

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

PROCAPS S.A.,

Plaintiff,

v.

Case No. 1:12-cv-24356-JG

PATHEON INC.,

Defendant.

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**PROCAPS' SUPPLEMENT TO RESPONSE TO PATHEON'S MOTION
TO COMPEL PLAINTIFF TO PROPOSE ADEQUATE SEARCH TERMS**

Patheon knew that Procaps' response on the adequacy of search terms was due today at 5:00 p.m. [DE 356] Yet, it elected to wait until 5:46 p.m., after Procaps filed its response [DE 370] to create a dispute as to a search parameter that Procaps believed was resolved.

Because Patheon's requests for production sought documents from January, 2010 (*Exhibits 1 and 2*), Procaps agreed with Patheon's proposal that Kroll would use January 1, 2010 as the "begin" date when performing its search. Because there had been no discussion on the proper "end" date, Procaps proposed the following:

Josh...Because the responses to Patheon's discovery requests upon which the request for a forensic analysis are based were returnable almost a year ago (April 7, 2013 and July 19, 2013), we are proposing a temporal search parameter for the Kroll ESI search....Procaps agrees to use the latest returnable date, July 19, 2013.....Please advise.....Thanks....Alan

Exhibit 3. When Procaps did not receive a response on March 10, 2010, it followed up with another email. *Exhibit 4.* At 2:42 p.m., Procaps emailed undersigned counsel agreeing to use July 19, 2013 as a "cut off". *Exhibit 5.* It then requested how the search parameters would be utilized in the overall search, including the search for documents relating to Patheon's Third Request for Production, which was not returnable until today, March 10, 2014. *Id.* Procaps responded that the temporal parameters would not apply to Patheon's Third Request, which sought limited documents, and proposed the following search criteria to implement the date restriction on Patheon's First and Second Requests:

Josh....Thank you for agreeing to the July 19, 2013 date... Regarding the metadata fields to be used, to implement the temporal search parameters, we propose to exclude from production any document with a date occurring before January 1, 2010 and after July 19, 2013 in any one of the following metadata fields identified in the attachment to your email dated March 4, 2013:

- DateCreated...
- DateModified...
- DateSent...
- DateReceived...

Exhibit 6.

Because the July 19, 2013 cut off was agreed upon subject to use in specific metadata fields, Procaps did not include an argument in today's Response to Patheon's Motion regarding the need for temporal search parameters. However, at 5:46 p.m., Patheon retracted its earlier agreement of a July 19, 2013 cut-off date, and requested a search "procedure to locate relevant documents dated after July 19, 2013." *Exhibit 7*. Thus, by requiring "relevant documents dated after July 19, 2013," any purported "cut-off" date in searching for documents responsive to Patheon's first and second discovery requests is illusory.

Procaps served its discovery requests on March 8 and June 19, 2013 (*Exhibits 1 and 2*) and Procaps' responsive documents were due on April 7 and July 19, 2013. The forensic analysis was sought and obtained specifically because of Procaps' alleged deficient search processes at that time. Any ESI search for documents "created" or "modified" after July 19, 2013 would produce documents which Procaps had no obligation to produce. Indeed, if there is no "end" date as a search parameter, Patheon would receive almost **a year's worth of new documents**.

Contrary to Patheon's statement in its email (*Exhibit 7*), a party does not have an obligation to supplement production with new documents that were created after discovery responses were due. Rather, any duty to "supplement" under Rule 26(e) is limited to discovery responses or production that were "incomplete or incorrect" at the time served. Indeed, if the parties had a duty to supplement discovery responses with new documents at any time they are created, then Patheon likewise would have to supplement its production, which it has not.

Procaps agreed to the forensic analysis, and has been candid and open with the Court and Patheon to ensure that all responsive documents that should have been produced, are produced. However, Procaps' willingness and obligation to engage in this process does not mean the Court should permit Patheon to circumvent all discovery rules and procedures in an effort to take

advantage of Procaps, particularly because it is clear that Patheon is not following its own purported rules on the propriety of ESI document searches.

s/ Alan Rosenthal
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CERTIFICATE OF SERVICE

I CERTIFY that on March 10, 2014, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

s/ Alan Rosenthal