

Patheon Wins Fees For Doc Fight In Procaps Merger Suit

By **Dani Meyer**

Law360, New York (July 21, 2015, 4:01 PM ET) -- A Florida federal magistrate judge on Monday ordered Procaps SA's attorneys to pay \$25,000 in attorneys' fees to Patheon Inc. after finding they had overdesignated discovery documents as "highly confidential" in Procaps' antitrust suit against former joint venture partner Patheon over its \$255 million acquisition of a pharmaceutical company.

Opening with a quote from Christine McVie's 1984 song "Keeping Secrets," U.S. Magistrate Judge Jonathan Goodman overruled arguments by Procaps and its counsel, Carlton Fields Jordan Burt and Morrison & Foerster LLP, that the mistakes were made because of contract lawyers and the expedited process of the documents review, saying the company is still responsible and giving it 10 days to reclassify the documents.

"It is difficult to believe that 95 percent of the documents produced in a court-ordered forensic examination of Procaps' electronically stored information are all actually worthy of the 'highly confidential' designation," Judge Goodman said. "Procaps has overdesignated documents — a conclusion it now acknowledges."

Patheon brought up the issue earlier this month because "highly confidential" documents can't be disclosed to inside counsel, and Patheon wanted its general counsel to review them for mediation purposes.

In fighting the motion to compel, Procaps instead asked that Patheon identify which documents it wanted re-reviewed or that the electronically stored information special master take a second look at the documents. But Judge Goodman denied the request, saying neither option holds Procaps responsible for its actions.

"It is inequitable to shift the burden of reviewing more than 141,000 documents to Patheon, who is in no way responsible for Procaps' less-than-precise (to be diplomatic) use of the designation methodology established in the very confidentiality order it jointly proposed," the judge said.

Judge Goodman awarded \$25,000 in attorneys' fees to Patheon since the misuse of the highly confidential classification violated a stipulated confidentiality order, but said Procaps shouldn't be responsible for the payment since the overdesignation is its counsel's responsibility.

He ordered Procaps' law firm to internally decide which attorneys should bear responsibility for the fee award and specifically instructed it not to pass the fee award onto Procaps.

The judge also threatened to consider more severe sanctions if Procaps doesn't perform the second round of designations in good faith.

Alan Rosenthal, an attorney for Procaps, told Law360 in an email Tuesday that while he disagrees with the order, it's just a fee-shifting award that Judge Goodman routinely enters in discovery disputes.

"It is neither unique to this case nor a sanction, which has never been imposed against either party or their counsel in this case," Rosenthal said.

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

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 trial is set to begin Nov. 16.

Representatives for Patheon were unavailable for comment on Tuesday.

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

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

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