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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 DARRICK M. GUY, Individually and on  
12 Behalf of All Similarly Situated  
13 Aggrieved Employees,

14 Plaintiff,

15 v.

16 TOYS R US, A Delaware Corporation  
17 Licensed to do Business in the State of  
18 California,

19 Defendant.  
20  
21

Case No.: 16-CV-2224-AJB-JMA

**ORDER:**

**(1) DENYING PLAINTIFF’S  
MOTION TO STRIKE DOCUMENTS  
PURSUANT TO FRCP 37, (Doc. No.  
30); and**

**(2) DENYING DEFENDANT’S  
MOTION TO STRIKE CLASS  
DEFINITION, (Doc. No. 27)**

22 Presently before the Court are two motions to strike: Defendant Toys R Us (“TRU”)   
23 seeks to strike Plaintiff Darrick M. Guy’s (“Guy”) class definition, (Doc. No. 27), and Guy   
24 seeks to strike documents attached to TRU’s motion for TRU’s purported failure to disclose   
25 pursuant to Federal Rule of Civil Procedure 37. (Doc. No. 30.) Both motions are fully   
26 briefed. Having reviewed the parties’ arguments in light of controlling legal authority, and   
27 pursuant to Local Civil Rule 7.1.d.1, the Court finds the matters suitable for decision   
28 without oral argument. As discussed below, the Court **DENIES** both motions.

1 **BACKGROUND**

2 This wage-and-hour class action seeks to hold TRU liable for failing to pay to its  
3 employees certain benefits. Specifically, Guy alleges TRU maintained a policy of not  
4 paying its employees for earned “COMP” days upon their resignation or termination, thus  
5 resulting in a forfeiture of wages. (Doc. No. 25 ¶ 1.)<sup>1</sup> Guy also alleges TRU required its  
6 employees to use their personal cell phones as their primary point of contact, use for which  
7 employees were not reimbursed. (*Id.*)

8 Guy was employed with TRU at a Babies R Us store as an assistant store manager  
9 from October 29, 2014, through April 2, 2016. (*Id.* ¶ 2.) Upon his resignation, Guy asserts  
10 he had earned two “COMP” days he had not taken and that he was not compensated for  
11 those days. (*Id.*) Guy also asserts he was required to have a personal cell phone as his  
12 primary point of contact, his superior contacted him on his personal cell phone, and he was  
13 not reimbursed for expenses he incurred in maintaining that cell phone, cell phone service,  
14 and data plan. (*Id.*)

15 Guy instituted this lawsuit in San Diego Superior Court on July 22, 2016. (Doc. No.  
16 1 ¶ 1; Doc. No. 1-3 at 5.) Guy seeks to represent a class composed of “[a]ll persons  
17 currently and formerly employed by [TRU] in the State of California commencing from  
18 July 22, 2012 through the date of trial . . . .” (Doc. No. 25 ¶ 6 (emphasis in original).)

19 TRU answered the original complaint on August 31, 2016, and immediately  
20 thereafter removed the action to this Court. (Doc. No. 1 ¶ 3.) As relevant to the instant  
21 motions, TRU asserted the affirmative defense of release by stating that the complaint “is  
22 barred, in whole or in part, to the extent that [Guy] and/or any member(s) of the putative  
23 class previously released the claims asserted in this Action.” (Doc. No. 1-3 at 30 ¶ 7; Doc.  
24 No. 4 ¶ 7.) The parties’ joint discovery plan also referenced the purported release of claims.  
25 Specifically, the plan states TRU’s position that a portion of the putative class previously  
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27 <sup>1</sup> The Court cites to the blue CM/ECF-generated document and page numbers located at  
28 the top of each page.

1 released the claims brought in this case “pursuant to a class settlement in a prior wage and  
2 hour class action filed against TRU entitled *Zia Hicks [v. TRU]*, U.S. District Court, Central  
3 District of California, Case No. 2:13-cv-01302-DSF-JCG, releasing claims prior to March  
4 21, 2014.” (Doc. No. 12 at 6 [hereinafter the *Hicks* action].)

5 TRU filed the instant motion to strike the class definition on March 13, 2017. (Doc.  
6 No. 27.) Guy filed an opposition simultaneously with his motion to strike. (Doc. Nos. 29,  
7 30.) Both motions have been fully briefed. (Doc. Nos. 29, 31, 36, 37.) This order follows.

## 8 DISCUSSION

### 9 *I. Motion to Strike for Failing to Disclose*

10 Guy urges the Court to strike documents attached to TRU’s motion to strike the class  
11 definition. All three exhibits are documents that were filed in the *Hicks* action. (Doc. Nos.  
12 27-3, 27-4, 27-5.) Guy asserts striking the documents is proper because TRU failed to  
13 identify the documents in its initial disclosures, never amended those disclosures after Guy  
14 filed the FAC, never filed a notice identifying the *Hicks* action as being related to this case,  
15 and TRU’s failure to produce the documents in response to Guy’s interrogatories prior to  
16 filing its motion to strike the class definition. (Doc. No. 30-1 at 11–14.)

17 Rule 26(a)(1)<sup>2</sup> requires parties to provide other parties with “a copy—or a  
18 description by category and location—of all documents, electronically stored information,  
19 and tangible things that the disclosing party has in its possession, custody, or control and  
20 may use to support its claims or defenses, unless the use would be solely for  
21 impeachment[.]” Fed. R. Civ. P. 26(a)(1)(A)(ii). If a party fails to make the disclosures  
22 required by Rule 26(a), “the party is not allowed to use that information or witness to  
23 supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
24 justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

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28 <sup>2</sup> All references to “Rule” are to the Federal Rules of Civil Procedure.

1 The party facing exclusion has the burden to prove its failure was substantially  
2 justified or harmless. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1212–13 (9th Cir.  
3 2008); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).  
4 The Ninth Circuit gives wide latitude to a district court’s exercise of discretion to issue  
5 sanctions for failure to disclose. *Yeti by Molly, Ltd.*, 259 F.3d at 1106. However,  
6 “[e]xclusionary sanction[s] based on discovery violations are generally improper absent  
7 undue prejudice to the opposing side.” *Wertz v. Target Corp.*, No. 08-CV-78 GSA, 2009  
8 WL 635655, at \*2 (E.D. Cal. Mar. 10, 2009) (citing *Amersham Pharmacia Biotech, Inc. v.*  
9 *Perkin*, 190 F.R.D. 644, 648–49 (N.D. Cal. 2000)).

10 Having reviewed the parties’ arguments and the docket in this case, the Court finds  
11 exclusion of the *Hicks* documents is not warranted. TRU should have highlighted the  
12 signifiacnce of the *Hicks* action more prominently in the joint discovery plan. However, the  
13 Court finds that inclusion of the action—including the case name, case number, and district  
14 where it occurred—on the joint discovery plan sufficiently provided Guy with notice of  
15 the *Hicks* action such that TRU’s failure to include the action in its initial disclosures is  
16 harmless. This is particularly so given that discovery is still ongoing and TRU’s good faith  
17 belief that its disclosure of the *Hicks* action was sufficient. *See Blair v. CBE Grp., Inc.*, 309  
18 F.R.D. 621, 626 (S.D. Cal. 2015) (noting that some relevant factors to determining whether  
19 exclusion is proper include “the extent to which allowing the evidence would disrupt trial”  
20 and “the nondisclosing party’s explanation for its failure to disclose the evidence” (quoting  
21 *Allen v. Similasan Corp.*, 306 F.R.D. 635, 640 (S.D. Cal. 2015))). Furthermore, given the  
22 Court’s denial of TRU’s Rule 12(f) motion, there is no undue prejudice to Guy that would  
23 justify striking the documents attached to TRU’s motion to strike. *See infra* Discussion  
24 Section II. As such, the Court **DENIES** Guy’s motion.

## 25 ***II. Motion to Strike Class Definition***

26 TRU argues the class definition must be stricken because it is overbroad and  
27 unascertainable. (Doc. No. 27-1 at 2.) Specifically, TRU asserts that some putative class  
28 members have released the claims at issue here in the *Hicks* action, others were not eligible

1 to earn “COMP” days, and it will be impossible to ascertain who used their cell phones  
2 without reasonable reimbursement absent individualized inquiries. (*Id.* at 2–3, 8–11; Doc.  
3 No. 31 at 5–9.)<sup>3</sup>

4 Under Rule 12(f), “[t]he court may strike from a pleading an insufficient defense or  
5 any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Class  
6 allegations can be stricken at the pleading stage under Rule 12(f). *See Kay v. Wells Fargo*  
7 *& Co. N.A.*, Case No. C 07–01351 WHA, 2007 WL 2141292, at \*2 (N.D. Cal. July 24,  
8 2007)). However, courts generally review class allegations and definitions through a  
9 motion for class certification. *Velasquez v. HSBC Fin. Corp.*, No. 08-4592 SC, 2009 WL  
10 112919, at \*4 (N.D. Cal. Jan. 16, 2009); *see Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d  
11 1120, 1125 (N.D. Cal. 2008) (“Motions to strike class allegations are disfavored because a  
12 motion for class certification is a more appropriate vehicle for the arguments . . . .”).  
13 Whether to strike a matter pursuant to Rule 12(f) is within the Court’s discretion. *See Nurse*  
14 *v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000).

15 The Court finds a motion for class certification is the more appropriate vehicle to  
16 consider the class allegations in Guy’s FAC. At this time, TRU has yet to answer the FAC,  
17 discovery is still underway, and a motion for class certification is not presently before the  
18 Court. *Silcox v. State Farm Mut. Auto. Ins. Co.*, No. 14cv2345 AJB (MDD), 2014 WL  
19 7335741, at \*9 (S.D. Cal. Dec. 22, 2014) (Battaglia, J.) (denying without prejudice Rule  
20 12(f) motion to strike class allegation because defendant had not yet answered, no  
21 discovery had been conducted, and no motion for class certification had been filed).

22 However, TRU’s arguments regarding the propriety of the class definition are well  
23 taken. As currently defined, it is easy to see there is some overlap between this case and  
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26 <sup>3</sup> In addition to opposing TRU’s motion, Guy attaches a separate objection to TRU’s  
27 request for judicial notice. (Doc. No. 29-1.) As this Court’s Civil Case Procedures clearly  
28 delineate, “Objections relating to the motion should be set forth in the parties opposition  
or reply. No separate statement of objections will be allowed.” Accordingly, Guy’s  
objection is **OVERRULED**.

1 the *Hicks* action and there may be some difficulty in ascertaining those who were required  
2 to use their cell phones for business purposes but were not reasonably reimbursed. Yet,  
3 while Guy's class definition may require further fine tuning, Guy should be given the  
4 opportunity to make the case for certification in a later motion where such issues can be  
5 evaluated by the Court in their entirety. Accordingly, Guy's motion to strike the class  
6 definition is **DENIED** without prejudice. *Azar v. Gateway Genomics, LLC*, No. 15cv2945  
7 AJB (WVG), 2017 WL 1479184, at \*2 (S.D. Cal. Apr. 25, 2017) (Battaglia, J.) (denying  
8 without prejudice Rule 12(f) motion, finding the motion premature and noting that courts  
9 generally "review class allegations through a motion for class certification"); *Silcox*, 2014  
10 WL 7335741, at \*8–9 (same); *see also Olney v. Progressive Cas. Ins. Co.*, 993 F. Supp. 2d  
11 1220, 1228 (S.D. Cal. 2014) ("Defendant asks the Court to strike Plaintiff's class  
12 allegations because the class definition is overbroad and unascertainable and because  
13 Plaintiff cannot cure this deficiency by amendment. The Court agrees with Plaintiff that  
14 Defendant's request amounts to a premature effort to defeat class certification.").

#### 15 CONCLUSION

16 Based on the foregoing, the Court **DENIES** TRU's motion to strike the class  
17 definition, (Doc. No. 27), and **DENIES** Guy's motion to strike TRU's exhibits pursuant to  
18 Rule 37, (Doc. No. 30).

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20 **IT IS SO ORDERED.**

21 Dated: May 22, 2017

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23 Hon. Anthony J. Battaglia  
24 United States District Judge  
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