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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ANTHEM-CIGNA MERGER LITIGATION	)	Consolidated
	)	C.A. No. 2017-0114-JTL
		PUBLIC VERSION
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ANTHEM'S PRE-TRIAL BRIEF

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INTRODUCTION

On July 23, 2015, Anthem and Cigna entered into the Agreement to create a combined company that would have transformed the health care industry. Anthem agreed to pay consideration of over $54 billion, providing Cigna's stockholders with a premium of 38.4% to the unaffected stock price. The Merger Agreement included a reasonable best efforts provision with a hell or high water obligation to take any and all actions necessary to avoid each and 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 secretly conscripted a cadre of lawyers and consultants to embark on an unprecedented campaign to sabotage the Merger and procure a $1.85 billion Reverse Termination Fee.

Cigna, through the conduct of its fiduciaries, ignored their obligations under the Agreement, sabotaged an industry-changing merger and sacrificed a $13 billion premium simply because they were unhappy with their proposed post-closing roles. Cigna's conduct is an affront to the best efforts obligation (indeed, good faith) and demands substantial damages to avoid rendering the customary and important obligation a nullity.

STATEMENT OF FACTS

There is an abundant contemporaneous record demonstrating Cigna's sabotage. Some of the most striking evidence was withheld and would never have been produced had Anthem not challenged Cigna's privileged assertions, including through motions to compel. Anthem will prove at trial that the testimony of Cigna's main witnesses, particularly Cordani and Jones,[1] is incredible, contradicted by the contemporaneous record and coordinated.

A. Cordani's Quest To Become CEO Of NewCo

Cordani first approached Anthem to discuss a potential acquisition in 2012 where Cordani proposed that he and Ike Harris[2] would retain the roles of CEO and Chairman, and the Board seats would be split equally, which Anthem rejected. (JX0023) In 2014 and 2015, Cigna again sought a deal in which it could maintain "control." (JX0116, CI-DE-000976988; JX078, CI-DE-000981718; JX3001, CI-

[1] Throughout their depositions, many of Cigna's witnesses were evasive and refused to give direct answers to even the simplest of questions. *See, e.g.*, Cordani at 639-641; 643-644; 651; 671-673; 694-695; 708-709; 710-720; 820-826; 827-828; Jones at 66-67, 78-82, 93-102, 111-112, 116-117, 120-121, 147-148, 153-156, 411, 413, 419- 421, 449, 545-547, 567-568, 572, 580-87, 589-593, 598, 600-601, 605, 607-608, 611-628, 630, 633-634, 637, 678, 690-691, 719-734, 739-744, 766-771, 802, 850, 870-872, 905-908, 961-963, 975-980, 985, 992-997, 1009-1010, 1012-1015, 1026-1036, 1042, 1047-1048, 1057-1062, 1065-1070, 1098-1099, 1103, 1110-1111, 1122-1123, 1131-1133, 1145-1148, 1155-1158, 1160, 1163-1168, 1170-1172, 1188-1189, 1190, 1937, 1200, 1204, 1207-1208, 1257-1259, 1265, 1269-1271, 1361-1365, 1372, 1381-1382, 1404-1405, 1414-1417.

[2] According to Jones: "David and Ike are very close and Ike is incredibly supportive of David." (JX0093)

DE-000269181) As Anthem's investment banker, UBS, testified, "it was fairly widely known that regardless of what happened with any of these potential combinations, that [Cordani] viewed that he should be the CEO of the resulting entity." (Forbes 36:21-25)

Anthem rejected Cigna's demands to appoint Cordani CEO and provide Cigna board members with equal board seats and it pay an acquisition premium to Cigna. Cordani then considered a dividend structure in which Anthem was "technically acquiring" Cigna but "we take control." (JX3001,CI-DE-000269181) Cigna's CFO, however, was concerned that Cigna's stockholders would be disappointed at paying a premium to Anthem. (*Id.*) Cordani and his CFO ultimately agreed to pursue a "BankOne model," where the target's CEO was to be appointed in the future: "but gaining control (in a more accelerated way than BancOne [sic])."[3] (*Id.*; JX0183, CI-DE-000221305) Anthem, however, would not agree to bind the future board's decision making on such an important issue. (JX0224,JX0229,JX0249,JX0282)

Ultimately, Anthem met Cigna's price, but Cigna rejected the offer because Anthem did not agree to Cigna's leadership and governance demands. Cordani participated in the decisions to reject Anthem's proposals based on his personal

[3] When JP Morgan acquired BankOne, BankOne's CEO, Jamie Dimon, was guaranteed the CEO role of the combined company two years post-closing. (JX0008)

position. Indeed, when Anthem increased its price by $6 per share to meet Cigna's price demand, Cordani remarked only that the proposal "went backwards in many key areas," referring to his position and Cigna board seats. (JX0273,CI-DE-000269692); *see also* Harris (Feb. 2019)66:2-67:3. The principal negotiator at UBS for Anthem viewed Cordani's behavior throughout the negotiations as "totally inappropriate" and testified that:

> most CEOs I know who are reputable would focus on getting the best deal for their shareholders. Not that their role had to be CEO at the end of the day. And when the negotiations that became the 90-plus-percent of the focus in the last month, month-and-a-half, [is] his role, as you saw from various emails, that is typically not what a CEO would do. They would focus on getting the best deal for their shareholders.

(Forbes 214:22-215:9)

1. Cordani And The Cigna Board Hold Up The Merger Based On Their Personal Positions

Blocked by Cigna's board and senior management from pursuing a transformative merger offering billions of dollars of premium to Cigna's stockholders, Anthem publicly announced the terms of its offer. (JX0281) Anticipating blowback from stockholders, Cordani conceived an excuse that Cigna later relied on when sabotaging the Merger and which became Cigna's mantra throughout this litigation. Cordani falsely blamed the Blues Rules as a reason for not agreeing to an Anthem deal.

When instructing his team to respond to Anthem's bear hug letter, Cordani

referenced the Blues Rules and explained that the "tee-ups need[] to explicitly lay out concerns that [Anthem] agreed with and validated as the cause of breaking off discussions at the direction of their board [in] Feb 2015." (JX0300,CI-DE-000270301) Cigna then responded, publicly, that a "fundamental concern" blocking a deal was that it had: "not been able to validate that a combination of Cigna and Anthem could be integrated successfully under the BCBSA rules, and the stakes are too high and the penalties too great to move forward without that validation." (JX0298,CI-DE-000049496) In fact, the Blues Rules were not a negotiation point, and there was no disagreement about them. The only disagreement was about leadership and governance. Indeed, Cigna had made a proposal just three days earlier, with Cordani guaranteed the CEO position within 12 months. (JX0261)

2. Cigna Stockholders Demand An Anthem Deal

Cordani and Harris' response did not dissuade Cigna stockholders from the massive premium Anthem had offered. GMT Capital, a longtime institutional Cigna stockholder, wrote to the Cigna Board that "the Board makeup, and particularly David Cordani's management role at the combined company, appear to be driving the Board's decision-making process . . . David's role at the combined company should not impede shareholders realizing this value." (JX325,CI-DE-000270990) Another institutional stockholder, T. Rowe Price, wrote they had

concerns "over the governance-related demands the Cigna board has reportedly made" and "about defining [Cordani's] future role such that it becomes a sticking point in negotiations," and urged Cigna to not insist on tying the combined company's hands with respect to future executive leadership. (JX0319,CI-DE-000223340) Others among Cigna's Top 50 stockholders expressed "disappointment that the governance issues would stand in the way of getting the deal done," and asked that the "Board [] do what is best for the shareholders / don't let the governance issue thwart the deal." (JX0321,CI-DE-000000137) Goldman Sachs, another large Cigna stockholder, warned Cigna's investor relations team, "[d]on't do a deal with [Humana] just to avoid the [Anthem] deal." (JX0333,CI-DE-000223927)

Nevertheless, two days later, Cordani and Cigna's Board determined "not to engage on [Anthem's] offer," and instead to submit an offer to acquire Humana. (JX0327, CI-DE-000290395)) Humana, however, rejected Cigna's offer. (JX0339)

3. With A "Heavy Heart," Cordani Negotiated A Deal Under Stockholder Pressure

Cigna reengaged with Anthem after the bear hug letter. Cordani claims he was not unhappy about the Merger (Cordani 41:17-44:11,46:22-25), but the morning after Cordani and Swedish reached agreement on price, Harris wrote to Cordani: "David, Congratulations to you and the team. Much work ahead of you,

but this is a major step, and the right step for our shareholders." Cordani responded, "Brain knows yes. Heart is heavy." (JX0370,CI-DE-000737096) He also agreed with another report about having the "emptiest of emptiest feelings" (JX0369,CI-DE-000426944) and confided to Jones that his "soul was unsettled." (JX0400,CI-DE-000051299)

Although Cordani was unhappy, stockholders were not. Approximately 99% of Anthem and Cigna votes cast were in favor of the Merger. Cordani, who held 300,000 outstanding Cigna shares, could not say he voted in favor of the Merger. (Cordani280:17-281:9) After the dust settled, a Cigna director acknowledged that "there were moments in the negotiations when ego, power, and control started to lead us to bad spot" and that they "came to a decision that may not have been our personal choice but the one that was right for the company's shareholders." (JX0886,CI-DE-001100522-3) Later, a Cigna director wondered "if there was anyway [sic] we could have pushed back harder against the deal with Anthem—we went with the team and the bankers advice—it may have been right but I still have remorse that we made the decision we did." (JX2666,CI-DE-001211709)

B. Cigna Failed To Use Reasonable Best Efforts To Obtain Regulatory Approval Of The Merger

1. Cigna Focuses On Cordani's Path To CEO Instead Of Supporting The Merger

When finalizing the terms of the Merger, a Cigna director, Partridge, wrote to Cordani:

> I think [Anthem] has possibly made a tactical mistake and it gives me a ray of hope. That mistake may be putting you on the board. During the early days of transition, the board will have more frequent meetings than usual. I believe that [] it will expose you and no where for Joe to hide. Possibly, we could have an event similar to the one we had when I joined the board. The board sees that a change will be needed in the CEO to extract the value and has the courage to take that decision early in the transition.

(JX0448,CI-DE-000225390-91)

The "similar" event was Cordani's displacement of Cigna's prior CEO, Ed Hanway, after Cordani was given more exposure to the Cigna Board. (Partridge 307:20-308:15; 332:3-12) Cordani testified that Hanway "made it clear that he was going to step down" and "said it was the right time" and was "great with the decision" (Cordani1068:10-1069-8), but Board members Partridge and Harris both confirmed that Hanway was terminated. (Harris Dec. 2018 27:2-7; Partridge 308:16-18; 332:9-12) Cordani "wanted the quiet of the evening to process" the note and then responded that it was "very well laid out" and "[h]ard to argue" and "as for the Board room. Good points. And therefore I need the four best partners possible. Keep an open mind when I come knocking." (JX0448,CI-DE-

000225390) Partridge agreed, and was later named as one of the Cigna designated directors of NewCo.

After the Agreement was signed, Cordani remained focused on his "path to CEO" and controlling the future of NewCo. Cordani refused to let Swedish conduct the necessary interviews of Cigna employees for executive leadership positions, claiming such interviews were "premature" and could cause "disruption and harm." (JX1283,CI-DE-000294917) Cigna, however, began similar work itself and invited outside consultants to begin "designing the new leadership structures/operating model, key roles[.]" (JX0678,CI-DE-000066600; JX0732,CI-DEL-000000555) (October 2015 handwritten notes that L-1 and L-2 decisions would be made by the "President/COO"). Indeed, Cigna retained Bain, a management consulting firm, who advised to "resolve the power and people issues quickly." (Singh 19:15-20:5;JX0693, 3) ("Make as many of the major decisions as you can so that you can move quickly once the deal has closed. Again, get the top-level organization and people in place fast.")

Bain was paid up to $10 million by Cigna, but did no work to help obtain regulatory approval of the Merger. (Singh 34:23-35:11;40:6-9) On December 20, 2015, Cordani met privately with Ashish Singh of Bain at Cigna's corporate airplane hangar. (Singh 88:4-25, 89:25-90:15; Hocevar 464:8-20) Bain provided Cordani advice on the NewCo CEO position and how best to shape NewCo

leadership and organizational structure. (Singh 47:11-49:14;93:12-94:5;87:25-94:5;113:11-124:25 (Bain's work "was on behalf of my client, and you know, what I felt were the right—interests of David Cordani."); *see also* JX0974. Bain advised Cordani that he "has to take clear charge of the Operating Model discussion with Joe, otherwise it is a given that Joe will be pushing for his version of things as he seems to be already doing . . . David has to set the agenda, leveraging his position of strength" (JX1007,CI-DE-00036821) and engage with the NewCo board for "his path to CEO" and to "try and get the overlap period [with Swedish] to be as short as possible." (JX1147,CI-DE-000370396-97) Bain also advised that "one of the most crucial things David and Joe need to align on is how exactly they will divide their roles between them" at NewCo and to be "as specific as possible, as early as possible." (JX0903,CI-DE-000265410)

2. Cigna Sabotages The Merger After A January 11, 2016 Meeting Between Cordani And Swedish

Swedish likewise realized the importance of aligning on the specific roles of leadership and met in-person with Cordani on January 11, 2016 in San Francisco to discuss NewCo ("January 11 Meeting"). Expecting to discuss how to best position NewCo for success, Swedish proposed an organizational structure that designated Cordani as the head of the commercial business—the largest line of business for Anthem, with $56 billion in revenue—which was substantially larger than the entire revenue of standalone Cigna. (Swedish212:11-19) Cordani was

"frustrated" and "disappointed" and "suspended" the meeting. (Cordani542:13-21) Cordani admitted that this topic was "very important to [him]" because he wanted "responsibility for four lines of business," which would be all of NewCo's lines of business. (Cordani539-44)

3. Cigna Secretly Retains A Cadre Of Consultants To Advance Cordani's Interests In Becoming CEO

Within hours of the January 11 Meeting, Cordani had three Cigna in-house attorneys analyzing Anthem's by-laws regarding the selection and removal of the CEO. (JX1044) Jones also contacted the law firm she regarded as "the preeminent firm on hostile deals," Wachtell (JX1051), and held a call with them that same day. (JX1066) Jones secretly engaged Wachtell "in a very under the radar way" (*Id.* at CI-DE-000086586), apparently using a code name (JX1861), and hiding the retention from Cigna's regulatory counsel, Cigna's head of litigation, and all but a few select officers at Cigna. ((JX1862,CI-DE-000103800) (Cigna sending documents to Wachtell "without raising alarm bells" from Cigna's regulatory counsel); (JX1583, CI-DE-000388755) (Cordani: "I will get a 1x1 with [chief marketing officer Bacus] … to assimilate into the issues on Monday as we need her in the tent with us . . . I made her aware of the additional advisors. But no more"); JX1738,CI-DE-000105418 (Cigna's head of litigation [redacted] about Wachtell retention) Within 5 days, Cigna had concluded that [redacted]

[redacted] (JX1095;CI-DE-000293735-00002)

Cigna also commissioned consultants at Moelis. Cigna paid Moelis $18.5 million, but Moelis also did no work to help obtain regulatory approval of the Merger. (Prasad 16:8-17:9) Rather, Moelis focused on Cordani's "authority, powers, duties and responsibilities . . . and positioning [Cordani] as the natural successor to the CEO[.]" *Id.* Arun Prasad, a Moelis managing director, drew inspiration for his work on seating Cordani as CEO from the "Sandy Weil[l]/John Reed leadership struggle at Citibank in the late 90s/early 2000s." (JX301,MOELIS-00005471) Prasad envisioned Anthem's then-CEO Swedish as Reed and Cordani as Weill, who was co-CEO of Citigroup with Reed for a brief period, before Reed was ousted.[4] *Id.* Anthem was never informed of the Moelis retention.

Moelis and Cadwalader formulated a two-pronged strategy of outreach to Anthem's Board of Directors to co-opt them in favor of Cordani and against Swedish. "Project Alpha" was based on a "military" analogy Cordani "seems to like so much" (JX1165,MOELIS-00005522) ("To use one of David's military

[4] "Sandy had secured his lifelong climb to the top . . . when he pushed out his last rival, John Reed, to become sole heir to the Citigroup crown . . . . Sandy had agreed to share power with the unlikely partner. But after a tumultuous collaboration, the brazen and instinctual Sandy outmaneuvered the reserved and cerebral Reed." JX3000, 2.

analogies which he seems to like so much—with the Board, we will use 'aggressive diplomacy' that could involve threats if we don't get right response.") Cordani claims he was acting at the will of the Board, but such strategy was concocted by Moelis long ago:

> Consider asking C directors to be 'scapegoat' and [to] explain that David wasn't the bad guy during merger negotiations. They can say they were adamant on the governance asks, including David's role . . . . That is why they included board splits and David's role as a contract term.

(JX1165,MOELIS-00005522-3)

Moelis's and Cadwalader's "battle plan" against Anthem was to be put in action at the February 16, 2016 meeting of the Cigna and Anthem directors that would serve on the NewCo Board. (JX1226,MOELIS-00005591; JX1231) If this meeting did not yield Cigna's desired outcome, Moelis was "not afraid to go hostile," noting that "more aggressive tactics need to be employed . . . geared toward generating feedback to A[nthem's] Board that they need to conform to C[igna's] Board perspective." (JX1224,MOELIS-00005590; JX1226,MOELIS-00005591) With its secret advisors, Cigna devised a "Plan B" consisting of multiple work streams unrelated to the Merger, including a "Public Relations Campaign" that would "include positive commentary on D[avid] C[ordani] and the C[igna] approach" where "positive profiles of D[avid] C[ordani] that … paint him

as [a] natural successor" would be "arrange[d]" at the same time as "stories questioning J[oe] S[wedish's] leadership and track record") (JX1223)

Cordani did not replicate his success in displacing Hanway at the meeting of the putative NewCo Board. Although Anthem appeased Cordani and confirmed he would have the COO responsibilities he desired at NewCo, that was not enough for him. Instead of using best efforts to clear the Merger, as contractually required, Cigna used its best efforts to ensure the Merger failed. As the media reported, "Cigna sabotaged its own merger." (JX2844)

4. Cigna Impeded Anthem's Integration Efforts

Integration was an important part of the regulatory strategy and positioning NewCo for success. Indeed, Moelis advised Cordani and Jones that [redacted] (JX1522,CI-DE-000098457-00002,-00006) As the court noted, there was "no question" that the integration of Anthem and Cigna would require hard work and tremendous effort from both merger partners (JX2834,115) but Cigna "de-scoped" and then ultimately stopped integration efforts. (JX1350,CI-DE-000290835,43; Gass 309:15-310:6;310:21-314:15) Specifically, Cigna stopped all non-Day-1 work streams, including work necessary to support the defense of the Merger's efficiencies at trial.

Cigna's Head of Integration, Chris Hocevar, instructed Cigna's integration leads not to share critical details for effective integration planning:

> [W]e do need to monitor our progress / pace with integration planning . . . . The details of "how we make money" or "our secret sauce" should continue to be held closely to the vest at all times as it truly is the competitive advantage we have[.] We know at a high level that there is a line of sight to the $2B of shareholder synergies and while we need to validate high level thinking on the synergies, we do not need to lock down on the details of any lever at this point . . . .

(JX1367); *see also* JX1405; JX1494; JX1387 (Cigna IT team informing Anthem that destination platform work should be paused in favor of Day 1 work). Cigna told Bain that there was a "freeze on integration activities," (JX1557, BAIN-ANT00019385) and Bain's takeaway was that Cigna "will no longer participate in the process as it is currently be[ing] run by Anthem and McKinsey." (JX1564)

A key component of the necessary integration planning that Cigna stopped was "Value Capture," which was the process by which the synergies and efficiencies for NewCo would be identified and realized, including utilizing Cigna's collaborative care and wellness offerings. (JX560) ("value capture . . . work has stopped on these fronts") Cigna's refusal to participate in the "Value Capture" integration process undermined Anthem's key defense at trial that the Merger would create efficiencies. Indeed, the court enjoined the Merger based on its concerns that the efficiencies could not be achieved because the "pre-merger integration planning that is necessary to capture any hoped-for synergies is stalled

and incomplete" and "[t]hat is because Cigna's input is required before the real work can be done, and the two parties have not been working together for some time." (JX2834, 9, 116)

5. Cigna Blocked Opportunities For Resolution

The usual way to clear a merger is through a settlement. Cigna, however, blocked Anthem's attempts to reach resolution with the DOJ through divestitures and then mediation.

a. Cigna Thwarted Any Opportunity To Settle With The DOJ Through Divestitures

Cigna recognized that divestitures might be required as part of the regulatory approval process even before the Agreement was signed. (Gray Apr. 2017 294:4-24; Paul 46:16-47:24; JX0078, at CI-DE-000981721) Cigna also understood it would be Cigna assets that would be potentially divested. ((Gray Apr. 2017)322:6-11; JX0079 ("[r]egulatory divestitures would best be from Cigna and dollar for dollar reduce the exposure to the Rules in the license markets and nationally"); JX0531).

Anthem's counsel conducted preliminary work on potential divestitures while waiting for the DOJ to identify any specific geographic areas of competitive concern. (JX0901; JX1304; JX1793) Anthem also developed a divesture plan to prepare for a meeting with the DOJ, which McCarthy characterized as a "[r]easonable approach" and Jones likewise was "ok with the approach as a

starting point." (JX1963, CI-DE-000112949, 50) Cordani, however, intervened hours later, declaring "[c]andidly I struggle with this." (*Id.*, CI-DE-000112949) Jones and Cordani then contacted Wachtell about it. (*Id.*, CI-DE-000112948)

Once the DOJ identified geographic areas of competitive concern, Anthem promptly developed a full remediation plan. Anthem found, met with, and signed NDAs with three strategic potential buyers. HCSC, Independence, and Centene. (JX206, PW-CI-DE-00065763; JX2066, PW-CI-DE-00065804; JX2061, ANTM-DE-00569956) But Cigna refused to enter into NDAs with HCSC and Independence. (Rule 488:20-24) Although Cigna entered an NDA with Cetnene, Cigna provided it with only a one-page spreadsheet of high-level aggregated data. Cigna refused to provide Centene any additional information unless it signed a second NDA with a non-customary provision restricting Centene's ability to engage in alternative M&A transactions, even though Centene was not even a competitor of Cigna for the businesses proposed to be divested. (Rule 712:3-713:2) Because Cigna refused to provide due diligence, no bidder could evaluate the assets, make an offer or advocate to the DOJ.

Cigna also blocked Anthem's divestiture efforts by not supporting the two Blue companies, HCSC and Independence, as potential buyers. Cigna, the party obligated to support the Merger, told Anthem that it "believed the viability of Blues as divestiture candidates must be raised . . ." and then threatened "[i]f you

don't plan to raise it [with the DOJ], we will." (JX2101, PW-CI-DE-00066171) But, as Cigna's own counsel testified, the DOJ never said that a divestiture to HCSC or Independence would be a "nonstarter." (Rule 489:12-22) Best efforts provisions are included in merger agreements because it takes advocacy and work to obtain clearance. Indeed, parties spend millions of dollars on attorneys and economists in discharging those efforts. Cigna, however, refused to advocate in favor of the buyers, would not sign on to Anthem's letter to the DOJ explaining why Independence and HCSC were viable buyers, and would not express support for Anthem's proposed divestitures in meetings with the DOJ. (JX2181; Rule 494:23-497:8, 543:19-25; Paul 286:13-19) Cigna also made no effort to develop a remediation plan. Anthem repeatedly requested Cigna's assistance to identify buyers, but Cigna would not do so, and, in fact, concealed an inbound inquiry. (JX2062; JX1676; JX2079; Gray Apr. 2017 315:1-315:20; 330:18-331:5)

b. Cigna Thwarted Any Opportunity To Settle With The DOJ Through Mediation

Cigna also impeded resolution with the DOJ by refusing to communicate an agreement to mediate. The court and Special Master, Judge Levie, both urged the parties to participate in settlement negotiations. (JX2481) Anthem promptly agreed, but Cigna refused. Cigna would not agree even to inform the court that Judge Levie would be an acceptable mediator because that presupposed an interest in mediation. (JX2634)

Anthem told Cigna that its refusal to communicate an agreement to mediate was a breach of the Agreement. Cigna responded falsely that "Cigna's position has been, and continues to be, that it has no objection to mediation." (JX2659, CI-DE-000175553) Two days later Judge Levie again asked the parties to mediate, stating that based on his considerable experience it was an appropriate time to discuss settlement. (JX2673, CI-DE-000425679) Anthem then asked Cigna to communicate to Judge Levie its statement from just two days earlier that it was willing to mediate, but Cigna refused to do so unless there was "a viable proposal from Anthem" and "support from the DOJ." (JX2673, CI-DE-000425675)

Cigna never identified what it would consider to be a viable proposal, and mediation is precisely the venue for developing such a proposal. Moreover, the defendants did not need "support from the DOJ" to present a united position to Judge Levie. Anthem had the contractual right to lead the strategy, but Cigna refused to follow. Cigna's refusal to state a willingness to mediate guaranteed that the parties would not achieve a consensual resolution to clearing the Merger.

6. Cigna Secretly Enlisted Teneo To Sabotage The Merger In The Press And Influence The DOJ To Block The Merger

In February 2016, "preeminent hostile deal" counsel, Wachtell, introduced Jones to Teneo, a global advisory firm which supports "clients through the highest-profile litigation and enforcement actions in the world." (JX2976) As Cigna's banker testified, Teneo does not feel constrained in the types of defense services it

provides. (Mowrey 170-174) Wachtell recommended Teneo to Jones, telling her "they knew a firm who they had worked with before who was certainly—they thought was good and they suggested that [Cigna] talk to them and make a decision and determine if they could meet our needs." (Jones 1098:9-14) And Cigna's lead trial counsel in this case had previously worked with Teneo in representing "a client in [a] merger case that was seeking to avoid a closing." (Cohen 22:11-19) Teneo touts that "[a] well-run communications strategy can dramatically change the outcome of a high-stakes litigation and/or enforcement action matters." (JX2976)

Teneo's retention was confidential, known only to Wachtell and select individuals selected by Cordani and Jones. (Bacus 222:3-5; Jones 1664:19-1665:6; 1666:13-1667:5; 1667:19-1668:10) The core Cigna team of Cordani, Jones and Bacus met frequently with Teneo. (JX1826; JX1882; JX1893) Cordani testified falsely that Teneo was hired to "[s]upport and help us get the deal done." (Cordani 146:22-25) Teneo did nothing to help obtain regulatory clearance. (Cohen 85:17-86:9, 126:21-127:2) Jones testified that Teneo "did work on things related to the merger, certainly. But—or, well, I'm not sure if they worked on things related to the merger. They certainly—there were things that obviously they were, that they were doing relating to the merger—well not doing relating to the merger. The answer is, I don't think they were working on anything specifically relating to the

merger." (Jones1111:9-22) Jones also testified that Cigna's strategy was not to have Teneo criticize the Merger or Anthem. (*Id*.1127:4-9) Bacus testified that she was "not really clear what [Teneo] did beyond our breakfast meetings" to raise awareness of the opioid crisis. (Bacus318:6-13) And this would have been the evidence if Anthem had not pushed for the withheld Teneo documents.

Teneo sought to channel its Cigna communications through Wachtell so that they would be disguised as privileged. (JX1752) Although Wachtell was [redacted] (JX1764), Cigna, Teneo, and Wachtell continued to conceal Teneo's actions. Cigna and Teneo did not produce documents related to Teneo's communications work against the Merger during the PI phase and for over a year into this litigation, baselessly claiming that nearly all Teneo documents were "privileged." Cigna agreed to produce Teneo documents only after Anthem filed a motion to compel. The concealed documents demonstrate a breathtaking campaign of sabotage.

a. Cigna Undermined The Efficiencies Defense By Leaking Discord Between The Parties

In April and May of 2016, Teneo accelerated work on its "priority assignment": "preparation for a derailment." (JX1691) In April 2016, Teneo prepared leak strategy documents with an "off the record" media engagement plan. (JX 1652, CI-DE-000103303) Teneo also reviewed drafts of the dispute letters

that Cigna intended to send to Anthem. (JX1529; JX1620; JX1745; JX1771; JX1840)

Teneo then kicked off its work in damaging the Merger by secretly providing to the Wall Street Journal confidential letters between Anthem and Cigna reflecting disputes relating to the Merger. (Cohen 224:11-14) As intended, this resulted in an article publicly disclosing the disputes, something that would deal a massive blow to a primary defense of the Merger at trial.

Jones swore to having no knowledge of the leak to the Wall Street Journal in interrogatory responses and at deposition, but the evidence at trial will demonstrate that those denials are not credible. Even Cigna's advisors at Bain drew the obvious conclusion: "They must be leaking this shit. Yikes." (JX1916) And Deloitte, a consultant who worked for both Anthem and Cigna, knew right away from reading the article that Cordani was responsible for the leak:

> The bickering has been ongoing having substantially to do with succession issues. [Cigna] was last man standing after other deals were sealed and necessity became a virtue. From the start Cordani was working to secure his longer term role (only 50) and rather publicly lobbying for his parochial interests. There is now more bitterness than before and Cordani has no lock on succession and will be without board control. This is either real brinkmanship to secure his position (something I have seen before in other consolidation discussions he was engaged in) or an effort to derail the deal and get the penalty cash so he can make another target run. The big issue is there is no alternative that would secure his position.

(JX3002) Cigna purported to investigate the leak, but Jones shielded the key

information from Cigna's Head of Litigation who was running the investigation. (Jones 1658:6-21;1661:10-16;1663:17-1664:10;1667:6-18)

Blindsided by this damaging article, Anthem asked Cigna to publicly support the Merger and issue a joint statement sending a unified message to stockholders and regulators that the companies remained committed to obtaining regulatory approval and closing the Merger. But doing so would have undermined the very purpose of providing the letters to the Wall Street Journal, so Cigna refused to join Anthem's statement. (JX1906;JX1908) In fact, Cigna threatened that if Anthem released its statement supporting the Merger, Cigna would release a response disputing Anthem's statement. (JX1909)

Cigna continued to support the DOJ in undermining the efficiencies defense after the Wall Street Journal leak. Cigna unilaterally informed the DOJ at a hearing before the Special Master handling discovery matters that Anthem and Cigna had exchanged further dispute letters. As intended, the DOJ served a discovery request seeking the letters the next day. (JX2494) Even though Anthem was arguing that the letters were subject to joint privilege, Cigna filed a brief that supported the DOJ's argument for production of the letters. (JX2501) Although the court did not adopt the DOJ/Cigna position in total, it did order the production of more information on the disputes.

Afterwards, Cigna and Teneo went to work to highlight in the media the disputes that the DOJ was relying on to argue against the efficiencies defense, contacting reporters from the New York Post and the Wall Street Journal. (JX2555;JX2556;JX2565) Cohen provided the reporters with a bulleted list, prepared by Wachtell, contrasting public statements made by Swedish with the newly-disclosed correspondence. (JX2499,TENEO-00039972;JX2556;JX2561) Both the New York Post and the Wall Street Journal then published negative stories about the Merger. (JX2570;JX2576 (Anthem and Cigna were "bickering, making it appear unlikely they can defeat the government."); JX2574 ("Cigna is irate because it feels Anthem has not properly prepared its case against the Justice Department.") When Cohen forwarded the Wall Street Journal article to Teneo's CEO, Kelly, noting that it "came out well," Kelly congratulated him on a job "well done." (JX2576)

Cigna was well aware of the effect the media plan would have on the regulators evaluating the Merger. (Sandberg125:20-126:2) (the purpose of media engagement was "to provide solid background music for this deal as [state and federal regulators] are considering it"); (Sandberg343:5-9) (Cigna PR team was "trying to influence what the judge thinks" throughout regulatory effort) As Cigna intended, the DOJ relied on the dispute letters to attack a primary Merger defense, arguing that the conflict between the parties would impede NewCo's ability to

realize efficiencies. (JX2494;Cohen52:5-11;152:23-153:5) And the court specifically cited the breach letters in enjoining the Merger. (JX2483,117 ("The two companies, through counsel, began to exchange increasingly heated letters accusing the other of being the first to breach the terms of the merger agreement. All of these circumstances impair the Court's ability to credit the total estimated network cost savings and G&A efficiencies."))

b. Cigna And Teneo Manufactured A "Blues Pitch" To Portray The Merger As Anticompetitive

Rather than advocating for the procompetitive benefits of the Merger, Teneo created a "Blues pitch" "to develop arguments that the Blues rules are anticompetitive" (Cohen136:11-15), Cigna's second attempt to use the Blues Rules to avoid the Merger. When the DOJ dropped a claim against the Merger, Teneo used the opportunity to [redacted] and began working closely with Jones on their ideas. (JX2483) Jones confirmed that Teneo and Cigna "have to play this as all roads go to the Blues" as Cigna "goes through the motions of moving this deal forward." (JX2486) Cohen testified that "Cigna was interested in having Teneo develop stories that the Blue rules would prevent the Merger from being cleared" and that highlighting the Blues rules would be "problematic for obtaining regulatory clearance." (Cohen41:10-14;126:21-127:3)

Cigna and Teneo "proactively" developed stories for the media—"off the

record," so as to leave "no fingerprints" (Cohen114:3-8;JX2298,TENEO-00034475)—pitching attacks on the Merger with arguments beyond what the DOJ had ever raised:

- [redacted] (JX2484,TENEO-R-0033835.001)
- [redacted] (*Id.*)
- [redacted] JX2298,TENEO-00037548)
- [redacted] (JX2462,TENEO-00038456)
- The MDL case has [redacted] against Anthem, [redacted] (JX2484,TENEO-R-00033835.002)

Teneo lamented that [redacted] (JX2484,TENEO-R-000033835.001)

Cohen understood that the Blues Pitch "would be harmful to the Merger" (Cohen 216:10-15), and could identify no basis for its assertions. (Cohen 130:20-131:2;140:17-141:22,146:5-10;147:15-20;155:24-156:6)

c. Cigna And Teneo Devised A "Trojan Horse" Communications Strategy To Support The DOJ's Arguments About Innovation

Cigna understood from the outset that the DOJ might challenge the Merger by arguing that either Anthem or Cigna was a "unique, procompetitive 'maverick'" or unique innovator. (JX0209) And Cigna identified that the response would be that "[n]either [Cigna] or [Anthem] is a uniquely disruptive maverick in the industry." As predicted, the DOJ argued that Cigna was a unique innovator that would be eliminated in the market (Cohen142:19-22;149:20-25), but instead of defending as planned (when Cordani thought he had path to CEO), Cigna and Teneo developed a strategy to *highlight* Cigna's status as an innovator. (Sandberg 354:23-355:15;JX2629)

Teneo and Cigna strategized about a "Trojan Horse" campaign to advance a narrative in the media that Cigna was innovative. (JX2614;Cohen278:3-7;279:3-12) A "Trojan Horse" is "someone or something intended to defeat or subvert from within by deceptive means" and "Cigna was a defendant" that was "on the inside of Anthem's defense" and "working on the inside on touting its innovations." (Cohen282:1-285:24) The strategy involved Cordani touting Cigna's innovations through various media engagements. (JX2614;Cohen 280:23-281:4;Cohen 280:17-22) Teneo would also influence various media outlets that were working on "trial curtain raisers," turning to Bacus for "new materials to

proactively talk about Cigna business / health outcomes / innovation." (JX2628; Cohen271:24-272:7) Teneo's DOJ "Hearing Communications Strategy" highlighted Cigna's status as an innovator, directly supporting the DOJ's argument to block the Merger. (JX2658;Cohen 301:4-8)

The Trojan Horse strategy culminated with Cordani's trial testimony when he testified, in support of the DOJ's arguments to block the Merger, that Cigna was an innovator at risk of being eliminated by the Merger. (JX2667)

d. Cigna Disparaged Anthem, Its Regulatory Strategy And Joe Swedish "Proactively" "Off The Record" To The Press

From the outset of this case, Cigna has wrongly accused Anthem of disparaging it in vague indirect ways, all of which arise from Anthem's efforts to defend against the DOJ's efforts to block the Merger. Ironically, discovery has proven that Cigna was secretly disparaging Anthem and Swedish. At a time when Cigna was obligated to support Anthem's trial strategy and fight for the Merger, Cigna sought to [redacted] in storylines criticizing not only the Merger, but also Anthem and Swedish. (JX2489) Indeed, Cigna, Teneo and Wachtell scoured the public record for any information it could use against Anthem and Swedish to plant negative stories (Cohen45:23-46:4;47:3-9;170:5-9), including that:

- "[Anthem] is not a well-run company,"
- Swedish caused "a steady stream of meaningful senior departures"

- Swedish not focused on Merger because he is distracted by "numerous outside activities," including acting as AHIP chair (a position currently occupied by Cordani)

- Swedish "possibly committed SEC violations."

(JX1922;JX2298;JX2489;Cohen 208:20-25;101:12-19) Cigna and Teneo even tried to leak to the Wall Street Journal a (non-existent) picture of Swedish smoking a cigar, observing that it "beggar's belief" to see the "head of a healthcare insurance company on a magazine cover with two other guys smoking a cigar." (JX1922)

7. Cigna Refused To Defend The Merger

As the district court essentially found, Anthem had to litigate against not only the DOJ, but also Cigna, its own merger partner. Positioned as an insider, Cigna's attacks on the Merger proved to be insurmountable.

a. Cigna Refused To Communicate Support For The Merger

After the DOJ filed a lawsuit in July 2016 challenging the Merger as anticompetitive, Anthem asked Cigna to participate in a joint press release expressing their commitment to the transaction and opposition to the lawsuit, but Cigna's senior management refused to do so. Anthem issued a press release stating that it "is fully committed to challenging the DOJ's decision in court." (JX2313)

Cigna then issued a press release informing the market it was "evaluating its options" and questioning whether the Merger would close "at all" (JX2312), knowingly signaling to the market, the DOJ, and other regulators that Cigna was not interested in the Merger. (JX2228) [redacted] Indeed, Cigna's CFO was "concerned about the reluctance to say we were disappointed [in DOJ's decision to sue] . . . I really didn't see the harm in that. I actually thought - I mean, I certainly was disappointed and I thought it reflected the company's point of view. And the rationale for not being comfortable with that was unclear to me and it seemed influenced by Teneo's advice . . ." (McCarthy 605:6-606:5)

b. Cigna Refused To Provide Any Pre-Trial Assistance

Anthem continued to use its best efforts to defend the Merger, taking and defending over 100 depositions, preparing all briefs defending the Merger, and developing the expert reports. Cigna refused to help. Cigna posed limited questions to only 3 witnesses at depositions, and those were unhelpful to the Merger. Anthem repeatedly provided Cigna with draft litigation materials for input, but Cigna refused to provide any. Cigna provided no comments to any of the key documents in the case.

Additionally, Cigna refused to provide Anthem with reasonable access to the Cigna witnesses testifying at trial. (JX2647) Anthem spent an average of sixteen to twenty hours preparing each of the Anthem witnesses. Cigna asked Anthem to handle its witnesses, but then refused to give Anthem more than *one hour* of witness preparation time with key Cigna witnesses, including Cordani, a witness that the court heavily relied on in blocking the Merger. Notwithstanding their best efforts obligations, Cigna characterized even the one hour as a mere "courtesy." (JX2647)

8. Cigna Helped The DOJ Undermine The Merger At Trial

a. Cigna Acted As Anthem's Adversary At Court

Before the trial even started, Cigna let the court know where it stood on the Merger by asking for permission to object to questions posed by Anthem in defending the Merger. The court observed:

> Well, it's completely extraordinary. I've never seen it done even in a criminal trial with multiple co-defendants. . . . [T]his is nothing I've ever seen before. I have trouble even wrapping my mind around it . . . . [O]bjecting when you're both the defense here, I find that so highly extraordinary . . . . I'm not going to tell you right now it's prohibited. But I can tell you I find it highly unorthodox, and I'm not entirely sure that it's even permissible.

(JX2523, 41:17-42:23)

Cigna continued its alignment with the DOJ by not cross-examining a single DOJ witness. Instead, Cigna's counsel, Rule, cross-examined Dr. Mark Israel,

Anthem's key expert witness on medical cost savings, even though Anthem asked him not to do so. Cigna tried to discredit Israel's authority in the field and attack his findings. The court noted that this too was an "unusual exercise" and that "[d]espite the fact that he was testifying as the defense expert, Dr. Israel was subjected to a not particularly friendly cross examination conducted by counsel for Cigna." (JX2833, 114 n.46)

Cigna also cross-examined Anthem's CEO, Swedish, even though Anthem asked Rule not to do so. The cross highlighted the prior dispute over Cordani's role in NewCo (even though it was resolved months before), bolstering the DOJ's argument that the efficiencies could not be achieved due to the disputes between the parties.[5] (JX2660, 378:18-386:23)

b. Cordani Provided Untrue And Unsupported Testimony That Poisoned The Court Against The Merger

Anthem's lead counsel, Curran, e-mailed Cigna's lead counsel, Rule, and asked him to prepare Cordani to rebut a potential DOJ attack of the Merger related to the "Bias to Blue" go-to-market strategy. (JX2649) "Bias to Blue" was a jointly developed go-to-market strategy for new customers in the 14 Anthem Blue states during the first 180 days post-closing. (JX1241, 13) Five months before his

[5]Cigna's trial media messaging on "Leadership" was that "Anthem had reneged on the agreed-upon, post-closing organization structure that was outlined in the merger agreement." (JX2640, CI-DE-000173039)

testimony, Cordani objected to the strategy, in keeping with his practice of not supporting anything related to the Merger. Curran advised Rule that Cordani could defend against this DOJ attack by testifying that the "Bias to Blue" strategy had been tabled and replaced with a "brand agnostic" strategy that was adopted to appease Cordani. (JX2649) Curran forwarded the resolution adopting the brand agnostic strategy. Rule sent Curran's request to Cigna legal, who promptly forwarded it to Wachtell.

But Cigna had another plan. Cordani spent 21 hours preparing with Cigna's counsel. (JX2908) Cordani practiced his testimony including "through mock Q&A [] with attorneys from Paul Weiss asking him questions and him answering." (Jones416:14-18) And Cigna's attorneys agree that he testified consistently with how he was prepared. (JX 908,Resp. 14;Jones 448:13-450-3;Rule613:6-615:7)

Cordani falsely testified that the tabled Bias To Blue strategy was the "framework in terms of how we would go to market, the so-called-go-to-market with existing clients and new clients in the overlap 14 states and then outside of those 14 states." (JX2660, 428:24-429:8) Then, he badly misstated the strategy. He falsely testified that Bias to Blue would be "extraordinarily disruptive in the marketplace" and make "the existing [Cigna] offering less competitive in both Anthem and non-Anthem states." (JX2660,439:23-440:17;432:4-7)

Q: And, as I think you said, the Bias Blue strategy will destroy the value of Cigna?

A: It will erode it pretty rapidly.

Q: Including the network?

A: Correct.

Q: Provider relationships?

A: Correct.

Q: Customer choice will be reduced?

A: Correct.

Q: Innovation will be at risk?

A: I think it would be at risk.

Q: And one plus one will not equal three?

A: To be determined, but harder to achieve.

(JX2660,441:2-14)

Indeed, Cordani happily (and falsely) supported the DOJ's case with a colorful metaphor that rebranding Cigna products as Blue products would be tantamount to pulling a string that unravels the Cigna network:

Q. Okay. And the way Bias Blue works is those lives will also be rebranded from Cigna to Blue, right?

A. That was a concern that we raised as we were working through that strategy as it was presented because it would be the risk of unwinding or pulling a string and unwinding it . . . So, yes, you'd pull a thread, and it would have an unwinding effect on the network, not just in the overlap states, but in the stand-alone states.

Q. So it's fair to say that the Cigna network would be harmed, not just in the Anthem states, but also the non-Anthem states?

A. That was the concern we registered, correct.

Q. And it would also harm provider collaborations in the non-Anthem states?

A. That was the concern we registered, correct.

Q. And as the Cigna network becomes weaker, fewer clients will find that network attractive?

A. That's correct.

Q. Which will, in turn, cause the network to become even weaker?

A. Correct.

Q. In other words, the effects will snowball?

A. Correct. That was a concern, again, we registered.

Q. And all of this will make Cigna less competitive in the Anthem states?

A. Well, it would make the existing offering less competitive in both Anthem and non-Anthem states.

Q. The Cigna branded products would be less competitive?

A. For medical.

Q. And then for medical, the Cigna branded product would also be less competitive in the non-Anthem states?

A. That's correct.

(*Id*.430:11-432:12) Cordani's rapport with the DOJ was remarkable in serving as a witness for the DOJ, and stands in stark contrast to Cigna's approach in this case, where he wants to win.

Cordani also testified against a primary merger defense, the achievement of more than $2 billion in efficiencies through medical cost savings. Cordani did no work to assess that number, nor did anyone else at Cigna. (Cordani281:20-282:9; 285:20-286:5;287:20-288:3;288:15-22) Cordani failed even to ask Dr. Israel or

Anthem about the calculation. (Cordani294:18-22) Nonetheless, as prepared, Cordani testified:

> It's not our number, so it's hard to agree with it. . . . . [The calculation] ignores both utilization in terms of the number of services, but the mix of the services, as well as the venues in which the services are consumed. . . . So the point is, it's an incomplete – it's an important – the discount's important, but an incomplete part of the equation. . . . So all that being said, we view that it is, at best, incomplete and, therefore, inaccurate.

(JX2660,442:3-18)

Cordani omitted that the reason such information was not included in Anthem's calculation is because Cigna refused to provide Anthem with its utilization information. (Paul242:22-246:5)

The court relied on Cordani's testimony in enjoining the Merger, finding that "the testimony of the CEO of Cigna, David Cordani, inflicted significant damage on the synergies defense." (JX2833,119) The court found: "Mr. Cordani testified, quite adamantly, that branding Blue will drain members from his provider networks and, therefore, do harm to the value-added proposition that is Cigna's contribution to the marketplace, essentially [that] is a summary of his position." (JX2660,1540:2-7) The court also relied on Cordani's testimony in determining that Anthem's key defense—the $2.4 billion in medical cost savings to consumers—could not be achieved. (JX2833,108 (Cordani "cast doubt" on the premise of Anthem's cost savings argument); 113 ("CEO David Cordani testified

that Anthem's predicted cost savings are unreliable in part because they are based on an unproven assumption that providers will not react and renegotiate their fee schedules upwards."))

The *Wall Street Journal* reported:

> Some of Mr. Cordani's testimony appeared to cut against Anthem's defense of the deal. He said the integration strategy favored by Anthem, not supported by Cigna, could hurt competition by eroding Cigna's offerings, an argument posed by the Justice Department. In fact, he said, Cigna disagreed with an ad run by Anthem that touted the merger's competitive benefits, because Cigna believed "choice would be potentially be constricted" for insurance clients under Anthem's preferred setup.

(JX2682) And Jeff Miles, an antitrust lawyer, commented to Law 360: "[i]f efficiencies is your major defense, and one of the parties is not willing to work on integrating the two companies, how in the hell can you work on achieving the efficiencies?" (JX2749)

After Cordani's testimony was unsealed, Watt Boone of GMT Capital, an institutional Cigna stockholder, wrote to Cigna: "As a shareholder, this unsealed testimony is very disappointing to read. I've expressed my concerns to you several times, now they are confirmed. Cigna's management's choice to disengage from the integration process and put up active resistance to the merger was abetted by the Board. Cordani's testimony to DOJ seems designed to give the agency ammunition to block this value creating merger. Why isn't the Cigna board putting shareholders first? Both the Board and management have lost substantial

credibility." (JX2687) Cordani had the same reaction: "Having read the testimony, this is a concern I had." (JX2687) Anthem's banker, with over 30 years of professional experience, noted about Cordani: "I would say opposing the transaction with the DOJ, to me is not – that's behavior that I've never seen before in my career." (Forbes214:23-215:16)

c. Cigna Did Not Even Ask The Court To Deny The Injunction Blocking The Merger

Cigna did not utter a single word of support for the Merger at the trial. Cigna did not make an opening statement that supported the Merger. Cigna did not make a closing argument in support of the Merger. Cigna never communicated to the court any interest in clearing the Merger. Cigna did not even ask the court to deny an injunction blocking the Merger.

Cigna's only argument was to undermine the Merger. The DOJ argued that the efficiencies serving as the centerpiece defense of the Merger would not be achieved because of the disputes between the parties. Anthem argued that the disputes were between the CEOs, and that the NewCo Board would control upon closing, ensuring alignment within the combined company. Cigna disputed Anthem, arguing for the DOJ that the disputes were company-wide, an argument that was unsupported by the evidence. (JX2660, 2706:16-23) Law360 reported that:

> Cigna attorney Charles F. Rule of Paul Weiss Rifkind Wharton Garrison LLP openly disavowed an assertion from Anthem's attorney that the "rift" the government had made so much of was in reality nothing more than a dispute between the two companies' CEOs. Remarkably, Rule said Cigna's misgivings stretch all the way down the board of directors and represent the views of the company itself. Hearing about Rule's statements, Ober Kaler's Jeff Miles was incredulous. "To put it in certain vernacular, if I were Anthem, I would be pissed off out of my mind," Miles said.

(JX2749)

At the conclusion of trial, Cigna then refused to sign Anthem's proposed findings of fact and conclusions of law or submit any of its own. (JX2737;JX2660 at 2705:19-2706:23) In other words, Cigna refused to submit any factual or legal support whatsoever in defense of the Merger. Remarkably, Cigna's counsel revealed that Cigna had been working on proposed findings of fact and conclusions of law for months, but neither shared them with Anthem nor submitted them. (Rule413:8-415:14) Faced with that failure, Jones simply denied the fact. (Jones369:17-20) ("Q: Did Cigna create any proposed findings of fact or conclusions of law itself? A: We did not.")

Apparently concerned that the court would not notice the fact that Cigna, a merger partner, was refusing to offer any defense of the Merger whatsoever—notwithstanding its best efforts obligation—Cigna's counsel announced to the court that it was not willing to sign Anthem's proposed findings of fact and

conclusions of law. Cigna's refusal to support the Merger had not gone unnoticed, and the court responded incredulously:

> What am I supposed to make of that? I wasn't going to ask you that question in open court because they're just drafts to this point, but since you brought it up, your name isn't on them; Cigna's name isn't on them. What am I supposed to think that tells me? What does that mean?

Media reports predicted that "Cigna's antics might . . . be the merger's undoing." (JX2749) The Wall Street Journal reported that "[d]uring antitrust trial proceedings that began in November, Anthem mounted a legal defense of the merger single-handedly. Cigna lawyers said very little during the proceedings, and when they did, it usually didn't help Anthem's position." (JX2845) Law360 aptly reported that Cigna's "lack of enthusiasm about its $54 billion merger with rival Anthem Inc. has given the U.S. Department of Justice a leg up in an ongoing trial in D.C. federal court" and "[n]ow a matter of public record, the discord is potentially fatal to Anthem's efficiencies defense [.]" (JX2749)

9. Cigna Hid Its Intention To Terminate The Merger Agreement

In early-January 2017, a few weeks before the decision was issued, Anthem delivered to Cigna a written notice extending the Termination Date through April 30, 2017. Notwithstanding the extension, on January 30, 2017, Cigna's Board of Directors, at a meeting with Wachtell, resolved to terminate the Agreement following "any issuance of a decision . . . to enjoin the Merger" and authorized a

lawsuit against Anthem. (JX2824,CI-DE-000291474) The next day, Cigna filed a SEC Form 8-K stating: "Cigna still intends to evaluate its options in accordance with the Merger Agreement once the Court issues its opinion" and that it "has made no determination with respect to Anthem's notice seeking to extend the termination date, including whether Cigna will seek to terminate the Merger Agreement," even though the Cigna Board had already determined to wrongfully terminate. (JX2826, 2) Cigna refused to answer Anthem's inquiries about honoring the extension. (JX2819;JX3003)

C. Cigna Was Successful In Sabotaging The Merger

On February 8, 2017, the court issued an order enjoining the Merger. The predictions of observers proved accurate. In blocking the Merger, the court found Cigna's conduct remarkable:

> [T]he Court cannot fail to point out that it is bound to consider all of the evidence in the record in connection with the question of whether the merger will benefit competition, and in this case, **that includes the doubt sown into the record by Cigna itself.**
>
> **This brings us to the elephant in the courtroom.** In this case, the Department of Justice is not the only party raising questions about Anthem's characterization of the outcome of the merger: **one of the two merging parties is also actively warning against it. Cigna officials provided compelling testimony undermining the projections of future savings, and the disagreement runs so deep that Cigna cross-examined the defendants' own expert and refused to sign Anthem's Findings of Fact and Conclusions of Law on the grounds that they "reflect Anthem's perspective" and that some of the findings "are inconsistent with the testimony of Cigna witnesses."** Anthem urges the Court to look away, and it

> attempts to minimize the merging parties' differences as a "side issue," a mere "rift between the CEOs." **But the Court cannot properly ignore the remarkable circumstances that have unfolded both before and during the trial.**

(JX2384,9 (emphasis added)).

The national media reported that "Cigna sabotaged its own merger" and a "big part of the decision to block the case" was the fact that "Cigna was actively fighting the merger." (JX2844) The media reported that the decision was a "win" for Cigna because Cigna "convincingly argued" against the Merger and "Cigna's skepticism—unusual for a party in a merger—strengthened the Department of Justice's case against the deal." (JX2846)

D. Anthem Appealed The Opinion, As Required; Cigna Refused To Do So Until The TRO Was Issued

The Agreement required an appeal. On February 9, 2017, Anthem filed its notice of appeal to the D.C. Circuit. (JX3004) Cigna refused to file an appeal, as required under the Agreement. (JX2840;JX2856) Anthem filed an emergency motion to expedite, and Cigna refused to join it. (JX2864) Instead, Cigna tried to foreclose an appeal by purporting to terminate the Agreement. (JX2872) Predictably, the DOJ used Cigna's purported termination as a basis for arguing that the appeal was moot. (JX2877,TENEO-00027049) Cigna also filed suit in this Court. That same day, Anthem filed this action and moved for a TRO to enjoin Cigna's purported termination of the Agreement. On February 15, 2017, this Court

granted the temporary restraining order enjoining Cigna from terminating the Agreement.

E. Despite This Court's Order Enjoining Cigna's Termination Of The Merger Agreement, Cigna Continued To Refuse To Cooperate

Following entry of the TRO and the Court's statement that "Anthem. . . has argued, and I think it has the better reading of the merger agreement on this point, that Cigna is required to support it in its appeal," Cigna filed a notice of appeal. But Cigna refused to offer any substantive arguments, instead stating "[i]n accordance with the merger agreement, Cigna has appealed, and defers to Anthem." (JX2894,1) In other words, Cigna filed an appeal, but did not actually challenge the decision blocking the Merger. An appeal requires argument, not just a notice, so Cigna again breached the Agreement.

Even after the TRO issued, Cigna and Teneo continued to work to impede approval of the Merger. Teneo continued to press the "Blues Pitch" while the D.C. Circuit considered the Merger, seeking reporters that would suggest that the Blues are monopolistic. (JX2890) On April 20, 2017, Teneo saw a Bloomberg report that "Anthem is said to be in negotiations with Trump administration to try to salvage its purchase of Cigna." (JX2914). In response, Kelly instructed Cohen to "kill this immediately," apparently with the help of a lobbying firm that Teneo used to influence government decisionmaking. (*Id.*;Cohen359:12-365:4)

The D.C. Circuit affirmed in a 2-1 decision on April 28, 2017. *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017). Then-Judge Kavanaugh authored a dissent, opining that "the record decisively demonstrates that this merger would be beneficial to the employer-customers who obtain insurance services from Anthem and Cigna" and that "the District Court clearly erred, therefore, in concluding that the merger would substantially lessen competition in the market in which insurance services are sold to large employers." *Id*. at 373,375.

F. Cigna Sent An Invalid Termination Notice, Then Misrepresented That It Was A Clerical Error

This Court found Anthem had "a reasonable probability of prevailing on its claim for breach" based on the then-available record, but denied Anthem's request for a preliminary injunction, in part, because "if Anthem is correct in its view of what happened during the post-signing/pre-closing process, then the damages it can recover from Cigna are potentially massive." (May 12, 2017 Tr. at 11, 18-19) The record of Cigna's breaches is now substantially stronger.

Cigna faxed a termination notice to Anthem on May 11, 2017 while this Court's TRO was still in effect. Indeed, Cigna faxed a termination notice even before this Court finished ruling on Anthem's preliminary injunction motion. (JX2927) Cigna then wrote to this Court stating: "due to a clerical error, it appears Cigna inadvertently faxed one copy before the Court announced that it was staying its ruling." (JX2930,2) Discovery, however, has confirmed that Cigna's fax, in

violation of this Court's TRO, was not sent in error. (Phan404:4-410:23; Jones1589:7-23)

G. The Blues Rules Were Not An Impediment To The Merger

Cigna's conduct here was so bad that none of experts it retained to offer opinions on the regulatory review process will even try to justify it. (Noether 292:13-294:15,JX2969,JX2978; Hemphill 48:9-18,111:5-23,167:16-21;JX2971, JX2979;Ruback177:5-14,372:10-373:3;JX2970;JX2980) Unable to defend its unprecedented campaign of sabotage in this Court, Cigna launched in this case its third attempt to blame the Blues Rules for the Merger's failure. Cigna revives its "Blues Pitch" here to wrongly claim that the NBE is anticompetitive and was the "key impediment" to regulatory clearance. The DOJ never challenged the NBE or alleged that it was anticompetitive. Likewise, the court made no finding against the NBE. The only relevance of the NBE was Cordani's false testimony that coming into compliance with it would destroy Cigna's value proposition.

The contemporaneous documents and testimony at trial will show that Cigna's claim that it expected Anthem to change the NBE is untrue. To the contrary, Cigna contemplated from the outset, and assessed the Merger on the basis of, full compliance with the Blues Rules. This is what Cordani told the DOJ under oath:

> Q: Did they—did Anthem tell you anything about whether the rules—whether Anthem had an expectation that the rules might

be changed at some point in the future?

A: I don't recall that relative to the future of the rules. . . .

(JX1842,271:3-6)

In this case, Cordani outright changed his sworn testimony to support the newly fabricated defense here:

> Q. Did Anthem tell you anything about whether it had an expectation that the rules might be changed at some point in the future?
>
> A. Yes.

(Cordani211:10-13)

There is a comprehensive, contemporaneous record of internal e-mails, Cigna Board presentations, meeting notes, and analysis from both before and after the Agreement was signed that prove Cigna recognized and planned on complying with the NBE:

- JX0351,CI-DEL-000001072 ("Operating outside the Blues Rules is not a realistic option")
- *Id.*,CI-DEL-000001074 (the combined company would need to come "into compliance" with the Blues Rules)
- JX0522,CI-DE-000226808 (Newco would "remain in compliance" with the Blues Rules)
- JX0524,CI-DE-000226767 (Cordani's talking points: "We have reviewed the rules and are confident that the combined organization can optimize its operations for the benefit of its clients and customers while complying with the rules")
- JX0565,CI-DE-000429215 ("Largely confirms earlier assessment: . . . We would need to comply with 'Blues

Rules'")

Thus, Cigna valued the Merger assuming no change to the NBE, and did not mention any potential change in the Proxy Statement. (JX0793)

And, contrary to Cordani's testimony that rebranding would destroy Cigna's value proposition, there is even a more comprehensive, contemporaneous record that Cigna planned to rebrand substantially all of its business Blue in Anthem's 14 states to comply with the NBE:

- JX0351,CI-DEL-00000107 ("Blue Rules Mitigants . . . Rebrand [Cigna] revenue as Blue in [Anthem] markets")
- JX0565,CI-DE-000429215 ("The most likely outcomes are: . . Rules stay in place as is and we adapt our model to comply through a mixture of rebranding and other actions, in line with the current business case.")
- JX0098,CI-DE-000662964 ("In a C/W combination, we fail the revenue test at ~57/43. To resolve this, we would need to rebrand between 23 and 27% of revenue nationally and between 64 and 73% of Cleveland revenue in the Washington license areas (the most likely lever)")

Additionally, contrary to Cordani's testimony that rebranding would harm the Cigna networks because of a loss in volume, the record is that Cigna concluded that, notwithstanding the expected loss in volumes, the Merger was beneficial:

- JX0079 (to comply with the NBE, Cigna and Anthem would need to "rebrand revenue and members" which "practically . . . [meant] "complying with [NBE] will mean reduced volumes to our network outside of the license states.")

- JX0119,CI-DE-000582885 ("[r]ebranding will divert volumes from [Cigna's] network to Bluecard in the non-[Blue] states.")
- JX0180,CI-DE-000269151 ("While the potential growth limitations were significant, the combination still delivered significant value even on a constrained growth basis.")

Thus, Cigna told its investors that the Blues Rules would *not* be an impediment to the Merger. (JX0526,CI-DE-000876967)

ARGUMENT

I. CIGNA WILLFULLY BREACHED THE AGREEMENT

"Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiffs." *WaveDivision Holdings, LLC v. Millennium Digital Media Systems, L.L.C.*, 2010 WL 3706624, *13 (Del. Ch. Sept. 17, 2010). No party disputes that the Agreement was a valid contract.

A. Cigna's Obligations Under The Merger Agreement

Under Section 5.3(a) of the Agreement, Cigna was obligated to, among other things:

> [U]se its reasonable best efforts to take, or cause to be taken, all actions, to do, or cause to be done, all things reasonably necessary to satisfy the conditions to Closing set forth herein and to consummate the Mergers and the other transactions contemplated by this Agreement.

A "reasonable best efforts" provision imposes "obligations to take all reasonable steps to solve problems and consummate the transaction." *The Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264,272 (Del. 2017).

Cigna's "reasonable best efforts" obligation was further strengthened to a "hell or high water" obligation because those efforts are specifically defined to include "taking any and all actions necessary" to achieve regulatory approval. (JX0468, § 5.3(b)) Delaware courts have described "hell or high water" covenants as "potent" in imposing liability on a party if it "fails to take any action, however extreme, necessary to secure [regulatory] approval." *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 763 & n.60 (Del. Ch. 2009; *see also Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 756 (Del. Ch. 2008); Richard Steuer et al., *Competition Law in Merger Transactions: Managing & Allocating Risk in the New Normal, 9-1 CLI 31* (April 2013) (a "hell or high water clause" requires a party "to do all things necessary to obtain regulatory approval . . . without any limitation on the extent of the burdens [it] must accept.").

B. Cigna's Breached The Merger Agreement

A "Willful Breach" is defined in the Merger Agreement as:

> a material breach of this Agreement that is the consequence of an act or omission by a party with the actual knowledge that the taking of such act or failure to take such action would be a material breach of this

Agreement. . . .

(JX0468, § 8.13)

1. Cigna Materially Breached The Best Efforts Provision

Under Delaware law, a "material breach" is a "failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *Shore Invs., Inc. v. Bhole, Inc.*, 2011 WL 5967253, *5-*6 (Del. Super. Nov. 28, 2011). Materiality "is determined by weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case." *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, *84 (Del. Ch. Oct. 1, 2018) (quoting *BioLife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003)).

Cigna's breaches were material and ensured the Merger failed, "defeat[ing] the essential purpose of the contract." As addressed above, Cigna used no efforts to obtain regulatory clearance. To the contrary, Cigna used its best efforts to block regulatory clearance.

2. Cigna Materially Breached The Public Announcements Provision

Cigna also breached Section 5.8, which required Cigna to consult with Anthem before issuing any press release or public statement with respect to the transactions contemplated by the Agreement, by launching a secret PR campaign

with Wachtell and Teneo to plant negative stories about the Merger in the press.

3. Cigna's Material Breaches Were Made With Actual Knowledge

The evidence also will show that Cigna acted "with the actual knowledge that the taking of such act or failure to take such action would be a material breach" of the Agreement. Cigna retained a team of advisors to help it sabotage the Merger, and Anthem sent multiple notices of breach and requests to help clear the Merger. *See* JX2732 at ANTM-DE-00208222;JX2840;JX2216;JX2278; JX2699. Although no direct evidence of knowledge is required, there is a comprehensive record here of "smoking guns" demonstrating Cigna's plan. *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 106-107 (Del. 2013); *see Matthew v. Laudamiel*, 2015 WL 5723985, at *13 (Del. Ch. Sept. 28, 2015) ("The Court does not require a figurative smoking gun, and knowledge can be inferred under circumstances where conduct is particularly suspect."), *aff'd*, 143 A.3d 709 (Del. 2016); *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 800 n.85 (Del. Ch. 2004).

C. Cigna Cannot Prove That Its Breaches Did Not Materially Contribute To The Failure Of The Merger

The Delaware Supreme Court has held in a best efforts case that "once a breach of a covenant is established, the burden is on the breaching party to show that the breach did not materially contribute to the failure of the transaction."

Williams, 159 A.3d at 273; *see also WaveDivision*, 2010 WL 3706624, at *15 (same). To establish that Cigna's breaches materially contributed to the Merger's failure, "it is not necessary that the [regulatory approval] would have been given 'but for' [Cigna's] conduct, but only that [Cigna's] actions contributed materially to the non-consent of the" regulatory authorities. *Id*. at *14.

Cigna cannot satisfy its burden to prove that its rampant breaches did not materially contribute to the Merger's failure. The evidence will demonstrate that Cigna blocked a resolution with the DOJ by refusing to sign NDAs or provide due diligence to prospective buyers, advocate to the DOJ or agree to participate in mediation. And Cigna materially contributed to the Merger's failure at trial by "actively warning [this Court] against it." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 183 (D.D.C. 2017). Indeed, the court cited "the doubt sown into the record by Cigna itself" and found that Cordani's testimony "inflicted significant damage" on the key defense to the Merger. *Id.* Additionally, Anthem will introduce expert testimony from Dr. Joseph Farrell, Donald I. Baker and Charles T.C. Compton confirming that Cigna's actions in this matter were unprecedented and materially impacted the outcome of the Merger.

Cigna cannot seriously argue that, after launching a strategic plan to support the very grounds raised by the DOJ to block the Merger—through a strategic communications plan and then through testimony at trial—its conduct did not

materially contribute to the result. Indeed, it is impossible to prevail in a litigation when one's partner is siding with the plaintiff in warning the court against the defense. Cordani, Jones and the other Cigna officers would not have taken such radical actions, sacrificing a $1.85 billion termination fee, had they not believed that their conduct was necessary to block the Merger. If their conduct was not going to materially contribute to the failure of the Merger, they would have done everything asked of them, waited for a failure, and then collected the termination fee.

D. Anthem's Damages

Anthem seeks two forms of damages: expectancy damages or out-of-pocket expenses.[6] "Because a buyer often intends to operate a business in a way that will change its cash flows, its expectancy damages are the profits it expected to make, if it can prove them up with reasonable certainty." *WaveDivision*, 2010 WL 3706624, at *22. The Delaware Supreme Court addressed the "reasonable certainty" standard in *SIGA Technologies, Inc. v. Pharmathene, Inc.*:

> Where the injured party has proven the fact of damages – meaning that there would have been some profits from the contract – less certainty is required of the proof establishing the amount of damages. In other words, the injured party need not establish the amount of damages

[6] Anthem has out-of-pocket damages well in excess of $500 million, but as set forth in the Joint Pre-Trial Order, the parties have agreed to defer the determination of the amount of out-of-pocket damages until after trial.

> with precise certainty "where the wrong has been proven and injury established."

132 A.3d 1109, 1130-31 (Del. 2015). The Supreme Court also stated in *SIGA* that "doubts about the extent of damages are generally resolved against the breaching party" and courts may "take into account the willfulness of the breach in deciding whether to require a lesser degree of certainty" as to the amount of damages. *Id.* at 1131 n.132. "[D]amages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. b (1981).

Anthem will offer testimony from Professor Daniel R. Fischel about the economic harm to Anthem resulting from Cigna's breaches. Professor Fischel will explain that he estimates such economic harm to reflect the change in Anthem's enterprise value as a result of the Merger, minus the value of the equity consideration to Cigna's stockholders and increase in Anthem's financial obligations. Using this formula, Professor Fischel will testify that Anthem suffered damages in the range of $8.5 billion to $15.8 billion if measured as of the date of the Merger Agreement (July 23, 2015), and $10.8 billion to $20.5 billion if measured as of the date that the DOJ sued to block the Merger (July 21, 2016).

E. Cigna Is Not Entitled To A Reverse Termination Fee

1. Cigna Is Not Entitled To A RTF Because Anthem Terminated Under Section 7.1(i) Of The Agreement

No Reverse Termination Fee ("RTF") is provided for in the event of a termination under Section 7.1(i). (JX0468, §7.3(e)) On May 12, 2017, at 11:20am, Anthem delivered a notice of termination of the Agreement under Section 7.1(i), which permits termination as follows:

> By Anthem, if prior to the Closing Date, there shall have been a breach of any representation, warranty, covenant or agreement on the part of Cigna contained in this Agreement…which breach or representation or warranty (A) would, individually or in the aggregate with all other such breaches and untrue representations and warranties, give rise 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.

Subsection A was satisfied because Cigna breached its best efforts covenant under Section 5.3, which gave rise to a failure of the condition set forth in Section 6.2(b):

> Performance of obligations of Cigna. 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. Anthem shall have received a certificate of the chief executive officer and the chief financial officer of Cigna to such effect.

Consequently, Cigna never provided the required certificate under Section 6.2(b).

The "in all material respects" standard found in Section 6(b) is "different and less onerous than the common law doctrine of material breach" and applies to

"issues that are significant in the context of the parties' contract " *Akorn, Inc.*, 2018 WL 4719347, at *86. Subsection B was independently satisfied in two ways. *One*, Cigna's breaches were not cured within 30 days of the numerous notices that Anthem delivered. *Two*, Cigna's breaches were incapable of being cured prior to the Closing Date: the Merger was blocked and could not be unblocked.

2. Cigna's Purported Termination Under Section 7.1(b) Is Invalid

After Anthem had already terminated the Agreement under Section 7.1(i), Cigna belatedly purported to terminate under Section 7.1(b) of the Agreement. Cigna's termination is invalid because (i) Anthem previously terminated the Agreement, and (ii) Cigna had no right to terminate under 7.1(b).

a. Anthem Terminated The Merger Agreement Prior To Cigna's May 12 Notice

Cigna sent a termination notice after receiving Anthem's notice of termination, but there was no extant Agreement to terminate at that point. *See, e.g.*, *NLRB v. Cone Mills Corp*., 373 F.2d 595,598 (4th Cir. 1967) ("It is axiomatic in contract law that parties to an agreement are relieved of their mutual obligations upon termination of the agreement."); *Blain v. Sullivan-Waldron Products Co*., 78 F. Supp. 661, 661 (D. Del. 1948) ("Where a party cancels a contract according to its provisions, remaining executory obligations are terminated. . . ."); JX0468, §7.2

("In the event of the termination of this Agreement pursuant to Section 7.1, the obligation of the parties shall terminate.…").

b. Cigna Had No Right To Terminate Under Section 7.1(b)

Section 7.1(b) does not permit termination by a party that "failed to perform fully its obligations under this Agreement in any manner that shall have proximately caused or resulted in the failure of the Merger to be consummated by Termination Date. . . ." For the reasons set forth above, Cigna breached the Agreement and Cigna's breaches resulted in the failure of the Merger to be consummated by the Termination Date.

3. In Any Case, Cigna Would Not Be Entitled To A RTF For A Termination Under Section 7.1(b)

No RTF would be owed even if Cigna had terminated under Section 7.1(b). Section 7.3(e) provides for a RTF in the event of a 7(b) termination only in the event that each of the conditions set forth in Section 6.2(b) were satisfied:

> 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*. . .then Anthem shall pay to Cigna a fee, by wire transfer in immediately available funds to account specified by Cigna, in the amount of $1,850,000,000 (the "Reverse Termination Fee"). . . .

As addressed above, at the time of termination, all of the conditions set forth in Section 6.2(b) were not satisfied. Specifically, Cigna breached its obligation to use its best efforts to obtain regulatory clearance. Consequently, even if the Agreement was terminated pursuant to Section 7.1(b), the RTF would not be owed. In short, the Agreement is consistent (and logical) in providing for no RTF in the event of a breach, whether the Agreement is terminated under Section 7.1(i) or Section 7.1(b).

II. CIGNA CANNOT PROVE THAT ANTHEM WILLFULLY BREACHED THE AGREEMENT

A. Anthem Did Not Knowingly Or Materially Breach The Agreement

Cigna's complaint focuses on three alleged breaches: (i) a failure to use reasonable best efforts to consummate the transaction, (ii) a failure to consult with Cigna, and (iii) misuse of confidential information. Cigna cannot prove any knowing or willful beach by Anthem.

1. Cigna Cannot Prove That Anthem Willfully Failed To Satisfy Its Best Efforts Obligations

Cigna alleges that Anthem should have adopted a different strategy, including by forcing other Blues to change the NBE, and by failing to do so, Anthem breached its best efforts obligations. This argument fails for at least four reasons.

One, the evidence will show that Anthem pursued the best strategy to obtain regulatory approval. As noted above, now-Justice Kavanaugh found Anthem's defense to be meritorious, but Anthem's efforts were undermined by Cigna's efforts to sabotage the Merger.

Two, Anthem had no obligation to change the NBE. The parties specifically expected that the NBE would remain in place and unchanged, and that NewCo would comply with it. Cigna sent Anthem more than twenty-five letters alleging breaches of the Agreement and never once before this case asserted that Anthem was obligated to change the NBE (or that NBE was an impediment to regulatory approval).

Cigna's argument is also legally incorrect. *Alliance Data Systems Corp.*, 963 A.2d 746 is on point. There, an affiliate of Blackstone Group, L.P. ("Blackstone") agreed to acquire Alliance Data Systems ("ADS") – a bank holding company. The acquisition required the approval of the Office of the Comptroller of the Currency (the "OCC"). As a condition to providing that approval, the OCC required that Blackstone – a non-party to the agreement – provide funding support for the bank. When the merger failed after Blackstone refused to provide that funding support, ADS sued the Blackstone affiliate that was party to the agreement, accusing it of breaching its best efforts obligation. ADS argued that "all the negotiators of the Agreement were aware that the OCC was likely to

demand that Blackstone enter into certain commitments with the OCC as a condition to approving the Merger" and that "during negotiations Blackstone knew that the OCC would require that Blackstone submit to some form of liability." Then-Vice Chancellor Strine rejected the argument, holding:

> The time for ADS to have protected itself from the risk that the OCC would make demands that Blackstone would not accept was when negotiating the words of the Merger Agreement. Instead of getting contractual assurances from Aladdin that Aladdin would pay the Business Interruption Fee unless Blackstone used best efforts-or some other form of efforts-to satisfy the OCC, ADS got nothing. Having struck a clear bargain, ADS cannot resort to extrinsic evidence to manufacture contractual obligations that are clearly foreclosed by an unambiguous Agreement.

Id. at 753.

Three, there is no evidence that Anthem did not try to change the NBE. Cigna understood and agreed that the way to change the NBE was through settlement of the MDL. Thus, before this case, Cigna had never alleged that Anthem did not try to change the NBE. Indeed, Anthem actively participated in the mediation throughout the pendency of the Merger (and beyond), and the record is that: "[t]he Blues . . . have finally come to the realization that the settlement of the Blues antitrust litigation will result in a significant reduction, if not total elimination of the [NBE]." (JX 2464,ANTM-DE-R-00575781)

Four, a breach of best efforts obligations requires a breach of efforts, not a failure to figure out the best strategy. *See Mark Techs. Corp. v. Utah Res. Int'l, Inc.*, 147 P.3d 509, 513 (Utah Ct. App. 2006) (affirming decision finding no failure to use best efforts as "[i]t is difficult to second guess whether one strategy or decision was incorrect or represented a failure to exert best efforts."). Cigna cannot dispute Anthem's enormous efforts. Anthem incurred over $520 million in advisor, attorney and bank commitment fees in working to clear the Merger.

2. Cigna Cannot Prove That Anthem Willfully Misused Confidential Information Or Failed To Consult With Cigna

Cigna claims Anthem misused confidential information, but there is no evidence of any misuse of some vague alleged confidential Cigna information, much less knowing and material misuse. Cigna further alleges that Anthem breached Sections 5.3, 5.7, and 5.8 of the Agreement by failing to consult with Cigna. The evidence will demonstrate that Anthem did consult with Cigna, in fact repeatedly requested help, but Cigna was trying to block the Merger.

B. Cigna Cannot Prove Causation

Cigna also cannot prove that any (non-existent) "Willful Breach" caused damages because it was Cigna's conduct in supporting the DOJ that caused the Merger to get blocked. Indeed, Jones testified that Anthem did not cause the failure of the Merger. (Jones810:16-811:3) Jones further testified that she could

not identify any additional evidence, witnesses, or argument that Anthem could have offered. (Jones 231:24-232:7;233:18-240:20;240:21-242:16;248:14-250:3)

C. Cigna Cannot Prove Damages

Cigna's damages theories are also flawed. As Professor Fischel will testify, the purported calculation of lost premium damages by Cigna's damages expert is flawed and thus, unreliable. Among other things, Cigna's expert measures damages as of a date that precedes the date of the Agreement by almost three months, and the date of the alleged initial breach by almost one year. *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003) ("Damages are to be measured as of the time of breach.").

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2019, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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