

IN AND FOR THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI DADE COUNTY, FL

PROCAPS, S.A., a Colombian sociedad
anonima,

Plaintiff(s),

vs.

CARLTON FIELDS JORDEN BURT,
P.A., a Florida professional association,

Defendant(s).

_____ /

Case No:

Florida Bar No: 317071

COMPLAINT

The Plaintiff, Procaps, S.A., a Colombian sociedad anonima, sues the Defendant. Carlton Fields Jordan Burt, P.A., a Florida professional corporation (the “Law Firm”), and states as follows:

NATURE OF THIS ACTION

1. This lawsuit claims damages in excess of \$15,000,000 against Carlton Fields for negligence and breach of fiduciary duty resulting from the firm’s representation of Procaps, S.A., a Colombian manufacturer of pharmaceutical products specializing in gelatin capsules that serve as oral delivery mechanisms for medications.

2. Carlton Fields filed suit against Patheon, Inc. on behalf of Procaps claiming, among other matters, that Patheon had violated Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”). FDUTPA allows for the award of attorney’s fees to be paid by the losing party. This claim was identical to other claims that did not expose Procaps to attorney’s fees.

WARREN R. TRAZENFELD, P.A.

3. Carlton Fields failed to advise Procaps that it could be liable for Patheon's attorney's fees prior to filing suit. Since the FDUTPA claim was duplicative of other claims that did not expose Procaps to attorney's fees, Procaps would have never agreed to bring such a claim if it was fully informed of the attorney's fee risk.

4. After the District Court ruled that "the antitrust claim, which was embodied in the FDUTPA claim, was either unreasonable or approaching the level of being unreasonable" and the Eleventh Circuit Court of Appeals held the lawsuit (a) contradicted "basic hornbook law"; (b) the argument advocated by Carlton Fields was "not the law"; (c) Carlton Fields cited no "authority for the assertion" it espoused and (d) the antitrust case was "intrinsically hopeless", Patheon was awarded \$18,494,846 in fees and costs against Procaps based on FDUTPA.

PARTIES AND JURISDICTION

5. This is an action for damages in which the amount in controversy exceeds \$750,000.00, exclusive of interest, attorneys' fees and costs. This action meets the criteria of Administrative Order 16-12 and Rule 1.201 of the Florida Rules of Civil Procedure and is within the jurisdiction of the Complex Business Litigation Section of the 11th Judicial Circuit in and for Miami-Dade County, Florida.

6. The Plaintiff, Procaps, S.A. is a Colombian sociedad anonima ("Procaps").

7. Defendant Carlton Fields Jordan Burt, P.A. ("CF") is a professional association organized under the laws of Florida and is engaged in the practice of law. At times relevant to this action Carlton Fields Jordan Burt, P.A. maintained an office in Miami-Dade County, Florida.

THE PATHEON AND PROCAPS AGREEMENT

WARREN R. TRAZENFELD, P.A.

8. Procaps and Patheon, Inc. are in the pharmaceutical manufacturing business. Procaps develops and manufactures pharmaceutical products, especially softgels, which are gelatin capsules that serve as oral delivery mechanisms for medications.

9. In early 2012, Procaps, represented by CF, and Patheon entered into a Collaboration Agreement (“Agreement”). The Agreement created a new “P-Gels” brand of softgels, with Procaps acting as their exclusive manufacturer and Patheon as their exclusive marketer in the United States. The Agreement contained an arbitration provision, which excluded antitrust (and certain other) disputes and prohibited the recovery of lost profits for contract breaches. Soon after entering into the Agreement, Patheon began negotiating to acquire Procaps’ main competitor, Banner, Inc.

10. Shortly after Procaps became aware of the Patheon purchase of Banner, there were meetings to discuss Procaps concern over the acquisition. A Law Firm representative attended one of such meetings and was made aware of the negotiations to end the business relationship. Patheon offered Procaps millions of dollars in settlement at that time. Procaps was advised by the Law Firm to reject such settlement because the Law Firm could obtain many more millions of dollars for Procaps if a lawsuit was filed.

11. Based on advice from CF that litigation would result in obtaining significantly more money than Patheon was offering, Procaps stopped performing under the Agreement and sued Patheon on December 10, 2012 in a case styled as *Procaps SA. v. Patheon Inc. et al.*, Case No. 1 :12-cv-24356-DLG in the United States District Court for the Southern District of Florida (“the Lawsuit”). CF was counsel for Procaps in the Lawsuit.

THE COMPLAINT

WARREN R. TRAZENFELD, P.A.

12. Procaps through CF filed a five-count Complaint under antitrust and other competition laws as a result of Patheon's alleged unlawful business conduct in connection with Patheon's acquisition of Banner.

13. Count IV of the Complaint sought damages and attorney's fees under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA").

FDUTPA

14. A prevailing party may recover fees in "any civil litigation" under FDUTPA "except as provided in subsection (5)" of Section 501.2105. §501.2105(1). Subsection (5) applies only to "civil litigation initiated by the enforcing authority," which is the Florida state attorney or the Florida Department of Legal Affairs. §§501.2105(5), 501.203(2). Procaps is a private company, so that exception did not apply.

15. Prior to filing the Complaint, CF did not advise Procaps that FDUTPA exposed it to both the benefits and the possible consequences of that act's provisions, including the possibility of paying Patheon's fees. If CF had provided this advice, Procaps would have not authorized the filing of a FDUTPA claim.

THE LAWSUIT IS LOST BY PROCAPS

16. On February 27, 2014, the parties filed summary judgment motions in the Lawsuit. During the hearing on the motions, the Court warned CF that, because Procaps sued under FDUTPA, it could be liable for Patheon's fees if Procaps lost. CF agreed with the Court's assessment as revealed by the following excerpt from the hearing transcript:

Hearing Transcript Dated April 24, 2014 [DOC# 487, pg.115, 116]

9 COURT: And a question for Procaps: Is -- since
10 you've raised a FDUTPA statutory claim and that provides for
11 the recovery of attorney's fees to the prevailing party, if you
12 lose either at summary judgment or at trial, wouldn't you then
13 be on the hook for Patheon's attorney's fees, which I've got to

WARREN R. TRAZENFELD, P.A.

14 believe at this point is in excess -- has got to be millions of
15 dollars in fees and costs? Wouldn't you be on the hook for
16 that?
17 MR. COUTROULIS: Your Honor, I haven't specifically
18 looked at that question. But my recollection and understanding
19 is that an award of attorney's fees under FDUTPA to the
20 prevailing party is discretionary with the Court. I don't
21 believe it's mandatory, as it is to a prevailing antitrust
22 Plaintiff. It is a mandatory award.
23 I think that the prevailing party on a FDUTPA claim
24 could seek to recover fees.
25 This case has been litigated overwhelmingly on the

1 basis of the antitrust questions. So I think there would be an
2 issue of what fees are reasonably apportioned to work on the
3 FDUTPA claim, which I would submit is not very much.
4 THE COURT: I think the FDUTPA statute does not, N-O-T,
5 not include the kind of safety valve that some attorney's fees
6 statutes provide, such as a prevailing party can get attorney's
7 fees if the other side's position was not substantially
8 justified. That kind of language is not in the FDUTPA statute.
9 And I understand the apportionment argument. But given
10 the fact that you told me earlier that your FDUTPA claim is in
11 large part based on the antitrust claim, I don't know how you
12 would carve out or segregate out all the work done on the
13 antitrust claim from the FDUTPA. But in any event, I think I
14 have a pretty good feel for what's happening there.

17. On July 30, 2014, the Court denied in part and granted in part Patheon's summary judgment motion as to the FDUTPA claim. The Court dismissed the portion of the FDUTPA claim that was based on the notion that Patheon misused Procaps' "confidential information" and stated:

Procaps' FDUPTA claim (Count IV) is based solely on the agreement to allocate customers or territories under the Collaboration Agreement. [ECF No. 1, ¶ 106 ("The [acquisition] renders the Collaboration Agreement an unfair method of competition and/or unfair or unconscionable trade practice.")] There is no other misconduct alleged in Count IV. So the allegations making up the FDUPTA claim are **identical** to those supporting the Sherman Act claims (Emphasis in original).

The Court's ruling on the cross summary judgment motions concerning the Sherman Act claims applies to the FDUPTA claim. Cf. *QSGI, Inv.v. IBM*

WARREN R. TRAZENFELD, P.A.

Global Fin., No. 11-80880-CIV, 2012 WL 1150402 at *4 (S.E. Fla. Mar. 14, 2012) (finding that when “a plaintiff’s FDUPTA claim is based on the same allegations as its antitrust claim, failure to establish a violation of antitrust law is sufficient to conclude the plaintiff has also failed to state a FDUPTA claim”). While the Court is denying Patheon’s and Procaps’ summary judgment motions on Court IV, it is appropriate at this time to pinpoint what claims Procaps cannot pursue at trial under this Court.

Procaps now, in its proposed summary judgment order, says that its FDUPTA claim is also based on allegations that Patheon did not protect Procaps’ confidential information to which Procaps gave Patheon “full access.” FDUPTA, however, requires, at a minimum, that a defendant misuse or unlawfully disclose the confidential information to a third party. *Sensormatic Elecs Corp. v. TAG Co. US, LLC*, 632 F. Supp.2d 1147,1193 (S.D, 2008) (defendant violated FDUPTA where its employees unlawfully disclosed plaintiff’s confidential information) ...

But Procaps’ theory is just that -- a theory. There is no evidence that Patheon disclosed Procaps’ confidential information to a third party. There is also no evidence that Patheon has misused Procaps’ confidential information. Even Procaps concedes that it “cannot pinpoint any specific piece of confidential information that [Patheon has] actually misused.” Therefore, Patheon is entitled to summary judgment on Count IV for all claims beyond the antitrust claim.

Order on Cross Motions for Summary Judgment, pages 43 and 44).

18. On October 29, 2015 the Court granted summary judgment on all claims in Patheon’s favor. The summary judgment was appealed to the Eleventh Circuit Court of Appeals.

19. On December 30, 2016, the Eleventh Circuit Court of Appeals affirmed the court’s grant of summary judgment and deemed Procaps’ case a complete failure holding that: (a) it contradicted “basic hornbook law”; (b) the argument Procaps advocated was “not the law”; (c) “Procaps cites no authority for the assertion” it espoused; (d) “Procaps has wholly failed to establish concerted action in restraint of trade”; (e) the Agreement did not, as Procaps argued, require “Patheon to remove any Banner assets from the market”; (f) “any claim that Banner was Patheon’s co-conspirator is dead in the water”; and (g) Procaps did not even come “close to

WARREN R. TRAZENFELD, P.A.

establishing actual effects.” . *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1077, 1080-82, 1085, 1087 (11th Cir. 2016). It also held that:

[T]his is essentially a breach of contract case -- and so Procaps’ failure to support an antitrust theory is not all that surprising. As the First Circuit has observed, [s]ome antitrust cases are intrinsically hopeless because . . . they merely dress up in antitrust garb what is, at best, a business tort or contract violation. This is such a case.

Id. at 1087 (quotations omitted).

20. In an 80-page Omnibus Order on Defendant’s Motions for Attorney’s Fees and Non-Taxable Costs (“Omnibus Order”) dated October 17, 2017, the Court awarded \$18,494,846 to Patheon in fees and costs based on FDUTPA.

21. At the hearing on the Defendant’s Motions for Attorney’s Fees and Non-Taxable Costs, Procaps’ counsel acknowledged the fee exposure.

Attorney’s Fees and Costs Hearing May 30, 2017 Page 22, lines 9-16

THE COURT: I’m sorry. I thought that I was bound by Florida State Supreme Court law. FDUTPA is a Florida state statute. So don’t I have to follow the Florida Supreme Court precedent on that?

MR. COUTROULIS: Of course, Your Honor. And let me clarify my statement. Yes, you are bound to follow Florida law, but Florida law, Chapter 501 makes it very clear that an award of fees under FDUTPA is discretionary.

22. The Court in the Omnibus Order at page 42 held “... that the antitrust claim, which was embodied in the FDUTPA claim, was either unreasonable or approaching the level of being unreasonable.”

23. The April 24, 2014 warning by the Court described in paragraph 16 was referenced in footnote 6 of the Omnibus Order as follows:

WARREN R. TRAZENFELD, P.A.

At the April 24, 201[4] hearing on the parties' competing [partial] summary judgment motions, the Court advised Procaps that it understood its apportionment argument but then added the following point: "But given the fact that you told me earlier that your FDUTPA claim is in large part based on the antitrust claim, I don't know how you would carve out or segregate out all the work done on the antitrust claim from the FDUTPA." [ECF No. 487, p. 116].

**COUNT I
NEGLIGENCE**

24. Procaps realleges paragraphs 1 through 23 as if set forth herein.

25. Procaps retained the Law Firm to represent it in the filing and prosecution of the Lawsuit.

26. CF owed a duty to Procaps to use the care that a reasonably careful attorney would have used under the circumstances that existed to protect Procaps interests.

27. Under the circumstances that existed, a reasonably careful attorney would have taken steps to avoid the foreseeable risk of an adverse award of attorney's fees and costs.

28. CF breached the aforesaid duty to Procaps by:

A. Asserting claims that were, according to the Eleventh Circuit Court of Appeals "intrinsicly hopeless." As a Colombian company whose executives have limited knowledge of the Unites States legal system, Procaps was entirely dependent on CF's advice and counsel. CF assured Procaps that its claims were meritorious and did not advise Procaps of any downside risk in the form of an adverse judgment. Procaps relied completely on CF's advice, paying the firm several million dollars to assert claims which the Eleventh Circuit Court of Appeals determined should not have been brought in the first place;

B. Filing the FDUTPA claim. It conferred no benefit on Procaps beyond the Federal Antitrust Claims, but exposed Procaps to an adverse award of attorney's fees and costs;

WARREN R. TRAZENFELD, P.A.

C. Continuing to press the FDUTPA claim even after being warned that CF was subjecting Procaps to a massive adverse fee award;

D. Carelessly and negligently failing to properly investigate the facts, circumstances and nature of Procaps legal matter;

E. Carelessly and negligently failing to give Procaps competent legal advice regarding the viability, likelihood of success and adverse consequences of the prosecution of the Lawsuit;

F. Carelessly and negligently counseling Procaps to reject Patheon's settlement offer prior to the filing of the Lawsuit;

G. Bringing the unnecessary FDUTPA claim for which a foreseeable risk existed that Procaps would be exposed to an adverse attorney's fee award;

H. Failing to put forth clearly, accurately, competently, fully and timely in a written communication to Procaps, in language that was clear and understandable to Procaps, the likelihood of success and attendant exposure that existed if a FDUTPA claim was pursued taking into consideration that as a foreign entity Procaps had no knowledge of the United States legal system and the exposure to Patheon's attorney's fees and costs; and

I Failing to inform and consult with Procaps concerning the exposure to attorney's fees under FDUTPA prior to the Lawsuit being filed.

29. As a direct and proximate result of the aforesaid negligence on the part of CF, Procaps has been damaged due to the monies it was required to pay Patheon to settle the Lawsuit.

WHEREFORE, Procaps demands judgment for compensatory damages against CF in excess of Fifteen Million (\$15,000,000) Dollars, for the costs of this action, a jury trial on all

WARREN R. TRAZENFELD, P.A.

issues so triable, pre-judgment interest and for such other and further relief as this Court deems just.

**COUNT II
BREACH OF FIDUCIARY DUTY**

30. Procaps realleges paragraphs 1 through 23 as if set forth herein

31. Procaps reposed trust and confidence in the Law Firm to protect its interests related to the filing and prosecution of the Lawsuit.

32. The trust reposed by Procaps was accepted by the Law Firm who at all material times knew that it had become a fiduciary to protect the legal rights of Procaps with regard to the filing and prosecution of the Lawsuit.

33. In accepting the legal representation of Procaps, and accepting Procaps trust and confidence, CF assumed the duties to competently and fully (a) advise and counsel Procaps as to the alternatives legally available to them, (b) protect Procaps interests (c) avoid foreseeable risk of harm to Procaps and (d) not place the Law Firm's interests ahead of Procaps.

34. As a fiduciary, the Law Firm was required to act on behalf of Procaps so that its rights would be protected while prosecuting and considering the Lawsuit.

35. Under the facts and circumstances that existed, it was not prudent to file a FDUTPA claim because a reasonable likelihood existed that the case against Patheon would result in an unfavorable outcome for Procaps with Procaps being liable for Patheon's legal fees and costs;

36. The conduct of the Law Firm constituted a breach of the fiduciary duty which the Law Firm owed to Procaps in that the Law Firm (i) failed to reasonably, adequately, accurately, timely and competently advise Procaps of the reasonably foreseeable FDUTPA fee exposure (ii) filed the unnecessary FDUTPA claim for which a foreseeable risk existed that Procaps would be

WARREN R. TRAZENFELD, P.A.

exposed to an adverse attorney's fee award (iii) failed to adequately fully and timely inform Procaps of the risk of filing the FDUTPA claim and (iv) advised Procaps to reject the pre-suit offer from Patheon to create large fees for itself to the detriment of Procaps.

37. CF should be required to disgorge the fees it received for pursuing a strategy that was designed to create large fees for itself to the detriment of Procaps. As determined by the Eleventh Circuit Court of Appeals, the dispute was a breach of contract case which required arbitration. Instead of restricting Procaps claim to arbitration, CF urged litigation to reap millions of dollars of unnecessary attorney's fees.

38. As a direct result of the breach of the fiduciary relationship established between the parties, Procaps has suffered damages due to the monies it was required to pay Patheon to settle the Lawsuit and the attorney's fees it paid to CF related to the Lawsuit.

WHEREFORE, Procaps demands judgment for compensatory damages against CF in excess of Fifteen Million (\$15,000,000) Dollars, disgorgement of all fees paid to CF concerning the Lawsuit, for the costs of this action, a jury trial on all issues so triable, pre-judgment interest and for such other and further relief as this Court deems just.

WARREN R. TRAZENFELD, P.A.

By: /s/ Warren R. Trazenfeld

Warren R. Trazenfeld, Esq.

FBN: 317071

2665 South Bayshore Drive, Suite 700

Miami, Florida 33133

Telephone: (305) 860-1100

Facsimile: (305) 858-6123

E-Mail: wrt@trazlaw.com

heather@trazlaw.com

Attorney for Plaintiff

WARREN R. TRAZENFELD, P.A.