IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KURTIS JEWELL, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	CIVIL ACTION NO. 1:12-CV-0563-AT
v.	:	
AARON'S, INC.	:	
Defendant.	:	

ORDER

This matter is before the Court on Defendant's Motion for Court Approval of Discovery Requests [Doc. 148]. The proposed requests will be served on the randomly selected 87 opt-in plaintiffs in this nationwide collective action. The Court will address the discovery requests in turn below:

I. Defendant's Request for Admissions:

With respect to its newly added defense that several of the plaintiffs' claims are subject to the Motor Carrier Act ("MCA") exemption, Defendant proposes the following Request for Admission ("RFA"):

> **Request for Admission No. 4:** Admit that during your employment by Aaron's within the class period[1], you drove an Aaron's truck.

[1] The "class period" is that period provided in the class notice: June 28, 2009 to October 11, 2012.

The purpose of Defendant's proposed RFA No. 4 is to confirm which opt-in plaintiffs drove an Aaron's truck in the scope of their employment duties, in order to determine which opt-in plaintiffs are potentially subject to the MCA exemption on the basis of a sample opt-in plaintiff having "driver" responsibilities. Defendant acknowledges that RFA No. 4 "will not help this Court or the parties determine which [sample] opt-in plaintiffs could be covered by the MCA exemption because of duties as a driver's helper or loader or which of the approximately 1,700 [] opt-in plaintiffs also may qualify for the MCA exemption." Instead, Defendant expects to develop the additional evidence needed for the MCA exemption, through the depositions of the [sample] opt-in plaintiffs and "possibly additional document requests" to the sample opt-in plaintiffs. As Plaintiff does not oppose Defendant's RFA No. 4, it is approved for service on the sample opt-in plaintiffs.

With respect to Plaintiff's overtime claims, Defendant proposes the following RFAs:

> **Request for Admission No. 1:** Admit that during your employment with Aaron's you were scheduled to work more than 40 hours per week.
>
> **Request for Admission No. 2:** Admit that there were weeks in which you recorded in the timekeeping system and were paid for working more than your scheduled hours for the week.
>
> **Request for Admission No. 3:** Admit that when you recorded in the timekeeping system working more than your scheduled hours for the week, you were not disciplined.

Plaintiffs object to Defendant's RFA Nos. 1 through 3 on the grounds that: (1) these requests ask the sample opt-in plaintiffs to admit or deny facts that will be definitively established by contemporaneous records in Defendant's possession; (2) such "critical questions" should not be answered on the basis of guesswork or offhand recollection; and (3) in order to provide reliable and accurate responses, Plaintiff's counsel will be required to review the documents. Defendant responds that RFA Nos. 1 through 3 are not designed to require Plaintiff's counsel to review documents to answer them but for the sample opt-in plaintiffs to answer them directly based on their personal knowledge. According to Defendant, the types of documents that Plaintiff's counsel claim they need to review before their clients answer these RFAs may not even exist for each sample opt-in plaintiff.

Fed. R. Civ. P. 36 governing Requests for Admission provides:

> Answer. If a matter is not admitted, **the answer must specifically** deny it or **state in detail why the answering party cannot truthfully admit or deny it**. A denial must fairly respond to the substance of the matter; and **when good faith requires that a party qualify an answer** or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The **answering party may assert lack of knowledge or information** as a reason for failing to admit or deny only **if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient** to enable it to admit or deny.

Fed. R. Civ. P. 36(a)(4) (emphasis added). Additionally, pursuant to Fed. R. Civ. P. 36(b), a party may file a motion requesting that an admission be withdrawn or amended "if it would promote the presentation of the merits of the action and if

the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." Fed. R. Civ. P. 36(b). The Court finds that Defendant's Requests for Admission are not improper as they address the key issues in this case. The opt-in plaintiffs may, in good faith, qualify their answers to state that they are based solely on personal knowledge and not a review of necessary documents yet to be produced by Defendant in this litigation.[2] *See Tri-State Hosp. Supply Corp. v. U.S.*, 226 F.R.D. 118, 138 (D.D.C. 2005) (holding that a party could qualify its responses to requests for admissions where requests asked party to admit facts related to a key legal issue in the case rather than "be bullied into an admission it did not want to make"); *Thalheim v. Eberheim*, 124 F.R.D. 34, 35 (D. Conn. 1988) (stating that a party's loss of the "right to contest a matter on the merits is not to be treated lightly"). To the extent the documents conclusively establish these facts one way or another, either party may move to amend the admissions. Additionally, to the extent that the individual Plaintiffs have been unable to provide a fully responsive information admission or denial to the requests, they may supplement the response upon receipt of the documentary information requested.

[2] The Court recognizes that practically this might be a meaningless exercise in the event each of the opt-in plaintiffs is unable to admit or deny based solely on their personal knowledge. The Court urges the parties to negotiate regarding a reasonable timeframe in which the plaintiffs are required to provide responses to these requests that are informed by the documents that should be produced by Defendant in discovery.

II. Defendant's Request for Production No. 4:

As a result of receiving alleged anonymous information that the named Plaintiff Kurtis Jewell often made posts on Facebook during work hours, Defendant crafted a discovery request designed to find out whether and/or how many of the sample opt-in plaintiffs engaged in similar conduct. Defendant's proposed Request for Production ("RPD") No. 4 states as follows:

> **Request for Production No. 4:** All documents, statements, or any activity available that you posted on any internet Web site or Web page, including, but not limited to, Facebook, MySpace, LinkedIn, Twitter, or a blog from 2009 to the present during your working hours at an Aaron's store.

According to Defendant, some of these posts may directly show that the employee was, in fact, taking a lunch break at the time.

Plaintiff objects to the request as unduly burdensome because identifying, obtaining, and producing all statements posted on Facebook or other social media sites from 2009 to the present during work hours of all 87 sample opt-ins would be a "tedious and incredibly time-consuming task." Plaintiff contends that responding to such a request would require Plaintiff's counsel "to assist the opt-ins in making a day-by-day, hour-by-hour search of the websites, comparing the date and time of each posting with the schedule of workdays and hours to determine if they coincided." By way of example, Plaintiff contends that Facebook does not contain a search function, Facebook posts do not contain a timestamp, and such information can only be obtained by "individually interacting with and clicking on each post." As a result, Plaintiff "estimates" that

such a task could require anywhere from 1,323 hours to 26,462 hours depending on the number of daily posts made by each opt-in plaintiff. Plaintiff offered no evidence to support these assertions.

The Court has attempted to verify the accuracy of Plaintiff's assertions and the potential burden imposed by Defendant's request. Facebook employs a feature that allows a user to download her Facebook data, including "timeline" information, "wall" postings, activity log, messages, and photographs directly from the website. Once downloaded, the user may view all posts/activity in a single document in chronological order with a date/time stamp.

Courts have recognized that social networking site ("SNS") content may be subject to discovery under Federal Rule of Civil Procedure 34. *Davenport v. State Farm Mut. Auto. Ins. Co.*, 3:11-CV-632-J-JBT, 2012 WL 555759, at *1 (M.D.Fla. Feb. 21, 2012); *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D.Cal. 2012); *Tompkins v. Detroit Metropolitan Airport*, 2012 WL 179320, at *2 (E.D.Mich. Jan.18, 2012). "Generally, SNS content is neither privileged nor protected by any right of privacy." *Davenport*, 2012 WL 555759 at *1; *Tompkins*, 2012 WL 179320, at *2. However,

> even though certain SNS content may be available for public view, the Federal Rules do not grant a requesting party 'a generalized right to rummage at will through information that [the responding party] has limited from public view' but instead require 'a threshold showing that the requested information is a discovery request must still be reasonably calculated to lead to the discovery of admissible evidence.'

Mailhoit, 285 F.R.D. at 570 (quoting *Tompkins*, 2012 WL 179320, at *2); *see also Davenport*, 2012 WL 555759 at *1; *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, 2007 WL 119149 at *7 (D.Nev. Jan. 9, 2007) ("Ordering ... release of all of the private email messages on Plaintiff's Myspace.com internet account would allow Defendants to cast too wide a net for any information that might be relevant and discoverable."); Fed. R. Civ. P. 26(b)(1). "Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in Plaintiff's [SNS] account[s]." *Davenport*, 2012 WL 555759 at *1 (quoting *Tompkins*, 2012 WL 179320, at *2). Accordingly,

> [a] court can limit discovery if it determines, among other things, that the discovery is: (1) unreasonably cumulative or duplicative; (2) obtainable from another source that is more convenient, less burdensome, or less expensive; or (3) the burden or expense of the proposed discovery outweighs its likely benefit. The district court enjoys broad discretion when resolving discovery disputes, which should be exercised by determining the relevance of discovery requests, assessing oppressiveness, and weighing these factors in deciding whether discovery should be compelled.

Mailhoit, 285 F.R.D. at 571 (quoting *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 558 (D.Conn.2006) (internal citations and quotation marks omitted)).

Defendant claims it is entitled to the production of all documents, statements, or any activity posted by each of the sample opt-ins on any internet

Web site, such as Facebook, Twitter, and MySpace from 2009 to the present during working hours at an Aaron's store. The rationale for this request, is that

> [g]iven the prevalence of social media today and the ability to post on personal social media accounts and blogs from personal smart phones, ***it is likely*** that many of the opt-in plaintiffs have made posts . . . Some of the posts ***may directly show*** that the poster was taking a lunch break at the time. The date and time stamp of other posts ***may indicate*** that the poster spent a chunk of 30 minutes or more during the work day engaged in a series of successive personal posts such that there is a 30 minute period of that opt-in plaintiff's work day that, regardless of whether the opt-in plaintiff actually ate a meal, is appropriately excluded from the compensable time of that opt-in plaintiff."

(Def.'s Mot. at 11) (emphasis added). Such evidence, according to Defendant, would directly refute Plaintiff's claims that employees could not take breaks during the day because they "had too many work pressures." (*Id.*)

Defendant has not made a sufficient predicate showing that the broad nature of material it seeks is reasonably calculated to lead to the discovery of admissible evidence. *E.g., Tompkins*, 278 F.R.D. at 388 (finding that defendant in slip and fall case who sought Facebook postings and photographs failed to establish relevancy of material where the material was not necessarily inconsistent with the plaintiff's injury claims). The exemplar evidence of Kurtis Jewell's Facebook activity does not persuade the Court that the Facebook postings will show, contrary to Plaintiffs' claims, that they were not forced to work through their meal periods. The Court agrees with Plaintiff that whether or not an opt-in plaintiff made a Facebook post during work may have no bearing on whether or not the opt-in plaintiff received a bona fide meal period as defined in

20 C.F.R. § 785.19. (Pl.'s Resp. at 3.) Defendant's argument in support of the discovery of every social media posting by 87 plaintiffs over a four year period is supported by nothing more than its "hope that there might be something of relevance" in these plaintiff's Facebook, Twitter, and/or MySpace accounts. *Davenport*, 2012 WL 555759 at *1; *Tompkins*, 2012 WL 179320, at *2; *Salvato v. Miley*, No. 5:12–CV–635–Oc–10PRL, 2013 WL 2712206, at *2 (M.D. Fla. June 11, 2013) (holding that the mere hope that party's "private text-messages, e-mails, and electronic communication might include an admission against interest, without more, is not a sufficient reason to require [him] to provide Plaintiff open access to his private communications with third parties"); *see also Jackson v. Deen*, CV412-139, 2013 WL 1911445 (S.D.Ga. May 8, 2013) (denying as overbroad defendant employer's request for plaintiff's text messages with other employees because discovery "is not so liberal as to allow a party to roam in the shadow zones of relevancy and to explore a matter which does not presently appear germane on the theory that it might conceivably become so"). Moreover, the burden of requiring all 87 opt-ins to review all of their postings on potentially multiple social networking sites over a four year period and match that information to their work schedules would be an extremely onerous and time-consuming task. Defendant acknowledges that the lunch hour of any sample opt-in is a potentially moving target.

"District courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to

produce." *Tompkins*, 278 F.R.D. at 389 (quoting *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir.2007) (citing Fed. R. Civ. P. 26(b)(2)); *accord Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir.1978) (Rule 26 "does not, however, permit a plaintiff to 'go fishing' and a trial court retains discretion to determine that a discovery request is too broad and oppressive.")). Thus, the Court finds that the burden imposed on a class of plaintiffs to produce such an overly broad swath of documents, while technologically feasible, is far outweighed by the remote relevance of the information. Defendant's Motion for Court Approval of Request for Production No. 4 is therefore **DENIED**.

III. Conclusion

For the foregoing reasons, Defendant's Motion for Approval of Discovery Requests [Doc. 148] is **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED this 19th day of July, 2013.

Amy Totenberg
United States District Judge