

## Salix Wins Jury Verdict In Breach Suit Over Napo Drug

By Kurt Orzeck

*Law360, Los Angeles (February 25, 2014, 5:56 PM ET)* -- A New York state jury decided on Tuesday that Salix Pharmaceuticals Inc. met its contractual obligations in commercializing anti-diarrheal drug crofelemer and thus didn't breach a license agreement with Napo Pharmaceuticals Inc., as the partner's suit alleged, according to the defendant.

After a two-week trial, five of the six jurors rejected Napo's claims of material breach and awarded no damages, with the verdict favoring Salix over claims that it failed to use commercially reasonable efforts to market and sell crofelemer, Salix's attorneys said.

Napo alleged that Salix didn't do everything in its power to develop and commercialize crofelemer for HIV/AIDS patients and other uses such as irritable bowel syndrome, but Salix countered that the two companies' collaboration agreement didn't require it to help Napo bring the drug to market for other uses.

Tony Herman and Benjamin Razi of Covington & Burling LLP, which is representing Salix, said in a Tuesday statement that they were pleased that the jury found the defendant had made substantial efforts and investments to get the drug approved and on the market in the U.S.

"Napo's damages claim and its effort to wrest back control of the drug from Salix were utterly without merit," Herman and Razi said.

Salix President and CEO Carolyn Logan agreed in a separate statement, saying the company continues to believe in the future of crofelemer and looks forward to continuing its commercialization efforts.

"Salix takes its contractual obligations to its partners very seriously," she said.

William S. Ohlemeyer of Boies Schiller & Flexner LLP, which is representing Napo, told Law360 on Tuesday that their client is disappointed with the verdict and "remains committed to doing all that can be done to get this drug to patients who need it."

"There were several claims dismissed by the court on summary judgment before trial that we believe presented issues of fact the jury should have been allowed to decide," Ohlemeyer said, adding that they are reviewing an appellate strategy with Napo.

Salix licensed the rights to the drug, a botanically derived anti-diarrheal medication also known as

Fulyzaq, from Napo in December 2008, according to Salix. Napo brought Salix on board to revive its stalled efforts at developing the patented medication, court papers said.

Salix alleged that it agreed to use commercially reasonable efforts to attempt to secure U.S. Food and Drug Administration approval of crofelemer and, if approved, to bring the drug to market. The FDA eventually approved it for use with certain HIV/AIDS patients in 2012.

Napo claimed that Salix sabotaged its efforts to develop the drug for IBS and other conditions because it wanted to maintain the dominance of its own IBS drug, Rifaximin, according to court filings. Salix's breaches of the collaboration agreement forced Napo to terminate their agreement, Napo said.

Salix countered that its collaboration agreement with Napo didn't require it to seek regulatory approval for crofelemer for other conditions in the U.S. or anywhere in the world, that it clearly devoted its reasonable best efforts to their collaboration, and that Napo's supposed termination of their agreement never happened.

In pretrial rulings, the court granted summary judgment to Salix on Napo's claims relating to Salix's alleged failures to devote enough effort and resources to the process of seeking FDA approval, according to the defendant.

After claims were trimmed from the suit, a trial on the remaining allegations started Feb. 10.

Salix is represented by Tony Herman, Benjamin Razi, Christian Pistilli, Tobias D. Tobler, Christopher Y. L. Yeung, Sarah MacDonald, Chinue Richardson Turner, Jaclyn Resly-Martinez, David Bender, Kimberly McNish and Jason Levy of Covington & Burling LLP.

Napo is represented by William S. Ohlemeyer, Evelyn N. Fruchter and Marilyn C. Kunstler of Boies Schiller & Flexner LLP and Daniel J. Becka of the Law Offices of Daniel J. Becka LLC.

The case is Napo Pharmaceuticals Inc. v. Salix Pharmaceuticals Inc., index number 651214/2011, in the Supreme Court of the State of New York, County of New York, Commercial Division.

--Additional reporting by Eric Hornbeck. Editing by Philip Shea.