

Patheon Can't Shake Procaps Suit Over \$255M Merger

By **Kat Greene**

Law360, Los Angeles (January 29, 2014, 8:19 PM ET) -- Pharmaceutical company Patheon Inc. lost a bid to shut down a suit by former joint venture partner Procaps SA on Wednesday, when a Florida federal judge determined Procaps hadn't been the sole cause of its own entanglement in antitrust issues as a result of a separate \$255 million merger by Patheon.

U.S. Magistrate Judge Jonathan Goodman denied Patheon's motion for judgment on the pleadings, ruling that Procaps — which previously agreed to collaborate with Patheon on development of a softgel capsule for pharmaceutical products — had standing to bring suit. The judge rejected Patheon's assertion that Procaps was to blame for its own damages.

The judge's order cited an earlier precedential suit regarding liability for damages: "If I swing my fist at your face, you may decide to duck. But if you stand still, and I deck you, I am the cause of your injury. You did not punch yourself."

Patheon, the judge said, was trying to blame Procaps for not avoiding its own damages, rather than admitting it had caused them in the first place.

"Patheon says that by not ducking its antitrust punch, Procaps has punched itself," Judge Goodman wrote.

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. Patheon then argued that Procaps had manufactured its own Article III standing by injuring itself when it refused to exit the collaboration agreement.

But the judge was unpersuaded. It's true that Procaps could have avoided antitrust injury by exiting the agreement or by seeking an injunction to stop the merger with Banner, Judge Goodman wrote.

"But the fact that Procaps did neither of those things does not mean that Patheon didn't throw the punch that started the causal chain in Procaps' antitrust injury," the judge wrote in Wednesday's order.

Procaps filed the suit in December 2012, seeking a declaration that the acquisition effectively would turn the joint venture between Procaps and Patheon — to which the companies had agreed in a January 2012 collaboration deal — 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.

The Patheon deal with Banner — a \$255 million merger — closed that same month.

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.

In February, U.S. District Judge Donald L. Graham ruled that Procaps had standing to bring its complaint under antitrust laws.

Representatives for the parties did not immediately respond to requests for comment late Wednesday.

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, Natalie Carlos, Chris Coutroulis, Matthew Allen and Joanna Garcia of Carlton Fields Jordan Burt PA.

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.

--Additional reporting by Scott Flaherty. Editing by Kat Laskowski.

All Content © 2003-2016, Portfolio Media, Inc.