

American University Washington College of Law

From the Selected Works of Jonathan B. Baker

December 6, 2013

Procaps S.A. v. Patheon Inc.: Videotaped Deposition Transcript

Jonathan B. Baker

EXHIBIT A
Deposition Transcript of Jonathan Baker
(Excerpts)

December 6, 2013

Baker, Professor Jonathan B.

December 6, 2013

1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA
MIAMI DIVISION

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PROCAPS S.A.,

Plaintiff,

vs.

PATHEON, INC., et al,

Defendants.
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Case No.:

1:12-cv-24356-JG

VIDEOTAPED DEPOSITION OF
PROFESSOR JONATHAN B. BAKER

Washington, D.C.

Friday, December 6, 2013

9:00 a.m.

Reported by: Laurie Bangart, RPR, CRR

Henderson Legal Services, Inc.

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Baker, Professor Jonathan B.

December 6, 2013

121

1 Q Let me ask you this.

2 Would you agree that prior to the
3 acquisition of Banner by Patheon, that within the
4 territory and field, you had Procaps competing
5 through the collaboration? And among other
6 companies, you also had Banner competing as a
7 stand-alone company; correct?

8 A With -- so this is -- you said before
9 the Banner acquisition?

10 Q Yes.

11 A And do you mean -- and so you're saying
12 products that are in the field and in the, in the
13 territory of the collaboration.

14 Q Right.

15 A And the answer is yes, I, I viewed
16 Banner as a market participant in my market, which
17 is part of the field and territory of the
18 collaboration in my -- in the markets I defined in
19 my report.

20 Q Right, and Procaps is a participant
21 through the collaboration?

22 A Oh, well, I don't know that I would

Baker, Professor Jonathan B.

December 6, 2013

122

1 say -- so you said before the collaboration?

2 Q No, no, no, no. I'm sorry. I'm sorry.
3 Before the acquisition.

4 A Okay. Then let me correct what I said.

5 I, I believe that before the, the, the
6 acquisition, Banner was a market participant, and
7 that -- but after the collaboration it was the
8 collaboration that was market participant.
9 Procaps was part of that collaboration.

10 Q All right.

11 A So, so I would describe it as the
12 collaboration and Banner were both participants.

13 Q All right.

14 Now, after the Banner acquisition, if,
15 as it has, Procaps has taken the position that it
16 cannot participate in the territory and field
17 through the collaboration because of its
18 allegation that it's illegal, then instead of
19 having both the collaboration with Procaps as a
20 competitor and Banner as a competitor, we only
21 have Banner through Patheon as a competitor;
22 correct?

Baker, Professor Jonathan B.

December 6, 2013

124

1 Procaps?

2 BY MR. COUTROULIS:

3 Q Right.

4 A If Procaps no longer participates in the
5 collaboration?

6 Q Well, my question, my question, more
7 precisely, was: If Procaps is excluded from the
8 territory and field, whether as part of the
9 collaboration or otherwise, as a result of
10 Patheon's acquisition of Banner, would you agree
11 there's no benefit to Procaps?

12 MR. MORSE: Objection.

13 THE WITNESS: So we're
14 hypothetically, Procaps excluded from the
15 field and territory of the collaboration?

16 BY MR. COUTROULIS:

17 Q Right.

18 A Was there a benefit to Procaps?

19 Q Yeah.

20 A I don't see one, sitting here.

21 Q Okay.

22 So when you say Procaps would actually

Baker, Professor Jonathan B.

December 6, 2013

125

1 benefit from, from the Banner acquisition, you're
2 assuming that the collaboration --

3 A Excuse me. Let me, let me -- I'm sorry.
4 Can I correct my previous answer?

5 Q Well, I was in the middle of a question.

6 A Pardon me. Please finish your question,
7 and then I'll ask to correct my previous answer.

8 Q I'll tell you what. I'll just let you
9 correct your previous answer right now.

10 A Okay. Well, I'm sorry for interrupting.

11 Q I appreciate that. I understand --

12 A I just got excited about how I --

13 Q I get excited, too.

14 A The, the -- okay.

15 So there is -- the benefit to Procaps --
16 and I would not -- don't know what the magnitude
17 would be, but -- I haven't analyzed that
18 question -- is that it would be -- it would have
19 the ability to participate in the field and
20 territory of the collaboration on its own.

21 Q But my, my question asked you to assume
22 that it was excluded from the field and territory,

Baker, Professor Jonathan B.

December 6, 2013

126

1 whether as part of the collaboration or otherwise.

2 A Okay.

3 Q It was effectively excluded.

4 In that case --

5 A So if it --

6 Q -- there's no benefit?

7 A If it was not, if it was not able, able
8 to participate through the collaboration or on its
9 own, then I would say I don't see a benefit.

10 Q Okay.

11 A So I'm sorry to --

12 Q That's, that's really quite all right.

13 A Okay.

14 Q Based on your work in this case,
15 Professor, how, if at all, are Procaps and Banner
16 similar companies?

17 MR. MORSE: Objection. Ambiguous.

18 THE WITNESS: They both engage in
19 manufacturing and development of soft gel
20 products, among other things.

21 BY MR. COUTROULIS:

22 Q Any other similarities you can think of?

Baker, Professor Jonathan B.

December 6, 2013

169

1 So, so --

2 Q With regard --

3 A You know, so as you posed the question,
4 I guess the answer is no, I think.

5 Q Well, but is Banner, in your -- let's
6 just ask it again.

7 Is, is Banner capable of selling to any
8 of the ten firms in the over-the-counter market
9 we've been talking about, rapidly and with little
10 sunk investment?

11 MR. MORSE: Objection.

12 THE WITNESS: In 2011 --

13 BY MR. COUTROULIS:

14 Q Yes.

15 A -- to sell to the, to any of the other
16 nine buyers, nonprescription, contract
17 manufacturing and development services for
18 nonprescription --

19 Q Right.

20 A -- soft gels for products for sale in
21 the US, the answer is it's likely able to do that,
22 yes.

Baker, Professor Jonathan B.

December 6, 2013

170

1 Q Okay, and in 2012 as well?

2 MR. MORSE: Objection.

3 THE WITNESS: Well, it doesn't
4 exist in 2012 in quite the way that it
5 existed in --

6 BY MR. COUTROULIS:

7 Q Well --

8 A If you want to ask me about Patheon in
9 2012 --

10 Q Well, I want to ask you about, about,
11 about --

12 A Oh, you mean before the acquisition?

13 Q Yeah, I mean --

14 (Discussion held off the record.)

15 BY MR. COUTROULIS:

16 Q The acquisition was very lengthy.

17 So before the acquisition in 2012, would
18 that be true as well?

19 A Yes.

20 MR. MORSE: Objection.

21 BY MR. COUTROULIS:

22 Q I think you mentioned this before, but

Baker, Professor Jonathan B.

December 6, 2013

171

1 just to be clear, is it fair to say that after
2 January 2012, when the collaboration agreement
3 between Procaps and Patheon was signed, Banner and
4 the collaboration were competitors or potential
5 competitors in the field and territory?

6 MR. MORSE: Objection.

7 THE WITNESS: As I said before,
8 they were -- they would both count as market
9 participants.

10 BY MR. COUTROULIS:

11 Q And therefore would be competitors or
12 potential competitors; right?

13 A To the extent that a potential -- not
14 every potential competitor would count as a market
15 participant.

16 Q Well, would those two count?

17 A But they would be -- I guess in 2012,
18 that they were both market participants -- they
19 both -- and -- so yes.

20 MR. COUTROULIS: All right. All
21 right.

22 Do you want to break for lunch?

Baker, Professor Jonathan B.

December 6, 2013

193

1 Q And where was Patheon strong?

2 A Isn't that the question you just asked?
3 The, the --

4 Q You explained where Procaps was strong
5 and Patheon was weak.

6 A Oh, I'm sorry.

7 Q Now I'm asking you where Patheon was
8 strong and Procaps was weak.

9 A Oh, Patheon was strong in customer
10 relations, marketing, organization and expertise
11 in the field and territory of the collaboration.

12 Q You would agree, Professor, that the
13 creation of the collaboration agreement between
14 Patheon and Procaps enhanced competition; correct?

15 A Yes.

16 Q How so?

17 A It, it -- by combining the -- those
18 capabilities, the collaboration had, likely had
19 greater prospects for success than either firm on
20 its own prior to the formation of the
21 collaboration, so the collaboration had potential,
22 greater potential to win business in the markets

Baker, Professor Jonathan B.

December 6, 2013

194

1 **that I define.**

2 Q Okay, and in that connection, isn't it
3 true that Patheon wanted to contract with Procaps
4 at least in part to compete against Catalent?

5 A I think that Patheon would like --
6 wanted to compete against Catalent, whether it was
7 within the collaboration or not.

8 Q Well, it hadn't been too successful,
9 though, before the collaboration; correct?

10 MR. MORSE: Objection. Objection.
11 Ambiguous.

12 THE WITNESS: It won one
13 opportunity before the collaboration, yes.

14 BY MR. COUTROULIS:

15 Q The one you told us about in product
16 development?

17 A That's correct.

18 Q So is it fair to say that in entering
19 into the collaboration agreement, one of the
20 things that Patheon hoped to do was to take market
21 share and business from Catalent in the product
22 development and contract manufacturing area?

Baker, Professor Jonathan B.

December 6, 2013

195

1 MR. MORSE: Objection.

2 THE WITNESS: One of the things
3 within the field and territory of the
4 collaboration, yes.

5 BY MR. COUTROULIS:

6 Q All right.

7 How long was the collaboration agreement
8 in effect before Patheon announced that it was
9 acquiring Banner; do you recall?

10 A I'm, I'm trying to recall. I believe, I
11 believe Patheon made -- when you say "announce,"
12 what do you mean by announce? Perhaps that's the
13 question I should ask.

14 Q Well, let's start with: When was the
15 collaboration agreement entered into, to the best
16 of your recollection?

17 A I believe it was January of 2012.

18 Q All right.

19 When was the prospective acquisition by
20 Patheon of Banner first made public, to your
21 knowledge?

22 A And what would count as making it

Baker, Professor Jonathan B.

December 6, 2013

218

1 those six had proprietary FDA registrations, which
2 means that they couldn't be selling proprietary
3 products in the US.

4 Q All right, but -- I don't mean to
5 quibble with you, Professor, but if you put this
6 in, in your report --

7 A Yes.

8 Q -- am I correct in assuming that if you
9 put in your report that Banner's strategy was to
10 focus on value added proprietary products, while
11 its principal rivals mainly followed a contract
12 manufacturing business model, and then you go on
13 to refer to none of the six other firms was into
14 proprietary products, and one of those firms is
15 Catalent, that you are here describing Catalent
16 and the others as among the principal rivals?

17 A Among the principal rivals in -- from
18 the point of view of Banner thinking worldwide.

19 Q Okay.

20 Are these firms not principal rivals in
21 the United States?

22 A I know that some of them are in the

Baker, Professor Jonathan B.

December 6, 2013

219

1 market that -- participate in the market I define.
2 I don't know whether all do.

3 Q Is Catalent a principal rival of Banner
4 in the United States?

5 A So the word "rival" here means -- my
6 understanding is, is that they could be rivals
7 some places for some products, and enough places
8 and products that Banner wanted to note them as
9 competitors, and it's not a -- it's not specifying
10 where and for what products they are rivals.

11 Now, you just added in the United
12 States --

13 Q I just added that.

14 A -- but I don't -- I'm not sure, but my
15 analysis focused on the markets I identified, and
16 I can answer you best if we restrict further the
17 question to that, to the products in the markets
18 that I identified, and I can say that Catalent was
19 a, a -- was among the principal rivals for Banner
20 in the market, markets I identified.

21 Q And those markets are contract
22 manufacturing and product development for Rx and

Baker, Professor Jonathan B.

December 6, 2013

220

1 for 10 OTC customers; correct?

2 A Almost. So they could be OTC or
3 nutritional. They're, they're just
4 nonprescription --

5 Q Right.

6 A -- and in both cases it's for products
7 for sale in the US, but I think you got
8 otherwise --

9 Q All right.

10 A -- the, the definition.

11 Q All right.

12 So in that context, "principal rivals"
13 and "competitors" are interchangeable terms;
14 correct?

15 A Well, no. Principal adds to, you know,
16 a sense of do they have a large share perhaps
17 or --

18 Q Okay.

19 A -- or, or something related to that.

20 Q Well, was, was Catalent a principal
21 competitor of Banner in the markets you identify?

22 A Prior to the acquisition --

Baker, Professor Jonathan B.

December 6, 2013

221

1 Q Yes.

2 A -- of the -- by Patheon, yes.

3 Q Okay. Fair enough.

4 Now, in paragraph 99, what is the basis
5 for the statement "At the time of Patheon's
6 acquisition of Banner, it is likely that Catalent
7 and Banner in the US were the second choice for
8 the other's customers"?

9 A My conversations with executives.

10 Q Which executives? The ones that, that
11 you interviewed?

12 A Correct.

13 Q Okay.

14 Are you able to tell me which ones told
15 you that?

16 A No.

17 Q Okay.

18 In paragraph, in paragraph 100, you
19 indicate that the acquisition of Banner by Patheon
20 thereby enhanced its ability to compete with other
21 firms offering soft gel development and
22 manufacturing, including Catalent, the dominant

Baker, Professor Jonathan B.

December 6, 2013

228

1 of the Patheon Procaps collaboration?

2 MR. MORSE: Objection.

3 THE WITNESS: My understanding is
4 that Procaps stopped cooperating with the
5 collaboration at the time of the acquisition,
6 so I mean -- so any cost savings and
7 efficiencies that could have gone to the
8 collaboration, you know, might not actually
9 have, because the -- because Procaps stopped
10 cooperating, so I think the answer is no.

11 I forgot how the -- which way you
12 asked the question, but . . .

13 BY MR. COUTROULIS:

14 Q All right.

15 Do you have an understanding as to
16 whether Patheon's plan, had the collaboration
17 agreement remained in effect after the Banner
18 acquisition, was to give all business in the field
19 and territory to the collaboration and none of it
20 to Patheon utilizing the legacy Banner assets?

21 A My understanding is that, that Patheon
22 planned to adhere to the terms of the

Baker, Professor Jonathan B.

December 6, 2013

229

1 collaboration, and -- which would require that
2 after six months, the, all of the opportunities --
3 unless modified, that all of the opportunities
4 that would be within the field and territory of
5 the collaboration go to the collaboration.

6 Q So would, would that involve Patheon
7 then looking at an opportunity, making a decision
8 whether it falls within the field and territory of
9 the collaboration, if it does, referring it to the
10 collaboration, and if it doesn't, handling it any
11 way it wanted?

12 MR. MORSE: Objection.

13 THE WITNESS: My understanding is
14 that when the collaboration was in effect
15 both before and after Patheon's acquisition
16 of Banner, Patheon had to undertake the kind
17 of task that you're describing of, of
18 determining whether the, the opportunity was
19 within the field and territory of the
20 collaboration or not.

21 MR. MORSE: Do you want to take a
22 break at some point, Mr. Coutroulis?

Baker, Professor Jonathan B.

December 6, 2013

249

1 the assets that were part of legacy Banner to the
2 benefit of the collaboration.

3 Q That would have required some kind of
4 modification of the collaboration agreement to
5 achieve that?

6 MR. MORSE: Objection. Lacks
7 foundation.

8 BY MR. COUTROULIS:

9 Q Do you know?

10 A I don't know that it's what that says.

11 Q All right.

12 You think that's a legal question?

13 A That's a question interpreting the, the
14 collaboration agreement.

15 Q Okay.

16 Have you identified whether there are
17 any efficiencies that would flow from what you
18 described as Patheon deciding what opportunities
19 would be allocated to the collaboration or not
20 allocated to the collaboration?

21 A I'm sorry. I've considered efficiencies
22 that might flow from the collaboration and

Baker, Professor Jonathan B.

December 6, 2013

250

1 efficiencies that might flow from the Banner
2 acquisition.

3 Q Fair enough.

4 A You're not asking me either of those
5 things.

6 Q That's correct.

7 A All right. So could you ask the
8 question again?

9 Q Yeah, I'll try.

10 I'm asking whether there are any
11 efficiencies that exist, and if there are, have
12 you identified what they are, that would flow not
13 from Patheon acquiring Banner, and not from the
14 collaboration between Patheon and Procaps, but
15 from Patheon having to make decisions after the
16 acquisition of Banner as to whether a particular
17 opportunity goes to the collaboration or doesn't.

18 A And when you said --

19 MR. MORSE: Objection.

20 THE WITNESS: And when you said not
21 from Patheon acquiring Banner, you, you were
22 including in that statement not from Patheon

Baker, Professor Jonathan B.

December 6, 2013

251

1 acquiring Banner with the collaboration still
2 ongoing?

3 BY MR. COUTROULIS:

4 Q Yes.

5 A Okay.

6 So I view the, the decision as the, the
7 determination of whether the -- a new opportunity
8 would fall within the field and territory of the
9 collaboration or not, you know, as a ministerial
10 function, you know, that, that someone is just
11 applying rules, being in the collaboration
12 applying rules, and that function didn't --
13 wouldn't change after the Banner acquisition if
14 the collaboration continued to operate.

15 Q So from that function, there wouldn't be
16 any efficiencies that would flow; correct?

17 A From that function per se?

18 Q Yes.

19 A It's a function.

20 Q That's fine.

21 A The, the -- how -- I don't understand
22 how efficiencies in principle would flow from a

Baker, Professor Jonathan B.

December 6, 2013

252

1 function. I don't think I understand your
2 question.

3 Q Then you don't think there are any
4 efficiencies that would flow from the function of
5 determining whether something goes to the
6 collaboration or doesn't?

7 MR. MORSE: Objection.

8 BY MR. COUTROULIS:

9 Q Fair enough?

10 A Well, that's not exactly right. I mean
11 to the extent that the collaboration -- this is a
12 necessary task for the collaboration agreement to
13 work, and if that task is not performed, the
14 collaboration would not be able to, to work, and
15 the benefits of the collaboration for competition
16 would not be available.

17 So in some sense all efficiencies from
18 the collaboration, both before and after the
19 acquisition, flow from this function, so --

20 Q So when you say it's a necessary task
21 for the collaboration to function, that's only
22 post Banner acquisition?

Baker, Professor Jonathan B.

December 6, 2013

253

1 That was not a task that was necessary
2 for the collaboration to function before Patheon
3 acquired Banner; correct?

4 A No.

5 MR. MORSE: Objection.

6 THE WITNESS: No, it's not correct.

7 BY MR. COUTROULIS:

8 Q Okay.

9 Why is that not correct?

10 A Because the sales opportunities coming
11 in before the Banner acquisition might or might
12 not be within the field and collaboration of the
13 territory, and somebody had to think about what's
14 in the field and territory of the collaboration
15 and compare that to where the opportunity is, and
16 then decide, and that decision had to be made both
17 before and after the Banner acquisition.

18 Q But the difference would be that
19 decision were made before, and the decision was
20 that it didn't fall in the field and territory.

21 It would not then be the case that
22 Banner assets might be used to take advantage of

Baker, Professor Jonathan B.

December 6, 2013

270

1 BY MR. COUTROULIS:

2 Q Is there some efficiency that you see
3 from Banner not being available as an independent
4 bidder?

5 A I don't, I don't understand that as a
6 well-posed question.

7 The, the, the -- it's, it's like the
8 other question. The efficiencies here come from
9 the Banner acquisition, not from some little
10 particular decision, which is how you were trying,
11 how you were framing it, I think.

12 Q In other words, the efficiencies don't
13 flow from the withdrawal of Banner as an
14 independent bidder. They flow from other things
15 that you've identified by virtue of the
16 acquisition; is that fair?

17 MR. MORSE: Objection.

18 THE WITNESS: The efficiencies flow
19 from -- yes, I think that sounds right.

20 BY MR. COUTROULIS:

21 Q Okay.

22 A And they are -- but those two are