

## Patheon Defeats JV-Partner's Antitrust Suit Over Rival Buy

By **Vin Gurrieri**

*Law360, New York (October 30, 2015, 9:11 PM ET)* -- A Florida federal judge on Thursday put an end to Procaps' suit accusing pharmaceutical company and its former joint venture partner Patheon of creating antitrust issues by purchasing one of Procaps' rivals for \$255 million, saying Procaps couldn't show that any actual competitive harm had occurred.

In an opinion that topped 100 pages, U.S. Magistrate Judge Jonathan Goodman held that Procaps SA, which previously agreed to collaborate with Patheon Inc. on development of a softgel capsule for pharmaceutical products, didn't muster any evidence to show that any negative effects to competition actually occurred as a result of Patheon's acquisition of Banner Pharmacaps Europe BV.

"Because Procaps cannot rely on general antitrust principles or assumptions about inherent consequences to predict the adverse effects it needs to establish ... the court concludes that Procaps has not met its burden and that Patheon is entitled to summary judgment," Judge Goodman said. "Procaps did not quantify the actual competitive harm on any basis with any actual empirical evidence."

Procaps launched its suit against Patheon in December 2012, alleging that Patheon's \$255 million purchase of Banner, a Procaps rival in the softgel market, might lead to an unlawful market allocation because of Procaps' joint venture deal with Patheon.

Procaps contended that the acquisition effectively would turn the joint venture into a violation of the Sherman Act. 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 presented four arguments in its most recent summary judgment request, with Judge Goodman ultimately siding with the company on two of those arguments, enough to sustain the company's motion.

The judge held Thursday that there were "no substantial actual detrimental effects" on competition as a result of the removal of Banner's products from the relevant market, and that Procaps did not, and could not, prove substantial marketwide harm.

Judge Goodman agreed with Patheon's contention that Procaps had to show evidence of actual damage done to consumers' in the market, such as a reduction of output or increases in price, and that presenting only theories about possible damage wasn't enough for Procaps to defeat summary

judgment.

“Based on the undersigned’s review of the applicable law ... there appears to be significant support for the view that the actual detrimental effect must be a result which has in fact already happened, as opposed to a result which is speculative, hypothetical, likely, inherent or one having potential to create damage,” Judge Goodman said. “In fact, the cases cited by Patheon are a powerful indication that predictions and general theories are insufficient.”

But even had Procaps been able to present evidence of actual adverse effects on competition, it could not show that they affected more than a few isolated customers, according to the judge.

Judge Goodman also pointed out that the seven-month duration of the alleged restraint — a period ending at the point when Patheon terminated the collaboration agreement with Procaps — was “far too short as a matter of law to create the required substantial marketwide harm of actual detrimental effects.”

“Procaps fails to identify a single long-run actual adverse effect, relying only on an unmeasured and unquantified effect of short duration on a small subset of customers,” the judge said. “Here, there is no genuine factual dispute on substantiality because Procaps never measured the magnitude of the alleged effects on the relevant markets.”

Although a trial in the case had been slated to begin in November, that trial will no longer take place in light of Judge Goodman’s ruling.

“We never believed the case had any merit with respect to any claim in the complaint,” Michael J. Klisch of Cooley LLP, an attorney for Patheon, said Friday. “We never violated any antitrust laws or engaged in any wrongful conduct [and] we are happy the judge agreed.”

Meanwhile, Procaps counsel Alan Rosenthal of Carlton Fields Jordan Burt PA told Law360 Friday that the order “is not a surprise given a number of Magistrate [Judge] Goodman’s erroneous pretrial rulings.”

“Despite his finding of compelling evidence of wrongdoing by Patheon, he incorrectly ruled that Procaps’ antitrust claim would not go to the jury,” Rosenthal said. “We believe the Eleventh Circuit will reverse.”

Procaps is represented by Alan Rosenthal, Natalie J. Carlos, Chris S. Coutroulis and D. Matthew Allen of Carlton Fields Jordan Burt PA as well as Karen L. Hagberg and Michael B. Miller of Morrison & Foerster LLP.

Patheon is represented by Michael J. Klisch, Robert T. Cahill, M. Howard Morse, Marc G. Schildkraut and Mazda Antia of Cooley LLP as well as Robert M. Brochin of Morgan Lewis & Bockius LLP.

The case is Procaps SA v. Patheon Inc. et al., case number 1:12-cv-24356, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Carolina Bolado and Dani Meyer. Editing by Emily Kokoll.

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