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January 5, 2012

VIA ECF

The Honorable Arthur D. Spatt
United States District Judge
P.O. Box 9014
Central Islip, NY 11722-9014

Re: *Dauids v. Novartis Pharms. Corp.*, No. 2:06-cv-0431-ADS-WDW

Dear Judge Spatt:

Pursuant to Rule 37(a)(1) of the Federal Rules of Civil Procedure, defendant Novartis Pharmaceuticals Corporation (“NPC”) respectfully moves this Court to compel plaintiff Barbara Davids to (a) produce the log-in information to her Facebook account and any other social media websites she may belong to and (b) execute a waiver allowing NPC to directly obtain these materials held in the corresponding databases. NPC’s certification of compliance in accordance with Federal Rule of Civil Procedure Rule 37(a)(1) is attached to this letter motion.

On November 29, 2011, counsel for NPC served plaintiff with its Second Set of Requests for Production of Documents. *See* NPC’s Second Set of Requests for Production of Documents to Barbara Davids (Ex. 1). NPC requested that plaintiff produce log-in information for her social networking sites and other websites to allow NPC to inspect documents specifically material to this case, as well as execute a release allowing NPC to obtain copies of any such documents directly from the websites. *See id.* NPC’s request was made in order to inspect “all documents that reveal, refer to, or relate to Zometa[®], chemotherapy, corticosteroids, hormonal drugs, radiation therapy and/or any other medication or medical treatment, any cancer-related condition for which you were treated, your alleged injury, the cause or potential cause(s) of your alleged injury, this lawsuit (other than legal pleadings), and your past and current physical and mental health.” *Id.* at 4. The materials are relevant to damages and important for NPC’s defense in that Ms. Davids continues to allege that she suffers presently from the effects of her alleged osteonecrosis of the jaws (“ONJ”).



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In response, on December 21, 2011, plaintiff produced copies of materials from her Facebook page that are available *only to the general public*. See Plaintiff's Response to NPC's Second Set of Requests for Production of Documents (Ex. 2). These copies specifically note that plaintiff "only shares some [of her] information publicly," including her pictures. See *id.* at Ex. 1. In light of plaintiff's response, NPC submits this motion in order to obtain the materials described above in NPC's Second Request for Production of Documents.

NPC's request is tailored to relevant materials in this case and is not a "fishing expedition." NPC is entitled to all relevant documents, photos, postings, profiles, messages, or other relevant materials ever posted to these sites, all of which are reasonably calculated to bear on admissible evidence concerning the damages that plaintiff alleges. See, e.g., *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (C.P. Franklin Nov. 8, 2011) (requiring plaintiff alleging monetary damages for damage to her health to turn over Facebook log-in information because "Any posts on Facebook that concern [plaintiff's] health, mental or physical, are discoverable, and any privilege concerning such information is waived.") (Ex. 3); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010) (granting access to plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information) (Ex. 4).

Regardless of Ms. Davids's choice to use restrictive privacy settings for her Facebook account, NPC is entitled to access to the entirety of her web pages, both past and present. See *Largent*, 2011 WL 5632688 ("making a Facebook page 'private' does not shield it from discovery"); *Patterson v. Turner Const. Co.*, 931 N.Y.S.2d 311, 311-12 (N.Y. App. Div. 2011) ("The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access . . . just as relevant matter from a personal diary is discoverable.") (Ex. 5). See also *Romano*, 907 N.Y.S.2d at 656 ("as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy."). Here, plaintiff's Facebook profile picture alone shows her smiling amongst a group of people, admissible evidence that goes directly to her compensatory damages claim. Ms. Davids admits she is hiding other "private" materials that should be discoverable.

NPC also moves the Court to order plaintiff not to take any steps to delete any content or alter any existing information on her Facebook or other social media accounts. *Zimmerman v. Weis Market, Inc.*, 2011 WL 2065410 (C.P. Northumberland May 19, 2011) ("plaintiff shall not take steps to delete or alter existing information and posts on his MySpace or Facebook accounts.") (Ex. 6).



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Sincerely,

A handwritten signature in blue ink that reads "Bruce J. Berger". The signature is fluid and cursive, with a long horizontal stroke at the end.

Bruce J. Berger

cc (via ECF): The Honorable William D. Wall
John Vecchione and other plaintiff's counsel



Certification of Compliance with FRCP 37(a)(1)

On November 29, 2011, counsel for NPC attempted to resolve this dispute via NPC's Second Set of Requests for Production of Documents to Barbara Davids (Ex. 1) with plaintiff's counsel. The parties, however, have failed to reach an agreement on this dispute, necessitating the filing of this motion.