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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 JEFFREY TAYLOR, *on behalf of himself*
12 *and other similarly-situated employees,*

13 Plaintiff,

14 v.

15 POPULUS GROUP, LLC, et al.,

16 Defendants.

Case No. 20-cv-0473-BAS-DEB

**ORDER DENYING DEFENDANT'S
MOTION TO STRIKE (ECF No. 11)**

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18 In this proposed employment class action, Jeffrey Taylor sues his former employer,
19 Populus Group, LLC, for wage and hour claims under the California Labor Code and the
20 Private Attorneys General Act of 2004 (PAGA), Cal. Lab. Code § 2698 *et seq.* The Court
21 is asked to strike portions of Mr. Taylor's Second Amended Complaint under Rule 12(f)
22 of the Federal Rules of Civil Procedure. The Court finds the motion suitable for
23 determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P.
24 78(b); Civ. L.R. 7.1(d)(1). Because Populus has not shown that the facts of this case
25 overcome the general presumption against granting Rule 12(f) motions, the Court denies
26 the motion.

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1 **I. BACKGROUND¹**

2 Mr. Taylor worked for Populus as a driver and a mechanic from March 18, 2018,
3 until July 23, 2019, in San Diego County, California. (Second Am. Compl.² (“SAC”) ¶ 5,
4 ECF No. 7.) He was paid approximately \$15.00 per hour as an hourly non-exempt
5 employee. (*Id.*)

6 Populus required Mr. Taylor and other hourly employees to arrive early for work.
7 (SAC ¶ 6.) Its discipline policy allowed firing employees for being late. (*Id.*) Mr. Taylor
8 clocked in 5–15 minutes before his scheduled shift start time, along with other similarly
9 situated employees. (*Id.*) Under Populus’s rounding system, Mr. Taylor’s paid time did
10 not begin until the scheduled shift start time. (*Id.*) Populus did not allow Mr. Taylor and
11 others to clock out after the scheduled shift end time. (*Id.*) As a result, Populus did not
12 pay Mr. Taylor for the time between when he clocked in and when his scheduled shifts
13 began. (*Id.*) Populus did not put Mr. Taylor on notice that he would only be paid for the
14 scheduled shift time even if he clocked in early. (*Id.*)

15 Mr. Taylor’s overtime rate was approximately \$22.50 per hour. (SAC ¶ 6.)
16 Applying that overtime rate, Mr. Taylor estimates that he was underpaid between \$2.25 to
17 \$5.63 per shift, or \$11.25 to \$28.12 per five-day workweek. (*Id.*) He estimates that
18 Populus underpaid him \$720 to \$1,800 during his fifteen-month employment. (*Id.*)

19 Mr. Taylor sued Populus on December 20, 2019, in the Superior Court of the State
20 of California for the County of San Diego. (ECF No. 1-2 at 3.) Populus removed the case
21 to federal court on March 12, 2020. (ECF No. 1.) Mr. Taylor filed the SAC on May 8,
22 2020, which raises nine causes of action: (1) failure to pay minimum and/or regular wages
23 for all “hours worked” based on a non-neutral rounding policy; (2) failure to pay overtime
24 wages based on a non-neutral policy; (3) failure to provide accurate itemized wage
25 statements showing all “hours worked”; (4) failure to timely pay all wage owed at
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27 ¹ All facts are taken from the Second Amended Complaint (ECF No. 7).

28 ² The record reflects that Mr. Taylor amended his complaint once, while the case was pending in
state court. (ECF No. 1-3.)

1 terminations or separation from employment; (5) unfair competition and restitution for
2 unpaid wages; (6) PAGA civil penalties for failure to pay all minimum, regular, and
3 overtime wages for all hours worked; (7) PAGA civil penalties for failure to provide
4 accurate wage statements; (8) PAGA civil penalties for “timely pay wages due during and
5 upon termination of employment”; and (9) other PAGA civil penalties. (SAC ¶¶ 46–126.)

6 Populus filed the present Rule 12(f) motion on June 5, 2020. (ECF No. 11.)

7 **II. LEGAL STANDARD**

8 Under Rule 12(f) of the Federal Rules of Civil Procedure, “[t]he court may strike
9 from a pleading an insufficient defense or any redundant, immaterial, impertinent, or
10 scandalous matter.” Fed. R. Civ. P. 12(f). Under the plain meaning of Rule 12(f), the court
11 may only strike matters that are “(1) an insufficient defense; (2) redundant; (3) immaterial;
12 (4) impertinent; or (5) scandalous.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970,
13 973–74 (9th Cir. 2010). “An ‘immaterial’ matter has no essential or important relationship
14 to the claim for relief or defenses pleaded.” *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d
15 1174, 1182 (S.D. Cal. 2015). “An ‘impertinent’ allegation is neither necessary nor relevant
16 to the issues involved in the action.” *Id.*

17 Rule 12(f) is “designed for excision of material from a pleading, not for dismissal
18 of claims in their entirety.” *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) (citing 5A
19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1380, at 644
20 (1990)). “Motions to strike are ‘generally disfavored because they are often used as
21 delaying tactics and because of the limited importance of pleadings in federal practice.’”
22 *Cortina*, 94 F. Supp. 3d at 1182 (citing *Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1180
23 (N.D. Cal. 2001)). Rule 12(f) motions that are “really an attempt to have certain portions
24 of [the plaintiff’s] complaint dismissed or to obtain summary judgment against [the
25 plaintiff] as to those portions of the suit” are better suited for Rule 12(b)(6) or Rule 56
26 motions. *Whittlestone*, 618 F.3d at 974.

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1 **III. ANALYSIS**

2 Populus seeks to strike the portions of Mr. Taylor’s SAC that pertain to the following
3 matters: (1) allegations that Populus failed to accurately state gross and net wages in the
4 wage statements; (2) requests for damages under PAGA’s subsequent violation provisions;
5 and (3) unascertainable or “fail-safe” definitions of the proposed subclasses. For the
6 reasons stated below, Populus’s motion is denied.

7 **A. Wage Statement Claim**

8 Populus asks the Court to strike Mr. Taylor’s allegation that his wage statements did
9 not reflect accurate gross wages “earned” and net wages “earned,” in violation of Section
10 226(a) of the California Labor Code governing wage statements. In relevant parts of the
11 SAC, Mr. Taylor alleges: “Defendants failed to provide wage statements accurately
12 reflecting all of the required information, including but not limited to gross wages earned,
13 net wages earned.” (SAC ¶ 70.) Populus argues that a wage statement claim must be
14 supported by allegations of injury. According to Populus, the injury may be presumed
15 where the allegation is about wages “paid,” but not where the allegation is about wages
16 “earned.”

17 Mr. Taylor’s allegation that his wage statements did not accurately reflect earned
18 wages is not redundant, scandalous, or pertains to an insufficient defense. Assuming
19 without deciding that the allegation is immaterial or impertinent for purposes of a Rule
20 12(f) analysis, the Court may not “exercise its discretion under Rule 12(f) to strike a
21 pleading unless the matters sought to be omitted have no possible relationship to the
22 controversy, may confuse the issues, or otherwise prejudice a party.” *Cortina*, 94 F. Supp.
23 3d at 1182. Whether Mr. Taylor’s wage statements correctly stated wages earned does not
24 fall under that rubric. The gist of Populus’s argument is that Mr. Taylor cannot state a
25 Section 226(a) claim based on the facts alleged in the SAC. That argument is better suited
26 for a Rule 12(b)(6) motion. *See Whittlestone*, 618 F.3d at 974. Therefore, the Court denies
27 Populus’s Rule 12(f) motion as to Mr. Taylor’s wage statement claim.

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1 **B. PAGA Civil Penalties**

2 Populus requests the Court to strike Mr. Taylor’s requests for civil penalties under
3 the “subsequent violation” provisions of PAGA. *See* Cal. Lab. Code §§ 210(a), 226.3, 558,
4 1197.1, 2699(f)(2). Populus argues that the prerequisite condition for the increased
5 penalty—finding of an initial violation by a court or the California Labor Commissioner—
6 is not satisfied by the facts alleged in the SAC.

7 Assuming without deciding that Populus is right that the facts of this case do not
8 support enhanced civil penalties under PAGA, a Rule 12(f) motion is not a proper vehicle
9 to attack a plaintiff’s request for damages. Mr. Taylor’s request for civil penalties is not
10 redundant, immaterial, impertinent, or scandalous, or pertain to an insufficient defense.
11 *See Whittlestone*, 618 F.3d at 974 (holding that a claim for damages cannot be impertinent
12 or immaterial because whether the damages are recoverable “relates directly to the
13 plaintiff’s underlying claim for relief” and “pertains directly to the harm being alleged”).
14 “Rule 12(f) does not authorize district courts to strike claims for damages on the ground
15 that such claims are precluded as a matter of law.” *Whittlestone*, 618 F.3d at 974–75. The
16 Court denies Populus’s Rule 12(f) motion as to Mr. Taylor’s request for PAGA civil
17 penalties.

18 **C. Class Definition**

19 Populus argues that the SAC’s class allegations defining the proposed sub classes
20 should be excised under Rule 12(f) because they would make the class unascertainable or
21 “fail-safe.”³ Specifically, Populus seeks to strike the portions of the class definitions on
22 whether the class member was “compensated for all hours worked,” “provided accurate
23 itemized wage statements,” “timely paid all wages due upon termination,” or “owed
24 restitution as a result of Defendant’s rounding timekeeping policy.” (SAC ¶¶ 33–37.)
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27 ³ A “fail-safe” class refers to a class that is “so narrowly defined as to ‘preclude[] membership
28 unless the liability of the defendant is established.’” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138
n.7 (9th Cir. 2016) (citing *Kamar v. RadioShack Corp.*, 375 F. App’x 734, 736 (9th Cir. 2010)).

1 Courts rarely grant motions to strike class allegations at the pleading stage before
2 discovery and in advance of a motion for class certification because the “rigorous analysis”
3 required of class certification requires development of the record. *See Perkins v. LinkedIn*
4 *Corp.*, 53 F. Supp. 3d 1190, 1221 (N.D. Cal. 2014) (citing *Amgen Inc. v. Connecticut Ret.*
5 *Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013)). In general, a motion for class
6 certification is a more appropriate vehicle that enables the court to make a fully informed
7 decision on whether the class is certifiable. *Compare Lyons v. Coxcom, Inc.*, 718 F. Supp.
8 2d 1232, 1235–36 (S.D. Cal. 2009) (denying a motion to strike class allegations under Rule
9 12(f) where factual and legal issues remained to be determined) *with Perkins*, 53 F. Supp.
10 3d at 1221 (collecting cases that have granted Rule 12(f) motions at the pleading stage to
11 strike class allegations where a class is defined too broadly).


12 After reviewing the parties’ pleadings, the Court is not persuaded that Populus
13 presents a concern that needs to be addressed before class certification. This is especially
14 so, given the developing law on ascertainability and fail-safe classes. *See Briseno v.*
15 *ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.3 (9th Cir. 2017) (holding that what makes a
16 class ascertainable is not established in the Ninth Circuit); *In re AutoZone, Inc., Wage &*
17 *Hour Employment Practices Litig.*, 289 F.R.D. 526, 546 (N.D. Cal. 2012), *aff’d*, 789 F.
18 App’x 9 (9th Cir. 2019) (declining to deny certification of a fail-safe class, in part, because
19 “it is not clear that the Ninth Circuit forbids fail-safe classes”). Legal issues remain to be
20 determined. The Court thus denies Populus’s motion to strike Mr. Taylor’s class
21 allegations.

22 **IV. CONCLUSION**

23 Defendant’s Rule 12(f) motion is **DENIED**.

24 **IT IS SO ORDERED.**

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26 **DATED: October 19, 2020**

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28 **Hon. Cynthia Bashant**
United States District Judge