulatory] efforts obligations." AAB 45. None of these contentions withstand scrutiny.

Anthem's assertion that the reverse termination fee is not a regulatory fee cannot be sustained. The contractual triggers for Anthem's obligation to pay the fee, as well as the exceptions to its obligation, all involve regulatory failure. Anthem repeatedly described the fee as a "regulatory reverse termination fee" in the merger proxy. *E.g.*, A2247-49. The evidentiary record is replete with instances of Anthem telling its board, its investors, even the trial court, the same thing. AR230; AR275; AR286; AR268; AR297; AR222:5-224:23.

Also untenable is Anthem's contention that "the Agreement is unambiguous that no RTF is due where Cigna breaches, without regard to causation." AAB 2. Anthem itself asserts that "under Section 7.3(e), a Section 7.1(g) termination"—that is, termination because of a non-appealable regulatory injunction—"*would* give rise to an RTF" under § 7.3(e)(i) unless "Anthem could prove Cigna's willful breach *and causation*." AAB 43 (emphasis added). Thus, as Anthem reads § 7.3(e), the fee turns on "causation," not just breach—sometimes.

Anthem's own statements likewise refute its assertion that "it would not be commercially reasonable for sophisticated parties to agree to reward" a party with

a fee if that party has "breached its [regulatory] efforts obligations." AAB 45. Anthem's reading of § 7.3(e) establishes that Anthem must pay the fee despite Cigna's breach in some circumstances. Anthem also admits that the regulatory fee in the Aetna/Humana merger agreement is "payable where the conditions for regulatory approval were 'not satisfied,' *unless the target's willful breaches caused the failure*." AAB 39 (emphasis added). So, according to Anthem, "sophisticated parties"—including Aetna, Humana, and Anthem itself—have agreed to fee terms that allocate regulatory risk to the acquirer even when the target has breached.

That is no anomaly. It reflects instead the general rule that "a cause of action for breach of contract includes damages as an element." *Connelly* v. *State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1279 (Del. 2016). Here, Anthem seeks to avoid paying the fee based on a breach claim for which it failed to prove a single dollar of damages.

The circumstances here illustrate why parties would allocate regulatory risk to the acquirer unless the target caused the regulatory failure. Anthem insisted on control of the regulatory approval effort. Op. 201; A2075 § 5.3(e). Anthem decided to sponsor an untested regulatory strategy. A2721-22, A2775-77, A2812-15; COB 16, 19. Anthem dismissed Cigna's suggested alternative approaches—ones the trial court credited as more promising. COB 13-14 & n.1 (citing A2510, A2486). DOJ rejected Anthem's strategy out of hand. COB 14-15. After DOJ's

opposition became clear, Anthem commenced a months-long record-making campaign to blame Cigna. A1048-50, A1065-70, A1654, AR287-88, AR292. Anthem's CFO privately recognized that its litigation strategy was designed to create "leverage with Cigna" to "negotiate down the break up fee." AR395.

Ultimately, the merger was enjoined—not because of Cigna, as the trial court held, but because the federal courts rejected Anthem's "tactical choice to present an efficiencies defense" rather than "a defense based on new products." Op. 220-21; Op. 263-73. The decision below thus confirms that the regulatory strategy failed with Anthem at the wheel.

B. Cigna's reading of § 7.3(e) gives meaning to every part of the provision, is internally consistent, and serves the risk-allocation purpose of a regulatory fee provision

Cigna's reading of § 7.3(e), unlike Anthem's, does not yield inconsistent outcomes. Anthem acknowledges that when the agreement is terminated under § 7.1(g)—the trigger in § 7.3(e)(i)—the proviso allows it to avoid the fee only "if [it] could prove Cigna's willful breach *and causation*." AAB 43 (emphasis added). But Anthem declares the proviso "irrelevant" when the agreement is terminated under § 7.1(b)—the trigger in § 7.3(e)(ii). AAB 40.

It makes no sense, however, for the fee obligation to be conditioned on the causal effect of a breach in the case of a regulatory failure under § 7.3(e)(i), but not § 7.3(e)(ii). Anthem's reading creates not just an inconsistency but a conflict

because *both* § 7.3(e)(i) and (ii) apply when a regulatory injunction becomes non-appealable on or after the Termination Date. On Anthem's reading, the fee would be both payable and not payable, at the same time, and on the basis of the same facts. In Anthem's words: "It is not commercially reasonable that sophisticated parties would agree to conflicting results in the event of the same event of Cigna's breach." AAB 45. Only Cigna's interpretation avoids that result.

To justify its reading, Anthem invokes the language in § 7.3(e)(ii) referring to the satisfaction of all conditions to its obligation to close, except the regulatory conditions set forth in § 6.1(a) and (b). According to Anthem, any material breach by Cigna, including of § 5.3, results in a failure of the closing condition set forth in § 6.2(b). Therefore, Anthem concludes, any Cigna breach relieves Anthem's obligation to pay the fee. AAB 37.

Anthem's reading trips at the threshold because it incorrectly assumes that satisfaction of § 5.3 is a condition to closing independent of the regulatory conditions. Were that assumption correct, a party could rely on a counterparty's breach of § 5.3 to refuse to close even when regulatory approval is in hand. The agreement does not give a party that prerogative. Indeed, Anthem's counsel told the trial court that a party could *not* refuse to close in that situation: "[A]s to the best efforts allegations, if regulatory approval is forthcoming, then there can't

really be an argument that we got there but we didn't get there in the best possible way and that, therefore, somehow, there's no need to close the transaction." A494.

Anthem's reading also has a bigger problem: it renders the proviso's language superfluous. A "Willful Breach" is by definition a material breach. *See* A2103 § 8.13. So, under Anthem's reading, the proviso serves no independent function: if a fee is not due upon any material breach, as Anthem contends, then by definition a fee is not due in the specific case of a Willful Breach of § 5.3 that caused the regulatory failure. But a reading that renders contractual language "mere surplusage" is impermissible. *Osborn ex rel. Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010). Here, the problem of surplusage arises when the general reference to the satisfaction of all non-regulatory closing conditions in § 7.3(e)(ii) is read to include compliance with § 5.3—a provision specifically addressed only in the proviso.

The problem is averted by a well-established principle of interpretation: "[s]pecific language in a contract controls over general language." *DCV Holdings, Inc.* v. *ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005). Application of that principle "avoids … the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). The canon achieves that result by reading "the specific or exact" language

"as an exception or qualification of the general" so that "both are given some effect." Restatement (Second) of Contracts § 203(a), cmt. e. By applying that principle here, § 5.3 is excepted from § 7.3(e)(ii)'s general reference to all non-regulatory closing conditions. The result is a reading in which the proviso serves an independent function: governing the circumstances in which a breach of § 5.3, in particular, relieves Anthem of its obligation to pay the fee.

Anthem invents a redlined version of the contract to suggest that giving this effect to the proviso "delete[s]" § 7.3(e)(ii)'s requirement that closing conditions except for § 6.1(a) and (b) are satisfied. AAB 39-40. That is incorrect. If the proviso is read as governing § 7.3(e)(ii) only with respect to § 5.3, then § 7.3(e)(ii) still serves a critical function—ensuring Anthem is not obligated to pay the fee when the merger fails to close by the drop-dead date for reasons unrelated to regulatory failure.

This Court's *DCV Holdings* decision is instructive. 889 A.2d at 961-62. The Court held there that an indemnification provision covering "any liabilities" was properly read to except liabilities for unknown legal violations because another provision specifically covered liabilities for known legal violations. *Id.* The Court rejected a reading—like Anthem's here—in which the general provision was not subject to exception because that "would render [the knowledge] qualifier meaningless" in "the more specific of the two provisions." *Id.*

Anthem suggests that the proviso might be interpreted as "redundant" under § 7.3(e)(ii) because it applies to § 7.3(e)(i). AAB 42-43. But the proviso repeatedly refers to the failure of the § 6.1(b) regulatory condition. A2091 § 7.3(e). That condition is mentioned only in § 7.3(e)(ii). A1755; A1531-32. The proviso's text thus establishes that it must serve a function under § 7.3(e)(ii) as well as § 7.3(e)(i). Interpreting the proviso to function under both § 7.3(e)(i) and (ii) also harmonizes § 7.3(e) with the two termination provisions that trigger the fee—§ 7.1(b) and § 7.1(g). Both § 7.1(b) and § 7.1(g) bar a party from exercising its termination right only if the party's breach "caused" the failure of the merger to close. The § 7.1(b) and § 7.1(g) termination rights thus work in tandem with the proviso to ensure that, regardless of which party terminates under those provisions, the fee is not payable if Cigna's breach "caused" the regulatory failure.

Anthem cites not a single decision in which general language was interpreted to leave specific language redundant or otherwise without effect. *See* AAB 41-42 (citing inapposite cases holding that express terms displace implied terms). The only case Anthem cites that addresses a dispute over general and specific language, *Norton* v. *K-Sea Transportation Partners, L.P.*, 67 A.3d 354 (Del. 2013), supports *Cigna's* reading. That decision rejected an interpretation of a general conflict-of-interest provision that could have left a provision "address[ing]

a specific conflict of interest" without "any independent meaning or … purpose." *Id.* at 365 & n.50.

Section 7.3(e), and all the provisions that trigger it, expressly disclose the parties' intent to make the fee payable absent a Cigna breach causing regulatory failure. The contract should be interpreted to "give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *Chicago Bridge & Iron Co.* v. *Westinghouse Elec. Co.*, 166 A.3d 912, 927 n.61 (Del. 2017). Only Cigna's reading of § 7.3(e) achieves this result. It gives effect to every part of the agreement, yields consistent "results in the … same event of Cigna's breach," AAB 45, and accords with the risk-allocation purpose of the provision.

II. CIGNA EFFECTIVELY TERMINATED THE AGREEMENT

A. Anthem's termination did not extinguish its fee obligation or Cigna's termination rights

Anthem contends that Cigna could not exercise its termination rights after Anthem did because "termination results in an agreement becoming void." AAB 20. That may be true of some contracts, but not this one. "Parties may draft provisions that address the effect of terminating an agreement (an 'effect-of-termination provision')." *AB Stable VIII LLC* v. *Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *102 (Del. Ch. Nov. 30, 2020).

The parties here did just that. Section 7.2 of their contract, "Effect of Termination," does not provide that termination "void[s]" the agreement. Instead, § 7.2 provides that upon a termination, "the obligations of the parties under this Agreement shall terminate," except for specific obligations, and that "there shall be no liability," except for specific liabilities. A2089. Indeed, the text of § 7.2 forces Anthem to concede that "Section 7.3(e) survives termination"—a result irreconcilable with Anthem's assertion that its termination voided the agreement. AAB 23. Nevertheless, the trial court did not even mention § 7.2 in its holding depriving Cigna the right to claim a fee under § 7.3.

Were there any doubt that the effect of exercising a contractual termination right is governed by the contract that created the right, it was dispelled by *Williams Cos., Inc.* v. *Energy Transfer, L.P.*, 2020 WL 3581095, at *13 (Del. Ch. July 2,

2020). In circumstances much like these, *Williams* held that the effect of a termination of a merger agreement was controlled by the agreement's effect-of-termination provision—and therefore rejected the buyer's attempt to use a preemptive termination to escape paying a termination fee. *Id.*; *see* COB 30-31. Anthem does not even try to reconcile its position with the result in *Williams.*

By the terms of § 7.2, a § 7.1 termination terminates obligations, not the rights of either party—which include Cigna's termination rights under § 7.1. To this, Anthem responds that § 7.2's reference to obligations, not rights, is "semantical." AAB 20. But "semantical" differences are what matter in contract interpretation because courts give effect to the words the parties actually used. Anthem does not contest that the agreement elsewhere distinguishes between rights and obligations, referring to them separately. *See, e.g.*, COB 28-29. Nor can Anthem dispute that "the use of different language in different sections of a contract suggests the difference is intentional—*i.e.*, the parties intended for the sections to have different meanings." *Williams*, 2020 WL 3581095, at *12 n.123. Instead, citing nothing, Anthem announces that it is "obvious" that "a termination right cannot survive termination." AAB 21.

None of Anthem's arguments sustain this conclusion. Anthem contends that the agreement's references to "the termination" show that multiple terminations are prohibited. AAB 21-22. But nothing in the contract says that its various

termination rights are mutually exclusive. To the contrary, the agreement provides that it "may be terminated … at any time prior to the Effective Time" under thirteen provisions listed in the conjunctive, not the disjunctive. A2087-89 § 7.1.

Anthem's contention that multiple terminations are prohibited also leaves § 7.3(h) without independent effect. *See* COB 31-32. Anthem asserts that § 7.3(h) ensures that Anthem need not pay both an Anthem Termination Fee and a Reverse Termination Fee. AAB 23. But § 7.3(e) already provides that both fees are not payable. *See* A2091 § 7.3(e) (Reverse Termination Fee "shall be the sole and exclusive remedy of Cigna"). Section 7.3(h) has effect *only* if it prohibits the double payment of the Reverse Termination Fee—and the Reverse Termination Fee can be triggered more than once *only* if multiple terminations are permitted. A2091 § 7.3(e). Nor would Anthem's § 7.1(i) termination right be undermined if multiple terminations are permitted because § 7.1(i) does not itself relieve Anthem's fee obligation. AAB 22.

To defend its reading, Anthem ranges beyond the contract, to the Model Merger Agreement. AAB 18-19, 27-28. Leave to the side that the model is not a "recognized model contract" reflecting a survey of actual agreements, as Anthem suggests (AAB 18), but instead, by its own description, a "hypothetical strategic buyer's first draft." Model Merger Agreement, p. xi. Anthem ignores key differences between the model and the agreement here that undermine its

argument. Under the model agreement, the "effect of termination" is to render the entire agreement "of no further force or effect," subject to exceptions that do not include termination rights. Model Merger Agreement § 7.2. By contrast, § 7.2 of the Cigna/Anthem agreement provides that the effect of termination is to terminate only certain obligations. So the model agreement sets up a race to exercise termination rights that the agreement here does not.

Anthem nevertheless insists that the parties were racing to terminate. According to Anthem, the agreement includes the model's provision "allow[ing] for a termination fee regardless of who terminated and when" for the standard termination fees, but not for the reverse termination fee. AAB 18-19, 27-28. But contrary to Anthem's assertion, the agreement here does *not* contain the model agreement's language or any other language triggering a termination fee "regardless of how the Agreement was terminated." AAB 19; *compare* Model Merger Agreement § 7.3(b)(i)-(iv) *with* A2090 § 7.3(b)(i)-(iv). Instead, the termination fees in the agreement here are payable only upon termination under certain provisions. *See* A2089 § 7.3(a)(i)-(iv), § 7.3(b)(i)-(iv).[1]

[1] Anthem argues that Cigna's efforts to terminate as soon as a preliminary injunction was denied show that Cigna understood the agreement to set up a race. AAB 28. But Cigna had substantial reasons, unrelated to any race, for terminating the agreement with Anthem—a major competitor—as quickly as possible. *See* A2062-68, Art. IV (significantly restricting each party's operations pending closing or termination, absent the counterparty's consent).

Nowhere does Anthem explain why parties would structure a complex, high-stakes contract to create a race to termination. Nor does Anthem account for the arbitrary outcomes uncoupled from the negotiated allocation of risks, rights, and obligations that such a race produces. One of many examples: under Anthem's own reading, Cigna's material breach, standing alone, disqualifies it from receiving the fee if Anthem terminates first under § 7.1(i), but not if Cigna terminates first under § 7.1(g). In Anthem's words, that outcome is "not commercially reasonable." AAB 45.

Accordingly, Cigna was permitted to terminate under § 7.1(b) regardless of whether Anthem had already terminated under § 7.1(i). Cigna's entitlement to the fee depends not on a race, but on whether the conditions to Anthem's obligation, set forth in § 7.3(e), have been met. As explained above, they have been.

B. Even if there was a race to termination, Cigna won or tied it

1. Cigna's February 14 notice validly invoked Cigna's right to terminate as of May 1, 2017

Cigna's February 14 termination notice preceded Anthem's by three months and was delivered before the TRO enjoining Cigna from terminating the agreement was entered. It therefore should be deemed effective May 1, when the Termination Date passed and Cigna had the right to terminate under § 7.1(b). COB 32-35.

Anthem disputes this conclusion on the ground that the TRO was in effect on May 1. AAB 29. But given the trial court's ultimate finding that Cigna did not

cause the regulatory failure, Cigna had the right to terminate under the terms of § 7.1(b) as of May 1. COB 33. The TRO thus "wrongfully enjoined" Cigna from terminating on or after May 1. COB 37. Anthem does not explain why an improvident TRO should operate retroactively to render the notice a nullity, let alone provide authority for that result.

Echoing the trial court, Anthem contends that the notice was permanently ineffective because it was sent in breach of Cigna's regulatory efforts obligations. AAB 29-30. But the Court of Chancery has rejected attempts to invoke regulatory efforts obligations to deprive a counterparty of express termination rights: "If an agreement to use commercially reasonable efforts to comply with obligations in a contract means that a party cannot exercise its bargained-for right to terminate that contract, that bargained-for right would be illusory." *Vintage Rodeo Parent, LLC* v. *Rent-A-Ctr., Inc.*, 2019 WL 1223026, at *22 (Del. Ch. Mar. 14, 2019).

That holding is especially apt here because § 7.1(b) itself addresses the circumstances in which a breach will disqualify a party from exercising its § 7.1(b) termination right. As recited above, a party loses its right to terminate under § 7.1(b) only if it "caused" the failure of the merger to close by the Termination Date. Anthem's contention that the notice did not invoke Cigna's § 7.1(b) termination right because the notice was itself a breach—though one that did not cause the failure of the merger—is contrary to the plain language of the agreement.

Anthem also contends that the notice was a nullity because it predated May 1, when Cigna was first permitted to effect termination. But Anthem has neither identified any contractual term, nor produced any law, indicating that Cigna was barred from *noticing*, as opposed to effecting, its termination before May 1. The legal question is: when does that notice become effective?

Substantial precedent holds that the notice should be held effective "as of the first proper termination date," here May 1. *G.B. Kent & Sons, Ltd.* v. *Helena Rubinstein, Inc.*, 393 N.E.2d 460, 461 (N.Y. 1979); COB 33-35. Anthem seeks to distinguish these holdings—sometimes called the "erroneous date rule"—because they "address contracts where a party had the power to terminate, but only after giving a certain amount of notice." AAB 30. As Cigna demonstrated (COB 34-36), that supposed distinction does not impair (or even address) the long-standing rationale for the rule.

Instead of explaining why this distinction should make a legal difference, Anthem grumbles Cigna's authorities are not sufficiently on point. But the authority Anthem counters with is not remotely relevant. *See Penguin Group (USA) Inc.* v. *Steinbeck*, 537 F.3d 193, 196 (2d Cir. 2008) (notice invoking statutory termination right for grants under the Copyright Act ineffective because later agreement superseded the grants); *Waterbury Twin, LLC* v. *Renal Treatment*

Centers-Northeast, Inc., 974 A.2d 626, 630-31 (Conn. 2009) (statute required landlord to file new notice to quit before filing new eviction action).

Finally, Anthem claims that Cigna's position incentivizes parties to notice terminations immediately after signing. AAB 31. That is true only if the contract creates a race to termination, and constitutes further reason to doubt that sensible contracts do. The agreement does no such thing.

2. Cigna's May 12 notice validly invoked Cigna's right to terminate as of May 1, 2017

Cigna had the right to terminate under § 7.1(b) on or after May 1, 2017 because it did not cause the failure to close by the drop-dead date. The TRO, however, prevented Cigna from effecting a termination on May 1. The notice Cigna sent on May 12, after the TRO lifted, is therefore properly treated as invoking Cigna's right to terminate as of May 1. COB 36-39.

Anthem does not contest that § 7.1(b) gave Cigna the right to terminate as of May 1. AAB 29. Nor does Anthem contest the sequence of events leading to the parties' dueling May 12 terminations: asserting that Cigna faced no harm, Anthem obtained a TRO without posting a bond; while the TRO was pending, Anthem's board voted to terminate if the PI was denied; after the PI was denied, Anthem procured an extension of the TRO ostensibly to consider an appeal that Anthem had already decided not to take; under cover of that extension, Anthem decided not to appeal; Anthem then waited to tell the Court of its decision until it could deliver

a notice of termination, thereby ensuring that it would terminate while Cigna was still enjoined (COB 18-21); then, much later, Anthem asserted that its preemptive termination is conclusive of Cigna's fee claim. AAB 18.

Anthem thus insists that the TRO determined Cigna's substantive rights. But such a TRO does not "preserve the status quo" to enable the court to make a final decision. Rather, it resolves the very issue—the parties' ultimate rights—that preliminary relief is intended to leave open. Anthem does not identify a single authority in the long history of remedies holding that a TRO or other preliminary relief can be properly interpreted in this way.

Instead, Anthem argues waiver, asserting that Cigna cannot contest the effect of the TRO on the supposed "race to termination" because it did not seek to appeal the TRO. AAB 29, 32. But a party need not seek review of an interlocutory order to preserve an appeal of the order upon a final judgment. *See* Del. Supr. Ct. R. 42(f).

Anthem adds that Cigna "never argued to the trial court that it lacked authority to enjoin termination past May 1." AAB 33. Not true. Cigna sought in the very first filing in this litigation—its complaint—a declaratory judgment that it was entitled to terminate no later than the drop-dead date. A412.

Anthem also asserts that Cigna "requested" an extension of the TRO beyond May 1. AAB 33-34, 36. The parties mutually agreed to that extension, as the

stipulation Anthem cites shows. AAB 33 (citing B010). Also false, and entirely unsupported in Anthem's citation, is Anthem's claim that Cigna "asked to adjourn the hearing." AAB 34 (citing A528).

More important, Anthem's assorted waiver arguments highlight the unfairness of the TRO as interpreted below. Anthem only revealed its position that the TRO had definitively resolved a "race" in its favor in its pre-trial briefing—at which time Cigna immediately joined issue. Nothing in Anthem's TRO application, or the Court's ruling, even hinted that the TRO could prove outcome-determinative. Rather, Anthem argued, and the Court stated, that the TRO would merely freeze the parties' rights pending a final resolution on the merits.

Finally, Anthem argues that it deserved its "timing advantage" from the TRO because it "was always able to terminate" before Cigna's right to terminate under § 7.1(b) accrued on May 1. AAB 35-36. This is incorrect and irrelevant. Incorrect, because Anthem told the Court that breaches of § 5.3 could not justify abandoning the merger when regulatory approval was still possible and insisted through the PI hearing on May 12 that regulatory approval was still possible. *Supra*, pp. 8-9 (quoting A494); A680-81. Irrelevant, because whatever it could have done, Anthem did not terminate until May 12, eleven days after the TRO prevented Cigna from exercising its right to terminate.

3. Under § 8.2, the parties' May 12 termination notices were simultaneous

Under § 8.2, Cigna's May 12 notice should be treated as simultaneous with Anthem's May 12 notice, even assuming it could be effective no earlier than that date. COB 39-41. Anthem's response again rests on strained interpretation of straightforward language.

Section 8.2 provides:

> All notices … shall be in writing and shall be deemed duly given
>
> (a) on the date of delivery if delivered personally, or by facsimile upon confirmation of receipt;
>
> (b) on the first Business Day following the date of dispatch if delivered by a recognized next-day courier service; or
>
> (c) on the third Business Day following the date of mailing if delivered by registered or certified mail, return receipt requested, postage prepaid.

A2092 § 8.2.

The Court is confronted with two readings of § 8.2(a) as it pertains to faxed notices. Anthem says § 8.2(a) should be read: "All notices … shall be in writing and shall be deemed duly given … by facsimile upon confirmation of receipt." Cigna says § 8.2(a) should be read: "All notices … shall be in writing and shall be deemed duly given on the date of delivery if delivered … by facsimile upon confirmation of receipt." By eliding, "on the date of delivery if delivered," Anthem's interpretation creates an ungrammatical hash.

The structure of § 8.2 confirms Cigna's reading. Each of § 8.2(a), (b), and (c) follows a parallel formulation specifying that notice shall be deemed given on a specified "date" or "Day" depending on the mode of delivery. Under Anthem's interpretation, delivery by fax is the only mode of delivery that results in the notice being deemed given upon an event—"confirmation of receipt"—as opposed to on the "date" or "Day" specified at the beginning of the subprovision. Anthem does not explain why the parties would single out faxed notices. Nor does Anthem supply any clue how to decide which of two notices delivered on the same day is "deemed" given first if only one was faxed.

Section 8.2 does not create such puzzles. Notices, however delivered, are "deemed" given on a "Day" or "date." As to Anthem's charge that Cigna failed to cite a case in support of its reading—no case law is needed to confirm a straightforward reading of simple English. Tellingly, Anthem's authority—involving a termination notice under a collective bargaining agreement sent to an outdated address—has nothing to do with the point in controversy. AAB 26.

CONCLUSION

The judgment for Anthem on Cigna's claim for the reverse termination fee should be reversed.

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CERTIFICATE OF SERVICE

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