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Patheon Can't Duck JV Partner's Suit Over $255M Acquisition

By **Scott Flaherty**

Law360, New York (February 25, 2013, 8:04 PM ET) -- A Florida federal judge said Friday that Procaps SA can contest joint venture partner Patheon Inc.'s $255 million acquisition of a pharmaceutical company, shooting down Patheon's argument that Procaps actually stood to benefit from the deal's alleged anti-competitive impacts.

U.S. District Judge Donald L. Graham ruled that Procaps — which previously agreed to collaborate with Patheon on development of a softgel capsule service for pharmaceutical products — had standing to bring its complaint under antitrust laws, according to an order. Procaps alleged in the suit that Patheon's purchase of Banner Pharmacaps Europe BV, a Procaps rival in the softgel market, might lead to an unlawful market allocation.

In favor of its motion to dismiss, Patheon had argued that Procaps lacked standing to make its claims because it likely would benefit from Patheon's purchase of Banner. But Judge Graham rejected that contention, saying that Procaps' complaint does, in fact, give it standing under antitrust laws.

"The complaint does not allege that Procaps benefits from the acquisition of Banner, rather, the complaint expressly states that the acquisition and agreement gives Patheon the ability to limit and control Procaps' and Banner's participation in the softgel market within an extensive territory," the judge said. "The injuries alleged by Procaps fall within the scope of United States antitrust law."

Patheon's $255 million purchase of Banner was first announced in late October and closed Dec. 14, according to Judge Graham.

Procaps filed the suit Dec. 10, seeking a declaration that the acquisition effectively would turn the joint venture between Procaps and Patheon — which the companies had agreed to in a collaboration deal signed in January 2012 — into a violation of the Sherman Act. Through the Banner acquisition, Procaps and Patheon would "become horizontally situated competitors in the softgel manufacturing and development services market," the complaint said.

The suit alleged further that, if the collaboration between Patheon and Procaps continued, the acquisition would force Patheon to remove certain Banner products in some regions, resulting in an unlawful allocation of the market.

Patheon lodged a motion to dismiss the suit Jan. 14, arguing, among other things, that Procaps would actually make out well from such market allocation, because it would reduce competition from Banner in certain geographic regions. Because it stood to benefit, Procaps did not have standing to mount an antitrust challenge to the acquisition, according to Patheon.

“A plaintiff who stands to gain from anti-competitive conduct has not suffered antitrust injury,” Patheon said in a memorandum supporting its motion to dismiss. “The alleged exclusion of a competitor from the territories in which [Procaps'] products are marketed would only be to [Procaps'] benefit.”

Judge Graham's Friday order sides with Procaps and denies Patheon's dismissal motion.

“Judge Graham rejected every argument made by Patheon and determined clearly that Procaps has stated a claim for relief under federal and state law,” Alan Rosenthal, an attorney representing Procaps told Law360 on Monday. “We intend to proceed vigorously and quickly to pursue those claims.”

An attorney for Patheon could not be immediately reached for comment Monday evening.

Patheon is represented by Robert M. Brochin and Marisa Fortunati of Morgan Lewis & Bockius LLP and M. Howard Morse, Marc G. Schildkraut, Douglas P. Lobel and David A. Vogel of Cooley LLP.

Procaps is represented by Alan Rosenthal and Natalie Carlos of Carlton Fields.

The case is Procaps SA v. Patheon Inc. et al., case No. 1:12-cv-24356, in the U.S. District Court for the Southern District of Florida.

--Editing by Chris Yates.
