IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ANTHEM-CIGNA MERGER LITIGATION	)	Consolidated C.A. No. 2017-0114-JTL

CIGNA CORPORATION'S PRE-TRIAL BRIEF

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INTRODUCTION

Anthem was a Blue Cross Blue Shield health insurance company, struggling with low growth and hemmed in geographically by the rules of the Blues Association. Cigna was a smaller, high-growth competitor that had differentiated itself in the marketplace with a value-based approach to healthcare cost management. Combining the firms might make sense—but only if they had a way around the National Best Efforts Rule of the Blues Association that capped Anthem's ability to grow under a non-Blue brand like Cigna. Seeing no solution to its Blue problem, Anthem decided to wait until the Blues Rules changed, and suspended merger talks in early 2015.

But when a wave of consolidation struck the industry a few months later, Anthem could not bear the risk of being left behind. So Anthem pursued Cigna aggressively, assuring Cigna that the rules would be changed by a settlement of federal class action litigation and that other solutions to the constraints of the Blues Rules—including directly challenging them—would be available if necessary.

Encouraged by these assurances, Cigna agreed to the merger. But it recognized the substantial risk that antitrust regulators would block the deal. The merger would combine two of only four carriers capable of serving the insurance market for "national accounts"—large companies with employees in multiple states. And the loss of competition would be exacerbated by the Blues Rules. To

account for this risk, Cigna negotiated a $1.85 billion termination fee payable if the deal was blocked.

The Justice Department moved aggressively to oppose the transaction. In its investigation, DOJ zeroed in on antitrust issues the parties had discussed from the outset: the risk that the government would define a highly concentrated "national accounts" market that would be substantially further concentrated were the merger consummated; the risk that the Blues Rules would constrain the company's incentives to compete; the risk that the merger would stifle innovation.

While DOJ dug in to investigate the deal publicly, the other Blues dug in privately, establishing a "special task force" to study ways to undermine the deal. Settlement talks in the class action litigation went nowhere. Anthem explored no other avenues of relief from the National Best Efforts Rule, [redacted]. What's more, Anthem disclosed none of this to DOJ or Cigna and even assured them without any basis that it expected the Blues Rules to be changed by the end of 2016.

These developments caused Anthem to adopt a highly improbable regulatory strategy. The parties had conceived of the merger as a way to combine the companies' complementary strengths, bringing Cigna's innovative services to a broader enrollment base, thus lowering costs and improving health outcomes. But

to comply with the Blues Rules, and their cap on non-Blue revenue, Anthem would have to herd Cigna customers to Blue insurance products and limit Cigna's growth. So Anthem instead decided to argue that Cigna had no special strengths and that the primary benefit of the deal was the savings—"efficiencies"—Cigna customers would realize from gaining access to Anthem's lower provider service rates.

This approach played right into DOJ's hands. Announcing the suit to enjoin the merger, the head of the Antitrust Division summed up Anthem's "efficiencies" defense as the "claim that consumers will benefit if it becomes the 800-pound gorilla at the bargaining table—forcing cost concessions from doctors" regardless of the effect "on the quality of medical care." Attorney General Lynch added that the merger, coupled with the Aetna-Humana deal that DOJ challenged simultaneously, "would restrict competition for health insurance products sold in markets across the country and would give tremendous power over the nation's health insurance industry to just three large companies," creating costs to society "that cannot be measured in just dollars alone."

At trial, DOJ invoked Anthem's internal documents and the testimony of Anthem's own witnesses to undermine Anthem's claims that the transaction would yield huge benefits to the public. Relying on this evidence—and noting that no court had ever approved a merger on the basis of an "efficiencies" defense—the District Court enjoined the merger as a violation of the Clayton Act. Affirming,

the D.C. Circuit ruled that it was "not a close case." The appeals court made clear that any conflict between the parties had "little to do with the anticompetitive effects of the proposed merger." The trouble, rather, was that Anthem's projected cost savings were "fantastical."

The precise risk the parties allocated in the merger agreement thus materialized, but Anthem now seeks to avoid the reverse termination fee. Anthem can escape its obligation only if it can show that Cigna willfully breached its obligation to use its reasonable best efforts to secure regulatory approval, and that breach caused the courts to block the deal. That showing is not possible on this record. To the contrary, it was Anthem's willful and concealed failure to address the Blues Rules that dictated its losing regulatory strategy. Judgment should be entered for Cigna.

BACKGROUND

A. The commercial health insurance market

As of 2015, the four biggest carriers in the domestic health insurance market were United, Anthem, Aetna, and Cigna. Known within the industry as the "Big Four," these companies compete to sell group health insurance services to the country's largest private employers, which have thousands of employees spread across multiple states. JX523 at PW-CI-DE-00128928. The Big Four offer large

employers claims administration services and access to a national network of medical care providers. JX2969 ¶ 20.

Unlike the other three carriers in the Big Four, Anthem does not have its own national network of providers. It instead relies on its membership in the Blue Cross Blue Shield Association (the "Blues Association" or "Association") to give its customers access to providers with discounted rates all over the country. JX581 at ANTM-DE-00484702–12. The Association is a group of regional carriers—the "Blues"—that are licensed to market health insurance plans under the "Blue Shield" and "Blue Cross" brand names. JX846 at ANTM-DE-00433340–47. Association members share provider networks and discounted rates, enabling members to bid for the business of multistate employers. JX581 at ANTM-DE-00484706.

The licensing terms imposed by the Association limit members' ability to compete against one another. JX36 at ANTM-DE-00151158–59. Each member is generally exclusively licensed to use the Blue brand within its territory; members may not bid for the business of an employer headquartered in another member's territory without that member's permission. Nehs Dep. 12:24–13:11. Each Blue is also subject to "best efforts" obligations that require it to generate at least 66.67% of its revenue nationwide from Blue products (the "National Best Efforts Rule"). JX36 at ANTM-DE-00151158, 61; JX846 at ANTM-DE-00433350.

Anthem, by far the largest Blue, is licensed to use the Blue brand in fourteen states. JX846 at ANTM-DE-00433342; Nehs Dep. 18:9–25. If Anthem fails to comply with the Blues Rules, the Association is entitled to revoke Anthem's Blue license and levy a $2.9 billion license termination fee. JX1170 at ANTM-DDC-000733353–55.

Medical care providers and employers have brought class actions against the Association and its members challenging the Blue licensing terms as violations of the Sherman Act. These actions have been consolidated for pre-trial proceedings into a federal multidistrict litigation. JX22. The plaintiffs allege that the Blue carriers have, among other things, illegally conspired to restrict the output of non-Blue insurance products by enforcing certain Blues Rules, including the National Best Efforts Rule. JX2723 ¶¶ 1–10; JX2668 ¶¶ 1–10.

B. Anthem and Cigna

In 2014, Anthem had approximately 38 million members (enrolled individuals). JX1677 at 43. Anthem's large membership and membership in the Blues Association allow it to deliver an enormous volume of potential patients to medical care providers who agree to join the Blue network, which Anthem has used to negotiate steep discounts in the rates that providers charge Blue customers for their services. JX1948 at PW-CI-DE-00062302–03.

Cigna had approximately 13 million members as of 2014. JX2314, ¶ 11. Because Cigna is smaller, its provider discounts are typically not as deep as Anthem's. JX1948 at PW-CI-DE-00062302–03.

Cigna has instead emphasized a different competitive advantage: sophisticated customer engagement and "value-based" provider reimbursement systems it has pioneered. JX1166 at 5–6; JX 2969 ¶¶ 25–40. In the traditional fee-for-service model, providers are paid for each service rendered, regardless of the clinical result. JX 2969 ¶ 29. In the newer fee-for-value model, providers are paid based on the quality of their clinical results as measured by pre-agreed benchmarks. *Id.* ¶¶ 29–30. The goal is to incentivize providers and patients to work together to reduce the need for avoidable medical interventions, resulting in better health outcomes and lower overall cost. *Id.* When the value-based model succeeds, it lowers healthcare costs and yields better health outcomes, despite the absence of heavy discounts for particular medical services. *Id.*

C. Anthem and Cigna negotiate a merger.

In the summer of 2014, Anthem approached Cigna about a potential merger. JX793 at 95 ("Proxy"). In the previous five years, Cigna had doubled its revenue—achieving a compound growth rate of 14%. JX298 at CI-DE-000049495. By contrast, Anthem's revenue had stalled to a rate of only 3%. *Id.*

The Blue licensing rules effectively confined growth in Anthem's Blue business to Anthem's fourteen-state territory, where Anthem already has dominant market share. JX36; JX28 at ANTM000072410–11. The only way for Anthem to grow was to expand its non-Blue business. Tallett Dep. 64:14–65:15. But Anthem lacked access to a non-Blue national provider network. JX28 at ANTM000072410–11; Zielinski PI Dep. 46:24–47:7. Acquiring Cigna, a major non-Blue brand with an existing national provider network, was the solution to Anthem's growth problem. Zielinski PI Dep. 46:24–48:20.

From the outset of its discussions with Cigna, Anthem recognized that the National Best Efforts Rule—which capped a member's revenue from non-Blue business at one-third of total revenue—would be a significant obstacle to growing the combined company. JX66 at ANTM-DE-QP-00150397; JX85 at ANTM-DE-01102537. If Anthem acquired Cigna, the combined company's non-Blue revenue would be about 50% of its total revenue at closing. JX138 at ANTM-DE-00933645. And assuming Cigna maintained its historical growth trend, that proportion would continue to rise. JX138 at ANTM-DE-00933645, 51, 54, 59.

Anthem's general counsel, Thomas Zielinski, told other Anthem executives in September 2014 that the National Best Efforts Rule was "an insurmountable barrier to doing the transaction" with Cigna. JX66 at ANTM-DE-QP-00150397. In February 2015, Anthem ended discussions, concluding that it did not want to

proceed in light of the Blues Rules. Proxy at 97–98; JX150 at ANTM-DE-01102762.

A few months later, Humana, the country's fifth-largest health insurer, began seeking a buyer, setting off a bidding frenzy. JX193 at ANTM-DE-P-00399846. In the following months, Aetna and Cigna pursued Humana, United pursued Aetna and Cigna, and Anthem again pursued Cigna. Proxy at 99–111; JX235; JX286.

In mid-May 2015, Anthem's CEO, Joseph Swedish, told Cigna's CEO, David Cordani, that Anthem wanted to resume negotiating a potential merger. Proxy at 99. Swedish explained that the Blues were now "moving forward" with mediation in the antitrust litigation [redacted] JX172 at ANTM-DE-P-00147615.

In early June, Anthem suggested a price of $174 per Cigna share, paid in 40% cash and 60% stock, representing a 28% premium to Cigna's stockholders. Proxy at 101; JX204 at CI-DE-000048515. Given Cigna's success as an independent company and Swedish's looming retirement, Cigna's board pressed Anthem to raise its price, increase the stock proportion of the consideration, and appoint Cordani as the combined company's CEO. Proxy at 102–06; JX212; JX274; JX285.

Worried about being left behind at the consolidation dance, Anthem grew impatient and sent Cigna a public letter accusing it of holding up a valuable transaction over misplaced concern for Cordani's future employment and announcing its "resounding" confidence that the Blues Rules would not impede the deal. JX281 at ANTM-DE-00298354–57. Cigna wrote back, arguing, among other things, that Anthem's offer price was inadequate and that Anthem had failed to explain how the combined company could operate successfully under the Blues Rules. JX298.

The companies continued negotiating. Anthem prevailed in its desire to make Swedish chairman and CEO at closing and Cigna negotiated for a higher price and a greater proportion of stock consideration. Proxy at 107–12.

During their negotiations, the parties also discussed the implications of the Blues Rules, in particular the National Best Efforts Rule, on the transaction. Proxy at 96–98, 102, 106; JX94 at CI-DE-000700927–28; JX85 at ANTM-DE-01102537. Both parties agreed that, ideally, a settlement of the Blues antitrust litigation would eliminate the Rule as a growth constraint. JX94 at CI-DE-000700927–28; JX66. But in case such a settlement could not be accomplished soon or at all, they discussed two other options for dealing with the Rule: seeking to comply with the Rule, including by "rebranding" Cigna customers (and thus the revenue they generate) as Blue—*i.e.*, creating a Blue version of Cigna's products; [redacted]

[redacted] JX62; Schlegel Dep. 77:12–78:13; Gray Dep. 105:14–23.

On July 3, 2015, Aetna announced it was acquiring Humana. JX362. A day later, Swedish and Cordani reached a preliminary agreement on a deal at $187 per share, to be paid in a mix of 55% cash and 45% stock. Proxy at 112. In addition, Anthem would appoint nine directors to the new board and Cigna five; Swedish would serve as chairman and CEO for two years after closing; Cordani would serve as president and chief operating officer; and Swedish and Cordani would co-lead integration planning efforts. Proxy at 111–12; *see* JX0468 § 1.13 ("Merger Agreement"); JX430 at CI-DE-000225308. The Cigna board believed that these governance terms were important to successfully bringing together the two companies and preserving their respective strengths, which were central to the merger's strategic rationale. Proxy at 123–25.

Recognizing the risk that regulators would block the merger, Cigna proposed a regulatory reverse termination fee equal to 8% of the equity value of the transaction. Proxy at 113. Anthem initially rejected any such fee but eventually agreed to a fee of $1.85 billion, equal to 3.8% of the transaction's equity value. Proxy at 113–14; JX411; Merger Agreement § 7.3(e).

In addition, Anthem sought a provision giving it control over the process for securing regulatory approval. JX425 at ANTM-DE-00559097. The parties ultimately agreed that "Anthem, in consultation with Cigna, shall take the lead in coordinating communications" with governmental entities and in "developing strategy" for responding to government investigations. Merger Agreement § 5.3(e).

D. Federal and state antitrust regulators investigate the merger.

The parties signed the merger agreement on July 23, 2015 and announced it the next morning, saying they expected it to close in the second half of 2016. Proxy at 115–16; JX480 at 2. The combination would be the biggest merger in the history of the health-insurance industry. JX2314 ¶ 1. If consummated the deal would reduce the Big Four—the group of carriers capable of servicing the largest private employers—to the Big Three. JX2314 ¶ 4. Coupled with the Aetna/Humana deal, the transaction suggested a substantial increase in industry concentration. JX2317.

"The question," market observers immediately recognized, "is whether government officials will allow that level of consolidation to pass." JX482. To jumpstart the parties' regulatory defense, Cigna's antitrust counsel (Cadwalader) sent an initial draft of "case themes" to Anthem's antitrust counsel (White & Case) by mid-August. JX567. Cadwalader advocated arguing that the transaction would

be procompetitive because the companies had different "comparative strengths" and "[c]ombining complementary operations and obtaining more scale will allow the combined firm to offer more and better solutions at a lower cost." *Id.* at PW-CI-DE-00042576–77.

Cigna's counsel also identified regulators' likely major concerns: (1) the merger's impact on the market for "national accounts" and (2) the effect of the Blue Best Efforts Rules on Cigna's ability to grow as part of Anthem. *Id.* at PW-CI-DE-00042585, 89–90. Regarding the first concern, Cigna's counsel noted the "[n]eed to prepare for potential maverick arguments"—*i.e.*, that Cigna was a maverick in the national accounts market because of its "uniqu[e] offering[s]." *Id.* at PW-CI-DE-00042589. Regarding the latter concern, Cigna's counsel predicted that regulators' "Potential Theory #1" was that the "Blue Rules will reduce output of the combined firm relative to the world 'but for' the transaction as a result of Best Efforts restrictions." *Id.* at PW-CI-DE-00042590.

In early September, the parties met for the first time with the DOJ Antitrust Division. JX626; JX630; JX637. DOJ staff said they were interested in understanding how proposed medical cost savings would be passed on to customers and how the Blues Rules would affect the combined company. JX630 at CI-DE-000064386–87; *see* JX637 at ANTM-DE-00932173.

Later that month, DOJ sent document requests to the parties pursuant to the Hart-Scott-Rodino Act—commonly called "Second Requests." JX708. The breadth and topics of the requests confirmed that DOJ would be intensely scrutinizing the merger, and in particular, the effect of the Blues Rules on the combined company. JX729; JX708 at ANTM-DE-00358945–947; JX767. Within a few weeks, DOJ asked Anthem to produce a corporate representative for a deposition focused on the Blues Rules. JX772 at ANTM-DE-00574749. After Anthem received these requests, Anthem's general counsel, Zielinski, told colleagues that his "biggest worry inside the DOJ is the BCBSA best efforts rule." JX852.

At the deposition, Anthem's corporate representative testified that it was "very likely" that the antitrust class litigation against the Blues would be settled in 2016 and that Anthem was "very confident" that the 66.67% Blue revenue minimum set by the National Best Efforts Rule would be "reduced or eliminated" in a settlement. JX870 at 47:20–51:15.

E. Anthem commandeers control of regulatory strategy and integration planning.

Shortly after the parties' September meeting with DOJ, Anthem independently retained the consulting firm CompassLexecon to conduct economic analysis in support of the regulatory defense. JX698. Cigna requested that the retention be a joint one. Anthem refused. Zielinski told Cigna's general counsel

that a "separate retention … avoids the need to referee and resolve differences of opinions in strategy and approach." *Id.*

Anthem also adopted a unilateral approach to integration planning. The merger agreement contemplated an integration planning process overseen by a joint committee and the parties had agreed that Swedish and Cordani would co-lead the integration. Merger Agreement § 5.10; JX430 at CI-DE-000225300, 08. But Anthem told Cigna in September that Swedish would be the sole chair of the committee. JX4002. When Cigna objected, Swedish dispatched a go-between to inform Cordani that the decision was "definitive" and Cigna "must conform." JX726; JX4001; JX4002.

In late December, out of the blue, Swedish sent Cordani a letter complaining of "unacceptable" delays in certain integration activities and insisting that he begin selecting senior executives for the combined company. JX998. Cordani wrote back, disagreeing that integration planning was off-track. JX1002. He also rejected Swedish's plan to select leadership so early because it risked provoking executives who were not selected to leave before the merger closed. *Id.* at CI-DE-000111133. Anthem directors privately urged Swedish to move on, with one noting, "If I was David, I would also probably object." JX1300 at ANTM-DE-01203211.

A week later, Swedish informed Cordani that his responsibilities as chief operating officer of the combined company would be limited to oversight of the commercial insurance segment only, instead of all business segments. JX1062; JX1487. This was contrary to the division of responsibilities that Anthem and Cigna had agreed to before the signing of the merger agreement and which Swedish had personally disclosed to investors upon announcement of the transaction. JX430 at CI-DE-000225308; JX490 at ANTM-DE-00186744; JX1501 at ANTM-DE-01073647; JX1487.

F. The Blues Association considers rule changes targeting the Anthem/Cigna merger.

In January 2016, the Blues Association's board created a "special task force" to study changes to the Blues Rules. JX1111. As Anthem's general counsel Zielinski recognized, "[t]he motivating force for creating this Task Force was to respond to the Anthem/Cigna transaction." JX1507 at ANTM-DE-R-00592144. The rule changes the task force considered included raising license termination fees, shortening the period for achieving compliance with the Best Efforts Rules after a merger, and limiting when non-Blue plans owned by an Association member could access the Blue provider network. *See* JX1718 at ANTM-DE-R-002277398.003–.013. The proposed changes "raise[d] very serious concerns for [Anthem] with respect to [its] Cigna transaction." JX1456 at ANTM-DE-00569546. Zielinski told Anthem's outside counsel that they would also cause

[redacted] JX1507 at ANTM-DE-R-00592144. Anthem, however, did not disclose the potential rule changes—or the existence of the special task force—to either DOJ or Cigna. *See* Dkt. 132 (2017-0109-JTL) (Anthem's Answer to Cigna's Amended and Supplemented Complaint) ¶¶ 12, 91; *e.g.*, JX1726 (privilege slipsheet).

G. Anthem rejects Cigna's proposal to submit a divestiture plan to DOJ.

In mid-February the parties' antitrust counsel met with DOJ staff. The staff indicated that it was focused on the national market, local markets, and the impact of the merger on providers. JX1326 at CI-DE-000333234.

Following the meeting, Cigna's general counsel, Nicole Jones, e-mailed her counterpart at Anthem, Zielinski:

> The DOJ gave no assurances that there would be no need for divestitures, which could materially extend the timeline for a clearance [beyond June]. We continue to believe that it is urgent that we develop a divestiture plan. Our team stands ready to engage on these issues to ensure that we have a strategy in place to address them, but we do not believe there is a realistic chance of DOJ clearance by June at this point.

JX1359 at ANTM-DE-QP-00541214.

Zielinski responded that he did "not agree with nor share your concerns that the DOJ is intent on extending the time period to communicate its decision beyond June." *Id.* He said nothing about the status of divestiture planning. He forwarded Jones's message (and his curt response) to Anthem's CEO, Swedish, who

commented: "Another amazing perspective." *Id.* According to Zielinski, "a constant issue of dispute" between the parties was whether to submit a divestiture plan to DOJ preemptively or to wait until the Department told the parties that it wanted divestitures and identified the local markets that the divestitures should address. Zielinski PI Dep. 291:10–22. "By going in first without knowing what the DOJ's interest was, you may be ... offering to give up more than you need." *Id.* at 291:15–18. This was, Zielinski recognized, "a disagreement on strategy." *Id.* 305:1–7.

H. When Cigna suggests that the parties focus their work on the regulatory process, Anthem creates a secret Anthem-only integration team.

On March 1, DOJ requested white papers on a range of topics, including "National accounts" and "[t]he effect of the Best Efforts rules on post-merger competition." JX1395 at ANTM-DE-00397944. DOJ also asked the parties to explain, in a white paper on efficiencies, how the efficiencies would be achieved; why the merger is necessary to achieve them; and how lower provider rates would affect the quality and quantity of healthcare. *Id.* at ANTM-DE-00397945.

Later that month, the parties' antitrust counsel met with DOJ staff. JX1551; JX1550. According to notes of Anthem's counsel, two of the six "big issues" that came up during the discussion related to the Blues Rules: (1) the Department was "still struggling with the Blue System and whether Cigna, post-merger, will

compete less vigorously with the other Blues," and (2) the Department was "still concerned about what happens if the national best efforts rule isn't eliminated or changed by the time they have to decide." JX1550 at ANTM-DE-R-00540778.

The parties' joint integration "steering committee" met a few weeks later. At the meeting, Cigna expressed its view that the parties' strategy for pursuing divestitures was still "[u]nclear" and that the parties' still had no "[c]lear [r]emedy" to address DOJ's concerns about the growth-constraining effect of the Blues Rules or concentration in the national accounts market. JX1506 at CI-DE-000098123, slide 6; JX1469. Given the amount of time-sensitive work necessary to persuade DOJ to approve the merger, Cigna proposed that the parties focus their efforts in the next ninety days on supporting the regulatory approval effort and ensuring that the company was ready to operate at closing. JX1513 at ANTM-DE-00159626.

Anthem summarily rejected Cigna's proposal, JX1454 at ANTM-DE-00240041 ("Bottom line is we do not want to debate on this."), and created an Anthem-only integration team to work without Cigna's input. JX1495 at ANTM-DE-R-00042738.

Anthem did not inform Cigna of its shadow integration team, even warning team members "not to tell anyone ... not even [their] family members" about the project. JX1491 at ANTM-DE-00011123. Anthem dubbed the secret project

"Phase 2B." JX1618; JX1567. It deliberately included in the secret project integration work that Cigna wanted to participate in immediately. *Id.* at ANTM-DE-00231428, slide 13. Anthem, for example, told its executives that "Best efforts-related work is categorized Phase 2B" and that developing a "[b]randing compliance plan for Blues Association" should be "[m]ostly Anthem-work; [with] limited influence from Cigna for next 90 days." *Id.* (Powerpoint slide titled "Phase 2B Scope: Summary of work efforts Cigna wants to engage in that Anthem recommends for Phase 2B or holding").

I. Anthem concludes that it must push Cigna customers to existing Anthem Blue plans to comply with the National Best Efforts Rule.

Before entering into the merger agreement, both Anthem and Cigna understood that if the National Best Efforts Rule remained in place, the combined company may need to "rebrand" Cigna customers to Blue-branded products in Anthem's fourteen-state Blue territory to comply with the Rule. Schlegel Dep. 77:15–80:12, 84:21–86:5; Gray Dep. 105:14–23. From their pre-signing discussions through integration work in early 2016, the companies agreed that the "preferred" way to do this would be to make the minimum changes necessary to qualify Cigna's plans as Blue and then pitch the new "Blue-enabled" Cigna-style plans to Cigna customers. *See, e.g.*, T. McCarthy Dep. 99:19–101:2, 111:22–114:22; JX1159 at ANTM-DE-00051423, slide 7.

In late March, however, after launching Phase 2B, Anthem concluded that "Blue-enablement require[d] complex system modifications" and that it was therefore not "possible to complete this work within the current Best Efforts [compliance] timeline (2 years and 4 months)." JX1573 at ANTM-DE-00199873. The only alternative for compliance in that timeline was to drive Cigna customers to Anthem Blue plans that lacked Cigna-style capabilities. *Id.* at ANTM-DE-00199872, 892, 903; JX1766 at ANTM-DE-00289078.

Also during Phase 2B, Anthem rejected another attractive route to integrating the firms. Anthem had "affiliate clauses" in its contracts with providers that would permit the combined company to give Cigna customers access to Anthem's discounted provider rates. JX1706. An "affiliate clause" required a provider to extend the Anthem discounted rate to customers of non-Blue-branded plans if those plans were "affiliates" of Anthem; Cigna, as part of Anthem, would be an "affiliate." *Id.* at ANTM-DE-00226821–22.

But in Phase 2B, Anthem executives concluded that invoking the affiliate clause would undermine Anthem's efforts to comply with the National Best Efforts Rule. JX1788; JX1733 at ANTM-DDC-001376895–98. If Cigna customers could access Anthem's discounted provider rates while keeping their products with Cigna's features, they would have no incentive to switch to an Anthem Blue plan. JX1733 at ANTM-DDC-001376895–98; JX1680 at ANTM-DE-P-00566476, slide

1. Anthem therefore determined not to invoke affiliate clauses on behalf of Cigna customers in most cases. JX1788.

Anthem also unilaterally decided not to advocate to DOJ that the merger would create savings from combining the parties' pharmacy benefits management operations. JX1627; JX1336 at CI-DE-000333305. Anthem did so even though Zielinski told DOJ in September that these "synergies will be very significant." JX637 at ANTM-DE-00932171.

J. Anthem's CEO is forced to restore the planned role of Cigna's CEO in the combined company.

In early April, Cigna's board sent Anthem's board a letter stating that Anthem's arrogation of unilateral control over the integration process and reduction of Cordani's planned responsibilities as chief operating officer were "inconsistent" with the parties' agreement and "not acceptable." JX1627 at ANTM-DE-00250446. Shortly after receiving that letter, Anthem's board restored the responsibilities associated with Cordani's role as chief operating officer to the ones disclosed upon signing of the merger agreement. JX1724 at CI-DE-000105085.

Swedish emailed himself a message titled "Notes":

> The complex challenge now before us—do we retain "ownership" of the company or cede control to the minority interest ...
>
> Yes we will accommodate until close, but there can be no future for him and by definition for his loyalists.

JX1673. Swedish acknowledges that "him" and "his loyalists" refer to Cordani and Cigna managers. Swedish Dep. 483:15–484:19.

K. Anthem reveals to Cigna that its post-closing business strategy is driven by the need to comply with the National Best Efforts Rule.

The joint steering committee met on June 9, 2016. JX2006. During the discussion, Anthem revealed to Cigna that Anthem intended to convert as many Cigna customers to Anthem's plans as possible to comply with the National Best Efforts Rule. *E.g.*, Manders Dep. 170:11–183:9; Cordani Dep. 299:15–305:11; Jones Dep. 759:20–761:13. Anthem also informed Cigna that it did not intend to invoke affiliate clauses to extend Anthem discounts to Cigna customers because doing so would undermine Anthem's effort to comply with the Rule. Cordani Dep. 299:19–300:6, 920:5–19, 1112:16–1113:7; *see* JX1999 at ANTM-DE-00227994.

Cigna executives warned that the strategy risked customer attrition, since Cigna customers had already rejected existing Anthem products in favor of Cigna products. Manders Dep. 175:5–178:12; *see* JX1573 at ANTM-DE-00199853. Moreover, they observed, Anthem's strategy—which Anthem had dubbed "Bias to Blue"—would play directly into DOJ's concerns that the merger would reduce the choices available to customers. *See* JX2056 at CI-DE-000116074; JX2047 at ANTM-DE-00494946; Jones 759:20–761:11; Cordani 1142:14–1145:12. In response to these concerns, Anthem offered only to delay introduction of the "Bias

to Blue" strategy for six months after closing. Matheis Dep. 114:17–23, 407:22–409:13; JX2264 at CI-DE-000301922 & CI-DE-000301924, slide 0.

L. Anthem rejects Cigna's suggestion to anticipate DOJ's likely theory that Cigna is an innovator.

From late May through mid-June, the parties submitted eight white papers to DOJ. *See* JX1948; JX1947; JX1949; JX1950; JX1974; JX1975; JX2050; JX2058. Anthem chose to draft all of those papers (JX1647); Cigna provided comments (often multiple rounds) on all of them. *See* JX1967 at PW-CI-DE-00063161–63; *e.g.*, JX1631, JX1838, JX1977, JX1986, JX2034, JX2043; JX1871, JX1900, JX2043, JX2047. Importantly, Cigna repeatedly urged Anthem to anticipate DOJ's likely theory that Cigna was an innovator. JX1850 at ANTM-DE-00428889; JX1836 at PW-CI-DE-00104048. For example, Cigna's counsel warned Anthem's counsel that emphasizing Cigna's inferior provider discounts would support a "maverick" theory—that "[Cigna] ha[s] generally worse discounts so [it] find[s] other ways to compete that has caused industry to change and disrupt traditional ways of doing business." JX1631 at PW-CI-DE-00050260. Cigna's counsel also commented that the paper on medical cost savings was "unpersuasive in part because it appears oblivious to DOJ's likely maverick theory." JX1850 at ANTM-DE-00428889. Because "DOJ appears to be trying to develop the argument that Cigna's cost of care and V2V [volume-to-value] innovations will be eliminated as a result of the deal," Cigna's counsel continued, "at a minimum this

paper needs ... to make the point that the Cigna efforts will be spread across the combined company to benefit customers," instead of "extol[ling] the virtues of reduced units costs ... as a seeming end-all, be-all." *Id.* Anthem, however, rejected these suggestions.

M. "They hate the merger."

In June 2016, the parties had a series of meetings with DOJ that revealed the government's deep hostility to the merger.

June 10 Meeting. At the DOJ staff meeting, DOJ "described a consistent theme—Cigna is innovative, and disrupts Anthem," which is "dominant in its markets" and "slow to innovate." JX2025 at ANTM-DE-R-00540891 (Arnold & Porter notes). Because "Anthem has the best discounts," most carriers cannot compete on price. But "Cigna found a way to differentiate itself, by rolling out new products, strong wellness initiatives, customer service, and extensive provider collaborations," and "Anthem has been forced to respond." *Id.*

The staff reported their conclusion that there was a distinct national accounts market and that they "view[ed] the merger as essentially a 4-3"—shrinking the Big Four to the Big Three. *Id.* at ANTM-DE-R-00540891.002. Moreover, the staff expressed concerns about the merger's effects on the market for the sale of insurance to large group employers in "dozens" of local markets. *Id.* DOJ added

that while it would consider a proposal, it "was skeptical that any remedy would resolve their concerns." *Id.* at ANTM-DE-R-00540891.003.

After this meeting, one of Anthem's consultants at CompassLexecon, the economics firm that Anthem retained to advance the efficiencies defense, reported her assessment of the government's view: "They hate the merger." JX2053. She added that DOJ believed "the provider discount efficiencies are anti-competitive so they won't count them as cost savings to customers." *Id.*

Anthem—which, notwithstanding Cigna's urging, had not previously contacted any potential divestiture buyers—rushed to prepare a divestiture proposal. Dkt. 90 (Anthem Responses to Cigna's First Interrogatories) at Ex. G. On June 19, Anthem proposed to divest all of Cigna's large group employer customers, including national accounts, in 35 local markets DOJ had identified as problematic, to three potential buyers—two Blue carriers and a smaller non-Blue carrier that did not compete in the national accounts market. JX2087 at PW-CI-DE-00047248, 50.

June 21 and 24 Meetings. At the parties' meetings with the DOJ "Front Office," DOJ focused on the Best Efforts Rules, asking Anthem whether "the combined firm would be able to grow as fast as an independent Cigna." JX2193 at CI-DE-000121773. Pressing Zielinski, Bill Baer, Deputy Attorney General in charge of the Antitrust Division, asked whether "'there is some risk here' that a

larger Anthem would be growth constrained," to which Zielinski replied: "Fair enough." *Id.*

Zielinski twice told DOJ that he expected the National Best Efforts Rule to be eliminated or modified by settlement of the MDL before the end of 2016. JX2193 at CI-DE-000121782; JX2123 at CI-DE-000117407; JX2830. He did not disclose that the Blues had formed a special task force that was considering *strengthening* the Blues Rules to interfere with the Anthem/Cigna merger. *See supra* pp. 16–17; JX2464 at ANTM-DE-R-00575781–82.

In response to the Department's concerns that the merger would eliminate Cigna as an industry innovator in controlling medical costs through value-based programs, Anthem asserted that it was an innovator too, and even better than Cigna at controlling costs. JX2123 at CI-DE-000117407; JX2193 at CI-DE-000121773–74. That prompted DOJ to ask why Anthem needed Cigna as a merger partner. JX2123 at CI-DE-000117407.

DOJ also expressed the view that Anthem's divestiture proposal did not address its "very serious concerns" about the deal, and that "'peeling off' some accounts from Cigna without the networks could "not replace the Cigna competition in National Accounts." JX2123 at CI-DE-000117408; *see also* JX492.

At the end of the June 24 meeting, Baer reiterated that DOJ was doubtful a divestiture remedy "could ever get there" and that—given that DOJ viewed the

Blues as a single entity in the national accounts market—he was "hard pressed to see how another Blue could be a divestiture buyer." JX2193 at CI-DE-000121776, 96. In a follow-up call on July 12, DOJ staff again informed the parties that "DOJ's position is that 'a divestiture to a Blue plan is not a path forward.'" JX2254 at CI-DE-000123481.

Despite DOJ's reaction, Anthem continued to tout two Blue carriers as divestiture buyers. Anthem also realized that its one non-Blue divestiture candidate, Centene, was not viable. Zielinski Dep. 1090:6–11; JX2330 at ANTM-DE-PR-00298421.002.

N. Federal and state regulators sue to block the merger as anticompetitive.

On July 21, 2016, DOJ, joined by multiple states, sued to enjoin Anthem's acquisition of Cigna and Aetna's acquisition of Humana. JX2314 at 2 ("DOJ Compl."); JX2319 at 2.

The lawsuits, filed in the U.S. District Court for the District of Columbia, each alleged that the challenged merger threatened to reduce competition in the healthcare industry and therefore violated § 7 of the Clayton Act. DOJ Compl. ¶ 9; JX2319 at ¶ 14; 15 U.S.C. § 18a. Both complaints alleged that the proposed mergers "would reshape the industry, eliminating two innovative competitors—Cigna and Humana" and reducing the number of large national health insurers from five to three. DOJ Compl. ¶ 4; JX2319 ¶ 4. The complaint challenging the

Anthem/Cigna deal also emphasized the anticompetitive effect of the Blues Rules, alleging that "Anthem has already conceded that it would violate one of the [Blue] best-efforts rules if it acquires Cign[a] ... meaning Anthem may have to limit Cigna's competitiveness throughout the country." DOJ Compl. ¶ 36.

At the press conference announcing the suits, Deputy AG Baer emphasized that the Anthem/Cigna merger would "put at risk the system that Americans across the country rely on to pay for their healthcare—threaten[ing] to increase insurance premiums, to reduce benefits, to lower the quality of health care, and to slow innovation." JX2323 at 6:2–17; *see* JX2322 (video of press conference); JX2304; DOJ Compl. ¶ 9.

Asked whether the parties to either merger could offer divestitures that would appease the Department, Baer responded: "There are some mergers which can be solved through divestitures. We've seen nothing to suggest that these can.... Absolutely nothing." JX2323 at 11:8–12:6; *see* JX2322.

O. At trial, Anthem defends the merger by arguing that it will result in billions of dollars in "efficiencies."

A bench trial was held before Judge Amy Berman Jackson from November 21, 2016 to January 4, 2017. *United States* v. *Anthem, Inc.*, 236 F. Supp. 3d 171, 187 (D.D.C. 2017) ("Trial Op." (JX2833)). The government pressed three claims:

(1) the merger would impair competition in the sale of health insurance to national accounts in the fourteen states where Anthem operates and in the entire United States;

(2) the merger would impair competition in the sale of health insurance to "large employers"—employers with at least 50 employees—in thirty-five local areas; and

(3) the merger would impair competition in the purchase of services from healthcare providers in the same thirty-five local areas. DOJ Compl. ¶ 8.

Anthem defended the merger by contending that "efficiencies"—*i.e.*, cost savings—would outweigh the merger's anticompetitive effects. Trial Op. at 181.

Anthem argued that the merger would generate at least $2.4 billion in medical cost savings for Cigna and Anthem customers because it would give them access to the lowest provider rate negotiated by either company. *Id.* To support the $2.4 billion figure, Anthem relied on the calculations of Dr. Mark Israel, the CompassLexecon expert it had independently retained. *Id.* at 212–13, 244 n.46. Israel testified that based on his analysis, the savings for current Cigna customers would be approximately $1.5 billion and the savings for current Anthem customers approximately $874 million. *Id.* at 233–34.

In addition to those medical cost savings, Anthem argued, the merger would generate approximately $2 billion in general and administrative savings by

allowing the combined company to eliminate redundant expenses. *Id.* at 234–35. Anthem did not contend, however, that the G&A cost savings—only a portion of which would be passed on to customers—were sufficient to outweigh the anticompetitive effects of the merger. *Id.* at 246.

At trial, Anthem witnesses testified that Anthem, not Cigna, led the market in wellness and value-based care. *See* Trial Op. at 243. Anthem also submitted a declaration from a national account insurance broker stating that Cigna is a "'me' too competitor [that] follows the innovators" and that "Cigna has not been able to identify ... any process, IT system, or provider relationship to support its marketing claims" touting its "uniqueness." JX1968 at ANTM-DDC-002871625–26.

Somewhat incongruously, Israel testified that "the key competitive benefit of the merger ... is that you can combine the Cigna innovative products and wellness programs ... with a more [e]ffective discount structure." Trial Tr. at 1837:16–23. Interjecting, the court asked Israel: "So I should ignore the Anthem testimony that they have everything that's just as good and they had it first?" *Id.* at 1838:2–4.

The trial of the Aetna/Humana merger began around the same time as the trial of the Anthem/Cigna merger. *United States* v. *Aetna Inc.*, 240 F. Supp. 3d 1, 17 (D.D.C. 2017) (JX2815). On January 23, the District Court issued a decision permanently enjoining the Aetna/Humana merger, rejecting the parties' argument

that the efficiencies generated by the merger overcame its anticompetitive effects. *Id.* at 99.

P. The federal courts permanently enjoin the merger.

1. The District Court's decision

On February 8, 2017, the District Court issued a decision permanently enjoining the Anthem/Cigna merger on two independent grounds.

The National Accounts Claim. The court held that the merger "may ... substantially ... lessen competition" in the sale of health insurance to national accounts in the fourteen states where Anthem operates, and it enjoined the merger on that basis. Trial Op. at 192. In addition to finding that the "high level of concentration in this market that would result from the merger is presumptively unlawful," the court found that "the merger will have the anticompetitive effects of eliminating direct competition between the two firms, reducing the number of national carriers from four to three and diminishing innovation." *Id.* at 179, 216.

Turning to Anthem's efficiencies argument, the court observed that "the defense has not pointed the Court to a single litigated case in which the merging parties were successful in overcoming the government's case by presenting evidence of efficiencies." *Id.* at 237. At a minimum, the court concluded, the defendants would have to come forward with "proof of extraordinary efficiencies" to prevail. *Id.* at 236.

The court then addressed Anthem's "efficiencies" model, which conceded that the merger would have anticompetitive impact but sought to outweigh that harm by showing $2.4 billion in medical cost savings. Holding "that the claimed medical cost efficiencies are not sufficiently merger-specific or verifiable to offset the anticompetitive effects of the merger," *id.* at 253, the court held that the efficiencies defense did not succeed even assuming it was doctrinally viable:

Medical cost savings for current Cigna customers. According to Anthem, the combined company could extend Anthem provider discounts to Cigna customers—and thus achieve $1.5 billion (out of Anthem's total $2.4 billion) of cost savings—in three ways: (1) by "rebranding" Cigna customers as Blue; (2) by invoking affiliate provisions in Anthem provider contracts; and (3) by renegotiating Anthem provider contracts. *Id.* at 181–83. As the court recognized, rebranding had to be the primary mechanism for achieving these cost savings because only rebranding could bring the combined company into compliance with the Best Efforts Rules. *Id.* at 240.

The court concluded, however, that to the extent "Anthem elects to attempt to capture this claimed value through rebranding Cigna customers ... the savings would not be merger-specific." *Id.* at 239. Quoting an Anthem executive, the court explained that "'in the short term,'" "[r]ebranding is nothing more than marketing the Anthem product to existing Cigna customers and persuading them to

buy it, and Cigna customers can do that now." *Id.* Nor would "rebranding" generate merger-specific savings longer term, even if the combined company eventually developed Cigna-style product offerings under the Blue brand. *Id.* at 243. "[G]iven the Anthem executives' confidence that it is Anthem that continues to lead the way in bringing innovative, value-based products to the market," the court concluded, citing the testimony of Swedish, among others, "the merger does not need to take place to enable Anthem to offer the programs that Cigna is selling that customers value." *Id.*

The court then went on to hold that the claimed cost savings for current Cigna customers were also "unverified" for three independent reasons.

First, internal Anthem documents and the testimony of Anthem executives showed that providers would resist Anthem's attempt to capture the savings by invoking affiliate clauses or renegotiating their contracts. *See id.* at 182, 243, 247.

Second, the court found that the "deterioration of the merging parties' relationship" impaired the court's "ability to credit the total estimated [medical] network cost savings and G & A efficiencies." *Id.* at 183, 245–47.

Third, the court found that "the Anthem prediction that the merger will make the Cigna product available to more customers at a lower cost ... is not supported by the evidence." *Id.* at 249. Even "Anthem's own witnesses recognized that there are reasons to doubt that providers will be willing to engage in the collaborative

efforts embodied in their contracts with Cigna if they are forced to accept lower Anthem rates at the same time." *Id.* at 247. The court further observed that certain testimony from Cordani called into question the achievability of cost savings for current Cigna customers. *Id.* But the court explained that the same finding could be reached "[e]ven if one discounts the Cordani testimony" and "considers the entire record," as "providers have been quite clear that one cannot ask them to do more but pay them less at the same time." *Id.* at 249. The court also found that Swedish's testimony undermined Anthem's efficiencies argument: "Anthem CEO, Joe Swedish … insisted that the merger would not result in the new company's paying less to all providers—'certainly not less than what we are paying now as Anthem.'" *Id.* at 234 n.32 (quoting Trial Tr. 294).

Medical cost savings for current Anthem customers. The court concluded that the "$800 to $900 million in supposed savings on the Anthem side of the equation is largely unverified" because "the record is devoid of plans specifying what method could be employed to enable existing Anthem members—or Cigna members who rebrand as Blue members—to enjoy any existing superior Cigna discounts." Trial Op. 244–45.

Medical cost savings for both Cigna and Anthem customers. The court found the entire $2.4 billion in projected medical cost savings unverified because "Anthem's own documents reveal that the firm has considered a number of ways to

capture the network savings for itself and not pass them through to the customers as it insisted in court that it would." *Id.* at 182; *see also id.* at 237 n.36, 251.

The Large Employers Claim. The court also enjoined the merger on the independent basis that "the merger is likely to lessen competition substantially" in the sale of health insurance to large employers in at least one of the thirty-five local markets identified by the government (the Richmond, Virginia market). *Id.* at 254.

The court concluded that the combined company's share of the Richmond market would be at least 64%, a presumptively unlawful level of market concentration. *Id.* at 207, 257. The court also concluded, based on "numerous Anthem documents," that Cigna is "one of Anthem's closest competitors" in Richmond. *Id.* at 258. Citing testimony of third-party carriers, the court rejected as "unpersuasive" Anthem's arguments that other carriers "will provide the necessary competition to overcome the anticompetitive effects of the merger in [the Richmond] market." *Id.* "Significantly," the court observed, the government's expert had testified that "even if he factored 100% of [Anthem expert] Dr. Israel's claimed efficiencies into his analysis, the merger would still have an anticompetitive effect"—*i.e.*, increase prices—"in the Richmond market." *Id.* at 259.

In light of these rulings, the court did not reach the 34 other local markets DOJ challenged or DOJ's claim that the merger would impair competition in the purchase of services from healthcare providers (the "monopsony claim").

2. The Court of Appeals' decision

On April 28, 2017, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's injunction ruling, both with respect to the national accounts claim and the large employers claim. *See United States* v. *Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) ("Appellate Op." (JX2920)).

In the opening of its opinion, the D.C. Circuit noted the District Court's reference to the rift between the parties as "the elephant in the courtroom" and commented: "That [the parties'] relationship may have deteriorated has little to do with the anticompetitive effects of the proposed merger." *Id.* at 348 n.1; *see also id.* at 365 (explaining that the "friction between the Anthem and Cigna CEOs" had "limited probative value").

The D.C. Circuit began its analysis by noting that "it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7 [of the Clayton Act]." *Id.* at 355. Consistent with its introductory remarks, the appeals court did not affirm the District Court's finding that the "deterioration of the merging parties' relationship" rendered the claimed efficiencies unverified. But the court affirmed all the District Court's other grounds for finding the medical

cost savings unverified, as well as the holding that savings achieved through "rebranding" were not merger-specific.

The D.C. Circuit criticized Anthem's proffered projections of medical cost savings as "suffer[ing] from additional, basic analytic flaws" not discussed by the District Court. *Id.* at 363–64. The D.C. Circuit summarized its assessment of the reliability of those projections as follows:

> The savings projected by McKinsey & Co. and Dr. Israel ... were without a doubt enormous. The problem is, those projections fall to pieces in a stiff breeze. If merging companies could defeat a Clayton Act challenge merely by offering expert testimony of fantastical cost savings, Section 7 would be a dead letter.

Id. at 364. Summarizing its rejection of Anthem's efficiencies defense, the appeals court observed: "this is not a close case." *Id.*

The D.C. Circuit also affirmed the District Court's finding for the government on the Richmond, Virginia large employers claim, stating that "[t]his holding provides an independent basis for the injunction, even absent a finding of anticompetitive harm in the fourteen-state national accounts market." *Id.* at 368.

Q. The parties each send notices of termination of the merger agreement.

On January 18, 2017, before the District Court issued its decision, Anthem notified Cigna that it was extending the merger agreement's Termination Date from January 31, 2017 to April 30, 2017 under § 7.1(b) of the agreement. JX2802. Anthem's CFO emailed that Anthem wanted to create the appearance that the deal

was still alive to "be in a position that we can negotiate down [t]he breakup fee" with Cigna." JX2763 at ANTM-DE-R-00962231.

On February 14, 2017, shortly after the District Court decision, Cigna notified Anthem that it believed the extension of the Termination Date was invalid and that Cigna was terminating the merger agreement under § 7.1(b) (which permitted either party to terminate the agreement if the merger was not consummated by the Termination Date). JX2872 at ANTM-DE-00061531. Later that day, Cigna filed this action seeking a declaration that its termination was valid and that it was entitled to payment of the Reverse Termination Fee. Dkt. 1 (2017-0109-JTL).

Anthem countersued and secured a temporary restraining order against Cigna's termination. Dkt. 1, 8 (2017-0114-JTL). Anthem claimed that closing was still possible because it could pursue settlement discussions with the new Trump Administration, even claiming during argument that Anthem had some back channel to Vice President Pence. DOJ declined to engage in any discussions. *See* JX2901, JX2903, JX2910, JX2912. On March 19, 2017, DOJ wrote Anthem that "[n]one of Anthem's settlement proposals would come close to replacing the competitive intensity lost as a result of the merger." JX2903 at 1. On April 18, rejecting further settlement discussions, DOJ stated that "Anthem's proposed

acquisition of Cigna would result in significant competitive harm throughout the United States." JX2912.

On May 11, 2017, this Court denied Anthem's motion for a preliminary injunction but stayed its decision to allow Anthem to decide whether to appeal. Dkt. 226 at 23:19–24:16. The next day, before notifying this Court or Cigna that it would not appeal, and while Cigna remained restrained from executing its noticed termination of the merger agreement under § 7.1(b), Anthem notified Cigna of its termination under § 7.1(i). JX2929 at ANTM-DE-00989344. Upon the lifting of this Court's stay, Cigna sent Anthem a second notice under § 7.1(b), terminating the merger agreement and requesting that Anthem remit to Cigna the Reverse Termination Fee in accordance with § 7.3(e). JX2928.

In April 2018, the court presiding over the Blues MDL issued a summary judgment opinion concluding that, as a naked output restriction on non-Blue insurance products, "the National Best Efforts Rule constitutes a *per se* violation of the Sherman Act." *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 1241, 1273 (N.D. Ala. 2018) (JX2959). To date, the MDL has not settled and the National Best Efforts Rule remains in place.

ARGUMENT

Cigna is entitled to the $1.85 billion Reverse Termination Fee (Point I) and damages for Anthem's Willful Breaches of the Merger Agreement (Point II). Anthem is entitled to no damages (Point III).

I. CIGNA IS ENTITLED TO THE $1.85 BILLION REVERSE TERMINATION FEE, WITH INTEREST.

Section 7.3(e) of the merger agreement provides that "Anthem shall pay to Cigna a fee … in the amount of $1.85 billion" if the agreement has been terminated under § 7.1(b) and the regulatory approval conditions to the merger have not been satisfied, unless "the failure of [those] [c]onditions [was] caused by Cigna's Willful Breach of Section 5.3." Merger Agreement, §§ 7.1(b), 7.3(e).

Section 5.3 provides that both parties shall use reasonable best efforts to obtain regulatory approval of the merger. The required "reasonable best efforts … include[d] … taking any and all actions necessary to avoid each and every impediment" to regulatory approval. *Id.* § 5.3(a)–(b).

The merger agreement defines "Willful Breach" as a "material breach … with the actual knowledge" that an act or omission "would be a material breach of this Agreement." *Id.* § 8.13.

Because Cigna validly terminated the merger agreement under § 7.1(b) and did not "Willfully Breach" § 5.3, it is entitled to the Reverse Termination Fee, with interest from the date it was payable. *See id.* § 7.3(e) (fee due within two business

days of termination); § 7.3(h) (unpaid amounts "bear interest from the date such payment is due").

A. Cigna validly terminated the merger agreement pursuant to Section 7.1(b).

Section 7.1(b) permits either party to terminate the merger agreement if the merger has not been consummated by the "Termination Date" of January 31, 2017 or, if validly extended, April 30, 2017. *Id.* § 7.1(b). A party may not validly terminate the agreement under § 7.1(b) if it "failed to perform fully its obligations ... in any manner that shall have proximately caused or resulted in the failure of the Merger to have been consummated by the Termination Date." *Id.*

Cigna validly terminated the agreement under § 7.1(b). On February 14, 2017, Cigna sent Anthem a notice of termination under § 7.1(b). Cigna reissued the notice on May 12, 2017, following the April 30, 2017 drop-dead date. JX2928. Cigna therefore timely issued a notice under § 7.1(b) even assuming that Anthem validly extended the Termination Date (which Cigna disputes).

For the reasons discussed below, the failure to obtain regulatory approval of the merger was not caused by Cigna's alleged breaches, and Anthem cannot meet its burden to show otherwise. For that reason, Cigna's termination under § 7.1(b) was valid and Anthem is not relieved of its obligation to pay Cigna the Reverse Termination Fee under § 7.3(e).

B. Under Section 7.3(e), Anthem owes Cigna the Reverse Termination Fee.

1. Cigna did not "Willfully Breach" Section 5.3.

To avoid its obligation to pay the Reverse Termination Fee, Anthem must claim that Cigna Willfully Breached its obligation under § 5.3 to use "reasonable best efforts" to consummate the merger. But Cigna did not breach the merger agreement at all, let alone willfully.

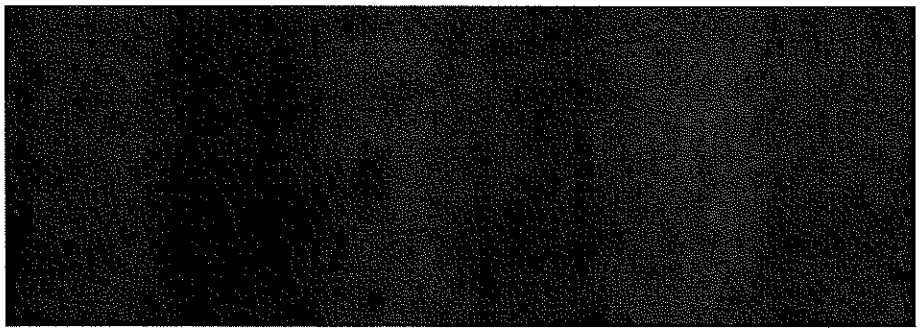
Anthem arrogated to itself responsibility for clearing the merger with regulators. Cigna fulfilled its obligations under § 5.3, answering DOJ's massive document requests, producing huge amounts of data, soliciting customer support, and preparing numerous witnesses for deposition during both DOJ's investigation and litigation. As to regulatory strategy, Cigna repeatedly warned Anthem that it was missing the major issues DOJ would care about—the Blues Rules, maintaining innovation in the market, and a post-close business plan that would yield merger-specific synergies. *See, e.g.*, JX1023; JX1340 at CI-DE-000093445-00001; JX1506. Invoking its right to lead the regulatory effort, however, Anthem ignored Cigna's concerns and instead sponsored a brute-force efficiencies defense that antagonized the government and lacked any precedent in the courts.

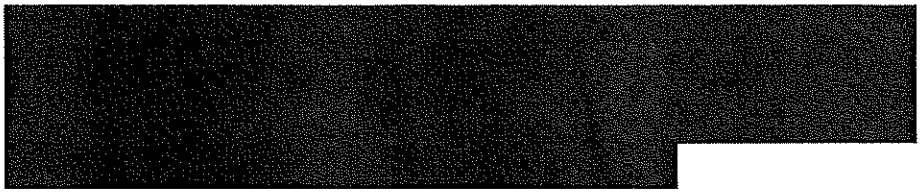
The explanation for Anthem's hapless regulatory strategy lies principally in the Blues Rules. Even before commencing talks with Cigna, Anthem knew the Rules posed a potentially "insurmountable barrier" to a transaction. JX66 at

ANTM-DE-QP-00150397. For that reason, Anthem preferred not to proceed with a Cigna transaction until the Rules were modified or eliminated. *See id.* But the 2015 consolidation wave forced Anthem's hand: rather than risk being left standing when the music stopped, Anthem pressed hard for the Cigna deal, hoping it could improvise a solution to its Blues problems.

But it couldn't. Developments in the MDL case also constrained many of Anthem's options to defend the DOJ suit. To defend the Blues Rules in Alabama, Anthem and its fellow Blues argued that the 36 Blue plans operated as a single competitor for national accounts, JX2517 at ANTM-DE-00389875; JX2941 at BCBSA-DELSUB-00003981–82, eliminating whatever chance may have existed to talk the DOJ off a national accounts market definition or to argue that the Cigna deal was not a 4-into-3 merger.

With this concession, it became even more important to explain to DOJ why the National Best Efforts Rule would not constrain the combined company from competing with Cigna products after the merger closed. This would not be easy. In internal notes, Zielinski wrote:





JX674. Recognizing the gravity of the problem, Anthem caused its head of corporate development to testify to DOJ that the National Best Efforts Rule would be modified or eliminated by the end of 2016, and Zielinski twice told DOJ the same thing.

But that wasn't true and Anthem knew it. In fact, mediation had stalled, JX774, JX2004, Anthem chose to seek no other relief from the Rule, and the other Blues—far from signaling any willingness to relax the Rules to facilitate the deal—had created a special task force designed to impede it. Anthem concealed these developments from both Cigna and DOJ. Indeed, at the time Zielinski assured DOJ the MDL would settle and resolve the Blues Rules by the end of 2016—in what DOJ characterized as "a calculated effort to try to persuade the [Antitrust] Division not to challenge the Cigna transaction" (JX2830 at ANTM-DE-00398226)—Zielinski actually had no idea when or whether that would happen. Zielinski Dep. 458:3–461:23, 537:15–539:1.

The overhang of the National Best Efforts Rule meant that the post-close company would have to herd nearly every Cigna customer in its Blue territory to Anthem's existing Blue-branded products within approximately two and a half years of the merger's closing. This drove Anthem's regulatory strategy. Anthem

could not bring a pro-choice message to DOJ, because brand choice was inconsistent with best efforts compliance. Anthem could no longer tout Cigna's innovation, because crediting Cigna's innovation would disincentivize customers from choosing Blue. All that was left—and what Anthem did over Cigna's objection—was to claim that its mass migration of Cigna customers would generate unit-cost reductions.

That strategy was a sure loser. And none of the breaches Anthem now alleges had anything to do with it:

White papers. Anthem complains about Cigna's participation in the DOJ white papers. In fact: Cigna provided detailed input on (and signed) more than 20 white papers. *See supra* pp. 24–25; JX1838; Cordani Dep. 284:3–84:5, 292:3–93:6; Gray PI Dep. 151:23–152:4, 247:7–23. In its comments, Cigna identified, and Anthem ignored, the issues that formed the basis of DOJ's suit. Anthem had not even finished its paper on the Blues Rules when the parties met with DOJ staff in early June, and when the paper was submitted, it included nearly no advocacy.

Divestitures. Anthem complains that Cigna did not help with divestitures. In fact: Cigna urged Anthem to take a divestiture plan to DOJ in early 2016. *See supra* pp. 17–18. Anthem refused, instead adopting a "hard public line" against divestitures that even its own lobbyist argued was counterproductive. JX1352 at ANTM-DE-P-00579385. After DOJ told the parties it "hate[d] the merger"

(JX2053), Anthem concocted a plan to divest assets to other Blue plans. This made no sense because DOJ had already concluded, on the basis of Anthem's own evidence, that the Blues were a single competitor in the national accounts market. Anthem also identified one non-Blue buyer, Centene, which Zielinski now concedes was not viable. Zielinski Dep. 1090:6–11. Cigna nevertheless signed an NDA with and populated a data room for Centene. JX2068; Rule Dep. 481:3–4; Jones Dep. 471:24–472:8.

Integration. Anthem complains that Cigna failed to help develop the "efficiencies" defense that arose from Anthem's plan to mass rebrand Cigna customers into existing Blue products to comply with the National Best Efforts Rule. In fact: Anthem's expert, Israel, based his efficiencies calculations on data the parties produced to DOJ, not integration work, and testified that he had everything he needed. Trial Tr. 1843:22–1845:4, 4439:21–25. And Cigna's work on the network integration team—the team focused on medical-cost savings—continued right up until DOJ's suit. JX2022; Muney Dep. 247:16–249:21.

Trial. Anthem also complains about Cigna's actions at trial. Anthem prompted its expert, Israel, to testify that "Anthem is actually ahead [of Cigna], in terms of the ability to control utilization" and that Cigna was not an innovator. Trial Tr. 1978:10–12; *see id.* at 2028:2–25, 2029:21–23. Pre-trial, Cigna had explained to Anthem that this theory helped the government—because if Anthem

could achieve effective collaborative care without Cigna, then efficiencies resulting from the combination would not be merger-specific. JX2601 at CI-DE-000168167–68. In response, Anthem assured Cigna it would not pursue this line of questioning. *Id.* at CI-DE-000168165. When Anthem went back on this assurance, Cigna sought to clarify the record. Rule Dep. 308:6–16, 324:20–325:15.

Anthem also prompted its CEO Swedish to testify that Cordani had never agreed to stay on with the combined company. Trial Tr. 350:21–352:1. This testimony was false and Cigna asked Swedish questions to clarify the record, which he did. *Id.* at 378:18–386:25 (Swedish); *see also* JX734; Tomas Dep. 141:20–145:8; JX1340 at CI-DE-000093445-00001.

Anthem also complains about Cordani's trial testimony. The government called Cordani, who testified that "rebranding Cigna customers and imposing lower fee structures would unravel the collaborative relationships with providers that are essential to accountable care and better clinical outcomes." Trial Op. at 247 (citing Trial Tr. 492–93 (Cordani)). Cordani had made the same points in comments to the rebranding section of the Blues white paper months earlier, which Anthem ignored. JX2047. Cordani testified truthfully, as Anthem has never disputed, and, as the District Court recognized, Anthem's own witnesses said the same thing. Trial Op. at 231 ("executives from both defendants testified" that

"efforts to move members out of Cigna's network, or to require Anthem network providers to apply Anthem rates to Cigna patients, will erode Cigna's relationships with its providers"). There is no breach in truthful testimony.

Public Relations. Finally, Anthem complains about Cigna's public relations consultants at Teneo. Somebody—apparently Anthem—disclosed information about the parties' correspondence to a *Wall Street Journal* reporter. Cohen Dep. 371:14–376:14; 381:5–10; JX1778; JX1848; JX1714. When the reporter thereafter contacted Cigna, a Teneo employee showed her further details of the correspondence, and the *WSJ* published an article about the parties' relationship in May 2016. JX1915.

The parties' public relations efforts—and Anthem had its own—do not bear on regulatory best efforts. And they had no effect on regulatory approval. As Anthem's trial witnesses recognize, DOJ would not base its decisions on press coverage, Baker Dep. 55:18–58:9, and Judge Jackson was clear that "I'm not going to make any decision based on what I read in the press. I think that would be completely inappropriate." JX2414 at 56:23–57:1.

2. None of Cigna's alleged breaches caused the failure to secure regulatory approval.

Even assuming Cigna breached the merger agreement, none of Cigna's supposed breaches caused regulators to oppose the deal, the District Court to enjoin the merger, or the D.C. Circuit to affirm the injunction. To the contrary,

regulators and the courts concluded that the merger was anticompetitive because of objective market realities and Anthem's strategic missteps.

The DOJ Suit. As DOJ's complaint made clear, regulators concluded the merger would be anticompetitive for several main reasons: As the biggest merger in the history of the health-insurance industry, it would reduce the number of national accounts insurers from four to three and create unacceptable levels of concentration in the national accounts market and dozens of local markets. DOJ Compl. ¶ 8. Not only would the transaction eliminate Cigna as an independent competitor, DOJ alleged, but Anthem would also need to constrain growth of the Cigna brand to comply with the National Best Efforts Rule. *Id.* ¶¶ 15, 36. Anthem's "efficiencies" response was unpersuasive to DOJ because they would result from slashing provider fees—with no explanation why providers would maintain the same quality in the face of a pay cut. *Id.* ¶ 77; *see* JX2193 at CI-DE-000121774. For these reasons, DOJ concluded, "Anthem's purchase of Cigna likely would lead to higher prices and reduced benefits, and would deprive consumers and healthcare providers of the innovation and collaboration necessary to improve care outcomes." DOJ Compl. ¶ 9.

Cigna caused none of these conclusions. Anthem's own lawyers testified that Cigna could not have changed DOJ's view that there was a distinct "national accounts" market. Zielinski Dep. 681:13–19; Rosen Dep. 390:3–13. Market

concentration was a matter of the parties' own data and simple arithmetic. And the Blues Rules, as Anthem's antitrust counsel conceded, were "an issue that was specific to Anthem." Rosen Dep. 521:9–10.

Nor did Cigna cause regulators to reject the merger's claimed "efficiencies." Anthem constructed the efficiencies defense with its CompassLexecon consultants—the same ones that Anthem refused to jointly retain with Cigna because it did not want to have to "resolve differences of opinion in strategy." JX698. The premise of the defense was that the merger would allow Cigna customers to access Anthem's discounted rates. Regulators rejected that defense because they doubted hospitals and doctors would provide the same services provided to Cigna customers for less pay. JX2193 at CI-DE-000121774. That skepticism was driven not by Cigna, but by Economics 101 (and confirmatory letters from groups like the American Medical Association). JX549; JX840. As Cigna warned Anthem in white paper comments, the defense "focuses on discounts and does not adequately address how the transaction will help improve total cost and quality of care." JX1789 at ANTM-DE-00395546.

As to divestitures, Cigna advocated "urgent" engagement with DOJ, JX1359 at ANTM-DE-QP-00541214, but Zielinski rejected that advice because he was fearful of proposing to divest more than the necessary minimum. Zielinski PI Dep. 291:10–22. And when Anthem finally came around to divestitures, it proposed

that Cigna sell lives to other Blues in Anthem's fourteen states—a plan that could not logically resolve DOJ's concerns, given Anthems' concession that all Blues operate as one in the national accounts market and the fact that those Blues would need to rely on *Anthem* to service those same lives. At any rate, DOJ was implacably skeptical that any remedy "could ever get there," JX2193 at CI-DE-000121776, emphasizing when announcing its lawsuit that there was "[a]bsolutely nothing" to suggest that any divestitures could save the merger. JX2323 at 11:8–12:6; *see* JX2322.

Moreover, DOJ's concurrent decision to block the smaller Aetna/Humana deal—on the same theory of harm, the loss of an innovative competitor—is further evidence that it would have sought to block the Anthem/Cigna merger regardless of the parties' conduct.

As Deputy AG Baer explained at the public announcement of the lawsuit, "Anthem claims that consumers will benefit if it becomes the 800-pound gorilla at the bargaining table—forcing cost concessions from doctors and hospitals." JX2323 at 6:21–24; *see* JX2322. But "[t]he antitrust laws don't work that way," he added—"[y]ou don't get to buy a competitor, eliminate substantial competition, just to increase your bargaining leverage with healthcare providers." JX2323 at 7:1–4; *see* JX2322.

The District Court. The District Court enjoined the merger on the ground that DOJ had shown anticompetitive effects in the national accounts market in Anthem's fourteen states and in the Richmond market.

National Accounts. The District Court identified the anticompetitive effects in the market for national accounts as follows:

> [P]laintiffs have established that the high level of concentration in this market that would result from the merger is presumptively unlawful .... [T]he merger is likely to result in higher prices, and that it will have other anticompetitive effects: it will eliminate the two firms' vigorous competition against each other for national accounts, reduce the number of national carriers available to respond to solicitations in the future, and diminish the prospects for innovation in the market.

Trial Op. at 179-80. None of this competitive harm can be tied to Cigna's alleged breach. Indeed, with regard to loss of innovation, the District Court pointed to rebranding required by the Blues Rules as the problem. *Id.* at 231.

Nor did Cigna cause Anthem's efficiencies defense to fail. As the District Court noted, no court has ever permitted a merger to proceed on the basis of an efficiencies defense. *Id.* at 237.

Any chance for this longshot defense was ruined by Anthem, not Cigna. As Judge Jackson found, the only way to achieve the claimed medical-cost savings for Cigna customers while complying with the National Best Efforts Rule was to "rebrand" those customers Blue. *Id.* at 239–40. The court held that this kind of

rebranding "would not be merger-specific" because Cigna customers can buy Anthem products in the market today. *Id.* at 239. To support this holding, the court relied on the testimony of an *Anthem* executive, Dennis Matheis. *See id.* (quoting Trial Tr. 1599). Anthem's testimony that it, not Cigna, "lead[s] the way in bringing innovative, value-based products to the market," clinched the point for the government. Trial Op. at 243 (citing Trial Tr. 295-96 (Swedish)). As the court held, if Anthem could readily develop Cigna-style products on its own, it had no need for the merger to bring them to its broader customer base. *Id.*

Nor was it Cigna's fault that the projected savings were unverified. Here again, the court relied on Anthem testimony and Anthem documents to hold that the $1.5 billion of projected savings for Cigna customers through invocation of affiliate clauses and renegotiation of provider contracts were unverified because those methods were unlikely to be successful. *Id.* at 183, 243, 247.

The court further held that the entire $1.5 billion in claimed savings was unverified because even "Anthem's own witnesses recognized that there are reasons to doubt" that providers would provide Cigna-style services if they were paid Anthem rates. *Id.* at 247. The record supported that view, Judge Jackson held, "[e]ven if one discounts the Cordani testimony" about which Anthem complains. *Id.* at 249. And Swedish's own testimony that the combined company

would not pay less to providers than Anthem already did had already undermined Anthem's argument. *Id.* at 234 n.32.

With regard to the $900 million in claimed savings for Anthem customers, those proposed efficiencies were unverified because the record was "devoid" of a mechanism for extending Cigna provider discounts to Anthem customers in those situations in which Cigna had superior rates. *Id.* at 244–45.

Finally, the Court rejected all of the $2.4 billion in medical cost savings as unverified because *Anthem's* internal documents showed that *Anthem* had considered how to keep those savings for itself instead of passing them on to customers. *Id.* at 182, 237 n.36, 251.

Large Groups in Richmond. Cigna likewise did nothing to cause the District Court to enjoin the merger on the independent ground that it would impair competition in Richmond. Data showed that the merger would cause market concentration "well in excess of what the [DOJ's Merger] Guidelines would deem to be presumptively unlawful." *Id.* at 256, 258. So acute was this concentration that, as the government argued and the Court held, "even [accepting 100% of Anthem's] claimed efficiencies," the merger "would still have an anticompetitive effect in the Richmond market." *Id.* at 259. Anthem's witnesses "did little to refute these undeniable statistics." *Id.* at 258. They instead argued that other competitors could replace the competition lost by the merger (which third-party

witnesses disputed) and "advance[ed] what appeared to be a well-rehearsed Anthem motif that the company does not view Cigna as a strong competitive threat." *Id.* All this testimony, the court found, was "not credible." *Id.*

The D.C. Circuit. At the outset of its opinion, the appeals court noted: "That [the parties'] relationship may have deteriorated has little to do with the anticompetitive effects of the proposed merger." Appellate Op. at 348 n.1. The court also expressly disclaimed relying on evidence of "friction between the Anthem and Cigna CEOs." *Id.* at 365. The court then went on to "affirm the issuance of the permanent injunction on alternative and independent grounds"—*i.e.*, both on the basis of the national accounts claim and the large employers claim. *Id.* at 349.

As to national accounts, the D.C. Circuit explained that "rebranding" was the "linchpin of Anthem's post-merger strategy" because it was "the only option" that would allow Anthem to "comply with its 'Best Efforts' obligations." *Id.* at 358. And because rebranding in the near term would simply "involve a Cigna customer switching to the extant Anthem product," it was "not a merger-specific outcome." *Id.* at 357. This conclusion, the panel held, was supported by *Anthem's* witnesses. *Id.* at 360.

The "alternative and independent ground[]" for affirming the injunction, the anticompetitive effect in Richmond, likewise turned not on Cigna's conduct, but on

the overwhelming market concentration: "even crediting all of the claimed savings, the merger of Richmond's two biggest large-group insurers would give the combined company such a vast market share that the overall effect of the merger would still be anticompetitive." *Id.* at 368.

State regulators. Even had the District Court ruled in the parties' favor, the merger still could not have closed by the outside Termination Date. When the District Court issued its decision on February 8, 2017, thirteen state approvals remained outstanding. As Anthem's counsel swore in a declaration submitted to the District Court, a minimum of 120 days were needed after a favorable federal judgment to complete the state process. *See* JX2383 ¶ 5; JX2382 at 3.

II. CIGNA IS ENTITLED TO DAMAGES FOR ANTHEM'S "WILLFUL BREACH" OF ITS REASONABLE BEST EFFORTS OBLIGATIONS.

Anthem breached its obligation under § 5.3 to use its reasonable best efforts to secure regulatory approval of the merger. Anthem is accordingly liable to Cigna for the damages Cigna incurred as a result of the failure to receive regulatory approval—the $14.7 billion premium Cigna would have received had the merger closed.

A. Anthem "Willfully Breached" Section 5.3 of the merger agreement.

From the outset of the DOJ investigation, Anthem understood clearly that the National Best Efforts Rule was a potentially significant obstacle to regulatory

approval. Yet Anthem failed to use its reasonable best efforts to remove the Rule as a basis for DOJ to challenge the merger.

As early as August 2015, Cigna's counsel explained that the parties would need to be prepared to respond to regulators' likely theory that Anthem would have to constrain Cigna's growth in order to comply with the Rule. JX567 at PW-CI-DE-00042590. Zielinski, Anthem's General Counsel, recognized that the merger [redacted] JX674. As he elaborated, [redacted] *Id.*

After DOJ predictably began to focus on the Blues Rules (JX630 at CI-DE-000064387; JX772), Zielinski told colleagues at Anthem that the National Best Efforts Rule was "very critical to our discussion with the DOJ and getting approval" (JX707 at ANTM-DE-R-00560034.002), and confided that "his biggest worry inside the DOJ is the BCBSA best efforts rule" (JX852). Unsurprisingly, the Blues Rules emerged as a "big issue" for DOJ in March, JX1550 at ANTM-DE-R-00540778, and were featured prominently in DOJ's complaint in July, DOJ Compl. ¶¶ 15, 36–37. Zielinski confided to the general counsel of the Blues

Association that [redacted] JX853 at ANTM-DE-R-00568075; JX2427 at BCBSA-DELSUB-00063790.

All Anthem did to respond to this "big issue" was to assure DOJ (and Cigna) that, by the end of 2016, the Rule and its hard cap on non-Blue revenue would be modified or eliminated in a settlement of the MDL. JX870 at 48:2–51:15; JX2193 at CI-DE-000121782; JX2123 at CI-DE-000117407. The litigation did not settle by the end of 2016; it has still not settled. After DOJ filed suit, Anthem tried to claw back its assurances, made in sworn testimony. The Department refused to let Anthem do so, observing that Anthem's statements "appeared to be part of a calculated effort to try to persuade the [Antitrust] Division not to challenge the Cigna transaction." JX2830 at ANTM-DE-00398226.

That "calculated effort" cannot constitute reasonable best efforts to remove the Rule as an impediment to regulatory approval. In fact, it constituted a falsehood. As Anthem's general counsel has admitted in this litigation, neither he nor other Anthem executives had a basis to assure DOJ—or Cigna—that the Blues antitrust litigation would settle by the end of 2016. Zielinski Dep. 537:15–539:1.

To comply with its obligations under § 5.3, Anthem had to do *something* to address the risk the Rule posed to regulatory approval. As Anthem assured Cigna before the merger agreement was signed, [redacted]

[redacted]. Anthem did none of that. Indeed, Anthem admits that it did *nothing* to attempt to obtain a change in or exemption from the Rule for the merger. Dkt. 148 at 8. Had Anthem brought remedial proposals to the Blues, they would have had to—and would have—consider them in good faith. Forsyth Dep. 61:18–63:2; Steiner Dep. 176:5–177:9; Hickey Dep. 320:9–321:6. But Anthem did none of that either. *See, e.g.*, Serota Dep. 166:5–168:18, 203:17–21, 249:1–6, 343:15–344:18; Booth Dep. 170:9–16; Forsyth Dep. 63:3–64:5; Geraghty Dep. 168:12–169:19; Hickey Dep. 165:2–10, 319:16–321:6.

Anthem did nothing to address the National Best Efforts Rule because, according to Zielinski, [redacted]. Zielinski Dep. 177:22–178:20. Anthem thus made a calculated decision to leave the Rule untouched [redacted]. Perhaps that calculation was in Anthem's interest, but it does not satisfy Anthem's obligations under § 5.3 of the merger agreement.

Anthem's failure to secure relief from the Rule forced it to adopt an unsound strategy for obtaining regulatory approval. With the Rule in place, Anthem would have to force Cigna customers to existing Blue products nearly immediately after the merger closed to comply with the National Best Efforts Rule. That Blues Rule-

driven reality caused Anthem to make the incredible claim to regulators that driving Cigna customers to existing Blue products would have no adverse effect on Cigna customers or market choice. Anthem tried to make that case by downplaying Cigna's lead in value-based care and instead touting its own innovative capacity.

That strategy was fundamentally flawed. By asserting that it was as innovative as Cigna, Anthem effectively conceded that the merger was not necessary to bring customers a Cigna-style product at Anthem rates. In addition, Anthem's attempt to show that Cigna customers would benefit from Anthem's lower provider rates exposed it to the criticism, also validated by the District Court, that providers were unlikely to provide the same services for less pay.

Given the Blues' concession that they operate as a single entity in a market for national accounts, relief from the National Best Efforts Rule was the one step that created a path to approval:

Had the National Best Efforts Rule compliance timeline been extended, Anthem would have had no urgency to migrate Cigna's customers to existing Blue products and could have pursued plans that may have generated merger-specific benefits.

Had the merger been exempted from the Rule, the parties would not have had to move Cigna's customers at all.

And had other Blues Rules been changed, Anthem may have been able to label Cigna's product Blue without losing the features that Cigna's customers preferred. *See* Sullivan Dep. 47:17–48:11; Serota Dep. 286:8–14, 344:7–12; JX1108 at CI-DE-000329950, slide 8.

Anthem's decision to put all of its eggs in the MDL basket foreclosed these options. Anthem was instead forced to denigrate Cigna's offerings and defend the merger on the basis of an "efficiencies" defense that has still never been adopted by any court. That misguided strategy cost the parties whatever chance they had to persuade either DOJ or the federal courts that the merger was not anticompetitive.

B. Anthem's Willful Breaches of Section 5.3 caused Cigna to incur $14.7 billion in damages.

Cigna seeks damages based on the loss of the economic benefit of the merger to Cigna's stockholders, as contemplated by § 8.5(b) of the Merger Agreement. *See* Merger Agreement § 8.5(b) (giving Cigna the right "on behalf of its stockholders … to pursue damages ... including claims for damages based on loss of the economic benefit of the Mergers to Cigna's stockholders"). Cigna's expert, Professor Richard Ruback, calculates these damages based on the premium that stockholders would have received had the merger closed. Ruback will show that these lost-premium damages are $14.7 billion. JX2970 ¶¶ 70–88 & Ex. 8.

III. CIGNA DOES NOT OWE ANTHEM ANY DAMAGES.

Anthem's claim for damages against Cigna fails on multiple grounds.

First, under § 7.2 of the Merger Agreement, after termination, Cigna is responsible only for "damages arising out of … the 'Willful Breach' of any covenant or agreement set forth in [the] Agreement." Anthem cannot prove that Cigna breached the agreement, much less a "Willful Breach" under the actual knowledge standard. *See supra* Point I.B.1.

Second, even if Anthem could show a Willful Breach, it cannot show that such breach caused the merger's failure to close. *See supra* Pt. I.B.2. Therefore, Cigna cannot be liable for damages to Anthem.

Third, Anthem has no damages. Cigna's expert, Ruback, will use the parties' stock prices to show that the merger was not anticipated to create value for Anthem in light of the substantial premium it agreed to pay Cigna's stockholders. JX2980 ¶ 5.

CONCLUSION

This Court should award Cigna the $1.85 billion Reverse Termination Fee, with interest, and additional damages. Anthem's claims should be denied.

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