

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BARBARA DAVIDS,

Plaintiff,

ORDER
CV06-0431 (ADS)(WDW)

-against-

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant.

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WALL, Magistrate Judge:

Pending before this court is a letter motion by defendant Novartis Pharmaceuticals Corporation (“Defendant”) to compel disclosure under Fed. R. Civ. P. 37. *See* Docket Entry (“DE”) [130]. Plaintiff Barbara Davids (“Plaintiff”) opposes the motion. *See* DE [133]. For the reasons set forth herein, the motion is DENIED.

On November 29, 2011, Defendant served Plaintiff with its Second Set of Requests for Production of Documents, which requested Plaintiff’s log-in information to all of her social-networking websites and a release allowing Defendant to obtain documents directly from those websites so that Defendant could inspect all documents that relate to her claim. *See* DE [131-1]. Defendant claims that this material is relevant to the issue of damages and Plaintiff’s claim that she presently suffers from effects of osteonecrosis of the jaw. DE [131]. In response to the initial discovery request, Plaintiff produced only materials that are available to all Facebook users from her Facebook account claiming that the request was overbroad and a fishing expedition. DE [133]. Defendant seeks to compel Plaintiff’s log-in information.

Defendant argues that Plaintiff’s log-in information is discoverable because statements or pictures on her Facebook page relate directly to her claim of ongoing suffering from

osteonecrosis of the jaw. DE [131]. Defendant's claim is predicated on Ms. Davids' profile picture, in which Defendant claims she is smiling. *Id.* Defendant did not inquire about Ms. Davids' social networking activity at her deposition.

No cases in the Second Circuit or the Eastern District of New York have directly addressed this issue. Defendant's argument rests primarily on the decisions in two cases: one case from the Pennsylvania Court of Pleas, *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (C.P. Franklin Nov. 8, 2011), and one from the New York Supreme Court, *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010). Each is distinguishable from the case at bar.

In *Largent* and *Romano*, publically available content on the individual plaintiffs' public Facebook profiles provided sufficient relevant information for the courts to infer that further discovery was necessary. *See Largent*, 2011 WL 5632688, at *3-4 (finding that "certain posts on Largent's Facebook account contradict her claims of serious and severe injury" and that the plaintiff had posted pictures contradicting her claim of loss of enjoyment to her public Facebook page); *see also Romano*, 907 N.Y.S.2d at 655 ("[I]t is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages, that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence."). While the plaintiffs in *Largent* and *Romano* posted pictures and statements on their public social networking sites contradicting their claims, here, no such evidence exists. Defendant's argument that Plaintiff smiling in her profile picture on Facebook satisfies its burden in this motion to compel is without merit. Even if Plaintiff is smiling in her profile picture, which is not clear to the court, one picture of Plaintiff smiling does not contradict her claim of suffering, nor is it sufficient evidence to warrant a further search into Plaintiff's

account. Thus, unlike in *Largent* and *Romano*, Defendant cannot point to sufficient evidence on Plaintiff's public profile that warrants an inference from this court that Plaintiff's private Facebook pages contain information relevant to her claims.

Furthermore, a New York Appellate division court has held that seeking to compel a plaintiff's Facebook log-in information without a factual predicate is tantamount to a fishing expedition. *See McCann v. Harleysville Ins. Co.*, 910 N.Y.S. 2d 614, 615 (4th Dep't 2010) ("[Defendant] failed to establish a factual predicate with respect to the relevancy of the evidence Indeed, defendant essentially sought permission to conduct a fishing expedition into plaintiff's Facebook account based on the mere hope of finding relevant evidence.") (internal citations omitted). Though the discovery rules are liberal, the court agrees with the *Romano* and *McCann* courts that there must be some factual predicate, like an individual's public postings, from which the court could infer that relevant information exists on the individual's private page. Because it lacks any such evidence, Defendant's motion amounts to a suggestion that a Plaintiff should have to grant free access to all of her social media accounts for no other reason than she filed a claim against Defendant. Thus, Defendant's motion to compel Plaintiff's Facebook log-in information and a release to obtain the requested Facebook documents is DENIED.

Dated: Central Islip, New York
February 24, 2012

SO ORDERED:

/s/ William D. Wall
WILLIAM D. WALL
United States Magistrate Judge