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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Monica Abboud,

10 Plaintiff,

11 v.

12 Circle K Stores Incorporated,

13 Defendant.
14

No. CV-23-01683-PHX-DWL

ORDER

15 In this putative class action, Monica Abboud (“Plaintiff”) alleges that Circle K
16 Stores Inc. (“Defendant”) violated the Telephone Consumer Protection Act (“TCPA”) by
17 sending several text messages to her without her consent after she registered her phone
18 number on the National Do Not Call Registry (“DNC Registry”). Now pending before the
19 Court is Defendant’s Rule 12(b)(6) motion to dismiss, or in the alternative, Rule 12(f)
20 motion to strike Plaintiff’s class allegations. (Doc. 13.) For the following reasons, the
21 motion is denied.

22 **BACKGROUND**

23 I. Relevant Factual Background

24 The following facts, presumed true, are derived from Plaintiff’s operative pleading,
25 the First Amended Complaint (“FAC”). (Doc. 11.)

26 Defendant “operates convenience stores that sell a wide variety of products, with
27 locations throughout the world” and engages in the “sole business [of] the sale of goods at
28 its convenience stores.” (*Id.* ¶¶ 6-7, 30.)

1 In February 2020, Plaintiff registered her phone number on the DNC Registry. (*Id.*
2 ¶ 20.)

3 On August 2, 2023, Defendant sent two text messages to that number. (*Id.* ¶ 21.)
4 The first stated: “Circle K: Reply ‘YES’ to Sign Up to receive special offers via txt
5 message. Msg & Data rates may apply. Txt ‘STOP’ to Opt-Out. [phone number
6 redacted].” (*Id.* ¶ 22.) The second stated: “Circle K: Reply ‘YES’ to get offers via txt. Go
7 to myck.site/k2KmEU, Age-verify 18/21+ offers. Msg & Data rates may apply. Txt
8 ‘STOP’ to Opt-Out. [phone number redacted].” (*Id.*)

9 On September 11, 2023, Defendant sent Plaintiff another text message. (*Id.* ¶ 21.)
10 This message, similar to the second text message on August 2, 2023, stated: “Circle K:
11 Reply ‘YES’ to get offers via txt. Go to myck.site/Qb9PtF, Age-verify 18/21+ offers. Msg
12 & Data rates may apply. Txt ‘STOP’ to Opt-Out. [phone number redacted].” (*Id.* ¶ 22.)

13 Clicking the link in the second and third text messages “takes the recipient to
14 Defendant’s website, <https://www.circlek.com/>.” (*Id.* ¶ 26.) This “website contains a Text
15 Messaging Program Terms and Conditions page that states that the Defendant sends
16 ‘MARKETING TEXT MESSAGES VIA AUTOMATED TECHNOLOGY.’” (*Id.* ¶ 27.)

17 Plaintiff neither had a “relationship with Defendant” nor “provided her telephone
18 number to Defendant or otherwise consented to advertisements or text messages from
19 Defendant.” (*Id.* ¶¶ 23-24.)

20 II. Procedural History

21 On August 17, 2023, Plaintiff initiated this action by filing a complaint. (Doc. 1.)

22 On October 9, 2023, Defendant filed a motion to dismiss the complaint for failure
23 to state a claim, or in the alternative, to strike the class allegations. (Doc. 9.)

24 On October 20, 2023, Plaintiff filed the FAC. (Doc. 11.) In the FAC, Plaintiff
25 asserts a single claim under the TCPA. (*Id.*) The FAC is styled as a “Class Action
26 Complaint” and alleges that Plaintiff is pursuing claims “individually and on behalf of a
27 class of persons and entities similarly situated.” (*Id.* at 1.) To that end, in the “Class Action
28 Statement” section of the FAC, Plaintiff alleges that she is bringing claims on behalf of a

1 “National Do Not Call Registry Class” (the “DNC Class”), which consists of:

2 All persons throughout the United States (1) who did not provide their
3 telephone number to Circle K Stores Inc., (2) to whom Circle K Stores Inc.
4 delivered, or caused to be delivered, more than one text message within a 12-
5 month period, which read, in part, either “Circle K: Reply YES to Sign Up
6 to receive special offers via txt message” or “Circle K: Reply YES to get
7 offers via txt”, (3) where the person’s residential or cellular telephone
8 number had been registered with the National Do Not Call Registry for at
9 least thirty days before Circle K Stores Inc. delivered, or caused to be
delivered, at least two of the text messages within the 12-month period,
(4) within four years preceding the date of this complaint and through the
date of class certification.

10 (*Id.* ¶ 33, internal quotation marks omitted.)

11 The FAC includes allegations that Plaintiff is a proper class representative (*id.* ¶ 34),
12 that “[t]here are numerous questions of law and fact common to Plaintiff and to the
13 proposed [DNC] Class” (*id.* ¶¶ 43-44, 46); and that Plaintiff’s counsel is experienced in
14 handling class actions (*id.* ¶ 45). The FAC also provides “Plaintiff does not know the exact
15 number of members in the [DNC] Class, but Plaintiff reasonably believes [DNC] Class
16 members number, at minimum, in the hundreds.” (*Id.* ¶ 38.)

17 On October 25, 2023, the Court denied the motion to dismiss the original complaint
18 as moot because Plaintiff had filed the FAC. (Doc. 12.)

19 On November 3, 2023, Defendant filed the pending motion to dismiss the FAC for
20 failure to state a claim, or in the alternative, to strike the class allegations. (Doc. 13.)

21 On November 10, 2023, Plaintiff filed a response. (Doc. 14.)

22 On November 17, 2023, Defendant filed a reply. (Doc. 15.)¹

23 DISCUSSION

24 I. Article III Standing

25 Defendant’s motion raises a threshold issue the Court must address before turning
26 to the merits—whether Plaintiff has Article III standing to bring this suit. *Sinochem Int’l*

27
28 ¹ Defendant’s request for oral argument is denied because the issues are fully briefed
and oral argument will not aid the decisional process. *See* LRCiv 7.2(f).

1 *Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (“[A] federal court
 2 generally may not rule on the merits of a case without first determining that it has
 3 jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties
 4 (personal jurisdiction).”)

5 Defendant argues that “[b]ecause Plaintiff’s number was entered on Circle K’s
 6 system and provided in order to receive such messages, Plaintiff did not suffer an injury in
 7 fact that is fairly traceable to any conduct by Circle K violating the TCPA.” (Doc. 13 at 6
 8 n.3.)² To the extent this argument seeks to challenge the existence of Article III standing,³
 9 it is unavailing—as the Ninth Circuit has explained, a TCPA defendant’s contention that
 10 the plaintiff consented to the receipt of the challenged communication is a merits-based
 11 defense, not an obstacle to Article III standing. *Romero v. Dep’t Stores Nat’l Bank*, 725 F.
 12 App’x 537, 539 (9th Cir. 2018) (“Disputes regarding whether Romero gave prior express
 13 consent to receive calls from the Banks or revoked that consent go to the merits of her
 14 TCPA claim, not to her standing.”); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d
 15 1037, 1043-44 (9th Cir. 2017) (concluding that “Van Patten alleged a concrete injury in
 16 fact sufficient to confer Article III standing” even though the Ninth Circuit later concluded
 17 that he “consented to receiving the text messages”).

18 II. Motion To Dismiss

19 A. **Legal Standard**

20 “[T]o survive a motion to dismiss [under Rule 12(b)(6)], a party must allege
 21 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its
 22 face.” *In re Fitness Holdings Int’l, Inc.*, 714 F.3d 1141, 1144 (9th Cir. 2013) (cleaned up).
 23 “A claim has facial plausibility when the plaintiff pleads factual content that allows the

24 ² This argument arises in the context of Defendant’s motion to strike class allegations:
 25 “Plaintiff cannot maintain a claim under the TCPA and cannot possibly have standing to
 26 represent a class of people who did not enter their numbers into Circle K’s system, as
 required by the proposed class definition.” (*Id.*)

27 ³ To the extent this argument is meant to challenge Plaintiff’s statutory standing, it is
 28 addressed in Part II.D.2 below. *Olney v. Job.com, Inc.*, 2013 WL 5476813, *1 (E.D. Cal.
 2013) (“[T]he argument that Plaintiff lacks statutory standing must be evaluated as a
 motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure
 12(b)(6) . . .”).

1 court to draw the reasonable inference that the defendant is liable for the misconduct
2 alleged.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “[A]ll well-pleaded
3 allegations of material fact in the complaint are accepted as true and are construed in the
4 light most favorable to the non-moving party.” *Id.* at 1144-45 (citation omitted). However,
5 the court need not accept legal conclusions couched as factual allegations. *Iqbal*, 556 U.S.
6 at 679-80. Moreover, “[t]hreadbare recitals of the elements of a cause of action, supported
7 by mere conclusory statements, do not suffice.” *Id.* at 678. The court also may dismiss
8 due to “a lack of a cognizable legal theory.” *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065
9 (9th Cir. 2015) (citation omitted).

10 B. Judicial Notice/Incorporation By Reference

11 In its motion, Defendant asks the Court to “take judicial notice of Circle K’s sign-
12 up screen and Terms and Conditions, copies of which are attached to the Declaration of
13 Victorino Perrine.” (Doc. 13 at 3 n.2.) Plaintiff, in turn, seems to agree that the Court “can
14 take judicial notice of Defendant’s website.” (Doc. 14 at 8 n.4.)

15 “Generally, the scope of review on a motion to dismiss for failure to state a claim is
16 limited to the contents of the complaint.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
17 2006). “A court may, however, consider certain materials—documents attached to the
18 complaint, documents incorporated by reference in the complaint, or matters of judicial
19 notice—without converting the motion to dismiss into a motion for summary judgment.”
20 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). For materials incorporated by
21 reference, “[a] court may consider evidence on which the complaint ‘necessarily relies’ if:
22 (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim;
23 and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.”
24 *Marder*, 450 F.3d at 448.

25 The Court agrees with both sides that the website materials proffered by Defendant
26 are properly before the Court at this juncture.⁴ Plaintiff’s theory of liability is that

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28 ⁴ Although both sides seem to view judicial notice as the doctrine authorizing
consideration of these website materials, in the Court’s view the more applicable doctrine
is incorporation by reference.

1 Defendant’s text messages were telephone solicitations because “the text messages here
2 encouraged [her] to sign up to receive ‘offers’ and ‘special offers’” and “included a link to
3 the front page of Defendant’s website where [she] could, among other things, locate
4 Defendant’s stores and learn about its products.” (Doc. 14 at 8, citations omitted; Doc. 11
5 ¶ 26 [link to Defendant’s website]; *id.* ¶ 27 n.1 [link to the terms and conditions on
6 Defendant’s website].)

7 C. The Parties’ Arguments

8 Defendant argues that the messages Plaintiff received are not “telephone
9 solicitations” within the meaning of the TCPA because “these ‘opt in’ confirmation
10 messages do not offer the purchase or rental of, or investment in, property, goods, or
11 services.” (Doc. 13 at 2.) In reliance on *An Phan v. Agoda Co. Pte. Ltd.*, 351 F. Supp. 3d
12 1257 (N.D. Cal. 2018), *aff’d sub nom. Phan v. Agoda Co. Pte. Ltd.*, 798 F. App’x 157 (9th
13 Cir. 2020), *Rotberg v. Jos. A. Bank Clothiers, Inc.*, 345 F. Supp. 3d 466 (S.D.N.Y. 2018),
14 *Daniel v. Five Stars Loyalty, Inc.*, 2015 WL 7454260 (N.D. Cal. 2015), and *Aderhold v.*
15 *Car2go N.A., LLC*, 2014 WL 794802 (W.D. Wash. 2014), *aff’d*, 668 F. App’x 795 (9th
16 Cir. 2016), Defendant argues that “the messages here are clearly *confirmation* messages
17 that follow from the entry of Plaintiff’s phone number into Circle K’s system during a
18 register transaction, which includes an express consent to receive messages.” (*Id.* at 5,
19 emphasis in original.)⁵ Defendant adds that “[t]his is particularly true where [Defendant]
20 has confirmed that Plaintiff’s phone number was entered on August 2, 2023.” (*Id.*)

21 Plaintiff responds that the FAC “adequately alleges that Defendant’s text messages
22 are telephone solicitations.” (Doc. 14 at 3-5.) According to Plaintiff, it is irrelevant that
23 the text messages did not *explicitly* mention a good, product, or service—in Plaintiff’s
24 view, Defendant’s intent to use the messages for marketing purposes can be inferred from
25 the fact that “Defendant engages in no business other than the sale of goods through its
26 convenience stores,” which shows that Defendant’s intent in “encouraging [her] to opt-in

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28 ⁵ Defendant describes the September 11, 2023 message as “confirm[ing] that Circle
K had removed [Plaintiff’s] number from its system, in part because [she] did not respond
‘STOP’ to the first message.” (*Id.* at 2 n.1.)

1 to receive ‘offers’ and ‘special offers’ . . . [was] to entice her to purchase goods from
2 Defendant.” (*Id.* at 4-6.) Plaintiff next argues that Defendant’s reliance on *Rotberg*, *An*
3 *Phan*, *Daniel*, and *Aderhold* is “misplaced” because unlike those cases where “it was
4 undisputed that the plaintiff provided his telephone number to the defendant as part of the
5 transaction that led to the text messages at issue,” she “never provided her telephone
6 number to Defendant and never consented to receive any text messages from Defendant,
7 whether telemarketing or otherwise.” (*Id.* at 6-7.) Plaintiff adds: “[T]hat some unidentified
8 person may have provided [her] telephone number to Defendant does nothing to further the
9 analysis here as only [she] (or someone she authorized) can provide consent for Defendant
10 to send text messages to her telephone number.” (*Id.* at 7 n.3.) Plaintiff also contends that
11 *Rotberg* is distinguishable because “unlike in *Rotberg*, where the lone text message simply
12 contained a link to terms and conditions, the text messages here encouraged [her] to sign
13 up to receive ‘offers’ and ‘special offers.’” (*Id.* at 8, citations omitted.)

14 In reply, Defendant argues that “Plaintiff does not actually dispute that Circle K
15 utilizes opt-in confirmation messages, which are sent only after a customer has already
16 provided their prior express consent to receive messages from Circle K. Instead, Plaintiff
17 now contends that she did not individually enter her number during a point-of-sale
18 transaction at Circle K. As such, Plaintiff now argues that the ‘opt in’ messages she
19 received from Circle K were not confirmation messages . . . but were instead unprompted
20 solicitations encouraging [her] to purchase Circle K’s goods.” (Doc. 15 at 2-3.) Defendant
21 contends that “[e]ven if it were true that someone else mistakenly (or intentionally) entered
22 Plaintiff’s phone number during a Circle K transaction, that does not inextricably transform
23 Circle K’s automatic opt-in confirmation messages into unprompted solicitations to
24 Plaintiff. . . . For this reason, Plaintiff’s attempts to distinguish *An Phan* and *Rotberg* are
25 misplaced.” (*Id.* at 3.) Defendant concludes that “[t]he fact remains undisputed that
26 someone entered her number, triggering the transmission of the subsequent opt-in
27 confirmation messages, and resulting in (i) the provision of prior express consent and
28 (ii) establishing a business relationship between the individual who provided the number

1 during the purchase and Circle K. Both consequences preclude the messages from being
2 considered ‘telephone solicitations’ under the TCPA.” (*Id.*)

3 **D. Analysis**

4 The TCPA and its implementing regulations prohibit initiating “more than one
5 telephone [solicitation] within any 12-month period” to “[a] residential telephone
6 subscriber who has registered his or her telephone number on the national do-not-call
7 registry of persons who do not wish to receive telephone solicitations that is maintained by
8 the Federal Government.” 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2). “Telephone
9 solicitation” is defined as “the initiation of a telephone call or message for the purpose of
10 encouraging the purchase or rental of, or investment in, property, goods, or services, which
11 is transmitted to any person, but such term does not include a call or message (A) to any
12 person with that person’s prior express invitation or permission, (B) to any person with
13 whom the caller has an established business relationship, or (C) by a tax exempt nonprofit
14 organization.” 47 U.S.C. § 227(a)(4). A telephone solicitation can be a call or text
15 message. 47 C.F.R. § 64.1200(e) (“The rules set forth in paragraph (c) and (d) of this
16 section are applicable to any person or entity making telephone solicitations or
17 telemarketing calls or text messages to wireless telephone numbers.”). *See also Hall v.*
18 *Smosh Dot Com, Inc.*, 72 F.4th 983, 988 (9th Cir. 2023) (“We have previously held that
19 the receipt of ‘unsolicited telemarketing phone calls or text messages’ in violation of the
20 TCPA is ‘a concrete injury in fact sufficient to confer Article III standing.’”) (cleaned up).
21 In a nutshell, Defendant argues that Plaintiff’s claim should be dismissed because (1) the
22 text messages at issue were not solicitations, and (2) Plaintiff consented to receiving the
23 messages.

24 **1. Telephone Solicitations**

25 The purpose of a text or call determines whether it qualifies as a telephone
26 solicitation, and courts use “a measure of common sense” to determine its purpose.
27 *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012). *See also Whittaker v.*
28 *Freeway Ins. Servs. Am., LLC*, 2023 WL 167040, *2 (D. Ariz. 2023) (applying *Chesbro* to

1 a claim under 47 U.S.C. § 227(c)(5)). As courts have recognized, “[t]ext messages
2 constitute a telephone solicitation even if the text message ‘serves a dual purpose—that is,
3 includes both advertising/telemarketing and merely informational or transactional
4 communications.’” *Vallianos v. Schultz*, 2019 WL 4980649, *3 (W.D. Wash. 2019)
5 (cleaned up). *See also Physicians Healthsource, Inc. v. Advanced Data Sys. Int’l, LLC*,
6 2020 WL 2764826, *8 (D.N.J. 2020) (“[H]aving informational content does not
7 conclusively prevent a fax from being classified as an advertisement.”). “[T]elephone
8 solicitation’ encompasses calls ‘referring a consumer to another entity if the purpose of the
9 referral is to encourage a purchase, even if a purchase from another entity or a future
10 purchase.’ Thus, to engage in ‘telephone solicitation,’ a caller does not need to directly
11 offer property or services for sale, but may merely encourage the future purchase of
12 property or services.” *Faucett v. Move, Inc.*, 2023 WL 2563071, *4 (C.D. Cal. 2023)
13 (cleaned up). *See also Chesbro*, 705 F.3d at 918 (“Neither the statute nor the regulations
14 require an explicit mention of a good, product, or service where the implication is clear
15 from the context.”); *Orea v. Nielsen Audio, Inc.*, 2015 WL 1885936, *3 (N.D. Cal. 2015)
16 (“A call that encourages future purchasing activity may be a telephone solicitation, even if
17 the sales pitch is not explicitly contained in the call itself.”).

18 The FAC alleges that the three text messages from Defendant sought to “market
19 offers about[] its goods and services” and “were sent to Plaintiff for the express purposes
20 of encouraging the purchase of its property, goods, or services.” (Doc. 11 ¶¶ 25, 28.)
21 Although those allegations parrot conclusory language from the statute, Plaintiff also
22 provides specific factual allegations, including screenshots of the messages. According to
23 the FAC, the texts “advise[d] Plaintiff to reply ‘YES’ to sign up to ‘receive special offers’
24 and to ‘get offers’ from Defendant” (*id.* ¶¶ 22, 29), the second and third messages included
25 a link to Defendant’s website (*id.* ¶¶ 22, 26), and “Defendant’s sole business is the sale of
26 goods at its convenience stores” (*id.* ¶ 30).

27 These facts make it plausible that the purpose of the text messages was to encourage
28 Plaintiff to sign up to receive offers for future shopping at Circle K. *Miholich v. Senior*

1 *Life Ins. Co.*, 2022 WL 410945, *5 (S.D. Cal. 2022), *reconsideration denied*, 2022 WL
2 1505865 (S.D. Cal. 2022) (“The FAC alleges that the text messages advertised ‘Financed
3 Leads,’ contained a link to [a] webinar provided by Defendant, and were ‘an attempt to
4 promote or sell Defendant’s services.’ . . . The FAC alleges that the webinar was also for
5 the purpose ‘to offer goods in the form of quality life insurance leads to prospective
6 contractors.’ The FAC alleges that Defendant ‘benefits commercially from the marketing
7 campaign on various levels, including cultivating a network of agents through which
8 Defendant ultimately sells its goods and services,’ and ‘receives revenue, and
9 compensation in turn, for its service of providing the financed leads.’ . . . Accepting the
10 FAC’s factual allegations as true, it is plausible that the text messages constituted telephone
11 solicitations.”) (internal citations omitted). Although the messages did not expressly seek
12 to induce Plaintiff to purchase a particular product, it is difficult to imagine why Defendant
13 would repeatedly encourage her to sign up for offers other than to encourage her to make
14 future purchases of goods at Defendant’s stores based on those offers. *Whittaker*, 2023
15 WL 167040 at *2 (“Except for encouraging the purchase of its products, it is hard to
16 imagine why an insurance company would contact a consumer not already insured by it
17 and state that it looked forward to saving the consumer money, as did the recorded message
18 in this case.”); *Fiorarancio v. WellCare Health Plans, Inc.*, 2022 WL 111062, *3 (D.N.J.
19 2022) (“[W]e know from common experience that free offers often come with strings
20 attached.’ . . . Thus, while Defendant’s messages may have been informational on their
21 face, it is plausible that they were part of a larger marketing, or profit-seeking, scheme and,
22 as such, fall within the TCPA’s prohibition.”). Courts have concluded that messages with
23 language similar to the ones at issue here encourage future purchases and thus constitute
24 telemarketing.⁶ *Chesbro*, 705 F.3d at 916, 918 (concluding that calls from Best Buy
25 encouraging plaintiff to redeem his reward points “required going to a Best Buy store and

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⁶ The definition of “telemarketing” under the TCPA is substantially similar to the
definition of “telephone solicitation”: “[T]elemarketing means the initiation of a telephone
call or message for the purpose of encouraging the purchase or rental of, or investment in,
property, goods, or services, which is transmitted to any person.” 47 C.F.R.
§ 64.1200(f)(13); *Chesbro*, 705 F.3d at 918.

1 making further purchases of Best Buy’s goods . . . [and] encouraged the listener to make
2 future purchases at Best Buy” and that “[b]ecause the calls encouraged recipients to engage
3 in future purchasing activity, they also constituted telemarketing”); *Meyer*, 2015 WL
4 431148 at *1, *3 (concluding it was plausible that the text message “[g]et on the list! Reply
5 YES to confirm opt-in. 10% OFF reg-price in-store/online. Restrictions apply. 2msg/mo,
6 w/latest offers. Msg & data rates may apply” was sent “to encourage future purchases”)
7 (citation omitted).

8 The language in the second and third text messages directing Plaintiff to “[g]o to”
9 Defendant’s website further supports Plaintiff’s contention that the messages qualify as
10 telephone solicitations, as the website includes graphics about the products Defendant sells
11 and information about Defendant’s rewards program. *See, e.g., Bennett v. Boyd Biloxi,*
12 *LLC*, 2015 WL 2131231, *3 (S.D. Ala. 2015) (“As noted, the defendant patently
13 encouraged the plaintiff to view online all its offers for sale. Employing common sense,
14 what possible purpose could the defendant have for such an encouragement other than that
15 of obtaining future sales to the plaintiff of the goods and services being offered? The
16 defendant suggests none.”).

17 The FAC also alleges that “Defendant’s website contains a Text Messaging Program
18 Terms and Conditions page that states that the Defendant sends ‘MARKETING TEXT
19 MESSAGES VIA AUTOMATED TECHNOLOGY.’” (Doc. 11 ¶ 27.) Although a
20 reference to marketing in the terms and conditions may, alone, not be enough to make the
21 text messages telephone solicitations, *Rotberg*, 345 F. Supp. 3d at 479 (“[A] caller seeking
22 out a consumer’s express written consent to send subsequent telemarketing or advertising
23 texts is not as a matter of law already engaged in telemarketing.”) (cleaned up), this
24 allegation when considered in combination with the allegations discussed above further
25 supports the conclusion that the text messages plausibly qualify as telephone solicitations.
26 *Comprehensive Health Care Sys. Of the Palm Beaches, Inc. v. M3 USA Corp.*, 232 F. Supp.
27 3d 1239, 1242 (S.D. Fla. 2017) (“The faxes at issue direct a potential participant to a survey
28 weblink, which in turn directs the potential participant to the website’s ‘Privacy Policy,’

1 stating that Defendant may target advertising and marketing based upon information
2 provided by a potential participant during the registration process. . . . Moreover,
3 Defendant’s ‘Terms of Use’ specify that by using the company’s sites and providing ‘User
4 Materials,’ the user grants Defendant and others the right ‘to use User Materials in
5 connection with all aspects of the operation and promotions of Company.’ In the face of
6 these allegations, the ultimate question of whether Defendant’s survey fax is merely a
7 pretext for advertising its goods or services is a question of fact not suitable for disposition
8 as a matter of law upon a motion to dismiss.”) (internal citations omitted).

9 *Rotberg* is not to the contrary. There, the court analyzed two text messages—an
10 initial message and an opt-out message. *Rotberg*, 345 F. Supp. 3d at 478-81. The court
11 concluded that the plaintiff did not sufficiently plead that the initial message qualified as
12 “telemarketing” for two reasons. First, the complaint “simply parrot[ed] a legal
13 requirement of his cause of action.” *Id.* at 479. Second, the plaintiff’s “only specific
14 allegation regarding the content of that text message is that it referred recipients [to a] . . .
15 webpage [that] consists of the terms and conditions required for participation in
16 Defendants’ automated mobile marketing program. But a caller seeking out a consumer’s
17 express written consent to send *subsequent* telemarketing or advertising texts is not as a
18 matter of law already engaged in telemarketing.” *Id.* (cleaned up, emphasis in original).
19 The court “decline[d] to construe the linked-to webpage as itself constituting marketing
20 material” because the plaintiff only received the message directing him to those terms
21 “after he had given his prior express consent to be contacted by [defendant].” *Id.* at 479-
22 80. Regarding the opt-out message, the court concluded it did not qualify as telemarketing
23 or advertising because it “merely confirm[ed] the consumer’s opt-out request and d[id] not
24 include any marketing or promotional information.” *Id.* at 480-81 (cleaned up).

25 This case is distinguishable for several reasons. As explained above, the FAC
26 includes specific, non-conclusory factual allegations regarding the content of the text
27 messages, and those details are sufficient to plausibly establish that the messages qualify
28 as telephone solicitations. Further, the FAC alleges that Plaintiff received the text

1 messages directing her to Defendant’s website and terms and conditions even though she
2 did not provide her phone number to Defendant, “consent[] to advertisements or text
3 messages from Defendant,” or have a relationship with Defendant (Doc. 11 ¶¶ 23-24),
4 unlike the plaintiff in *Rotberg* who received texts directing him to terms and conditions
5 *after* giving consent to be contacted. Although Defendant argues in its motion, and through
6 the Declaration of Victorino Perrine attached to its first motion to dismiss, that Plaintiff or
7 someone else must have provided Plaintiff’s phone number to Defendant, the Court must
8 accept Plaintiff’s contrary allegations as true at this stage of the case. *Abrahamian v.*
9 *loanDepot.com LLC*, 2024 WL 1092442, *3 (D. Ariz. 2024) (plaintiff adequately pleaded
10 that he did not consent to defendant’s messages based on his allegation that “he never
11 provided his telephone number to Defendant”); *Whittaker*, 2023 WL 167040 at *2
12 (“Defendant contends . . . the call was made in response to Plaintiff’s inquiry and was not
13 a solicitation. But Plaintiff alleges that she did not have a preexisting relationship with
14 Defendant and never ‘expressed any interest in Defendant’s insurance policies, products,
15 or services.’ The Court must accept this allegation as true in ruling on Defendant’s motion,
16 and it defeats any argument that the calls were made in response to Plaintiff’s inquiry.”)
17 (cleaned up); *Blalack v. RentBeforeOwning.com*, 2022 WL 7320045, *5 (C.D. Cal. 2022)
18 (“Defendant contends that ‘someone signed up for and wanted to receive these messages.’
19 However, that contention presents a factual question that cannot be resolved on a motion
20 to dismiss.”) (internal citation omitted).

21 For similar reasons, this case is distinguishable from *An Phan, Daniel*, and
22 *Aderhold*. Those courts concluded that the messages at issue were not telemarketing
23 because they were sent to complete an ongoing business transaction. *An Phan*, 351 F.
24 Supp. 3d at 1265 (“[T]his Court holds that the text messages Agoda sent to Phan were
25 neither advertising nor telemarketing. . . . [T]hese messages were sent as part of an
26 ongoing business transaction between Agoda and Phan.”); *Daniel*, 2015 WL 7454260 at
27 *4 (“The context in which the text message was sent—i.e., minutes after Daniel asked the
28 Flame Broiler cashier about Five Stars and gave the cashier his telephone number—merely

1 highlights the text’s purpose of enabling Daniel to complete the registration process that
2 he had initiated minutes before.”); *Aderhold*, 2014 WL 794802 at *9 (“There is no
3 indication that the text was intended for anything other than the limited purpose stated in
4 its two sentences: to permit Mr. Aderhold to complete registration.”). Here, because the
5 FAC alleges (and the Court must accept as true) that Plaintiff did not have a business
6 relationship with Defendant before receiving the text messages, Defendant could not have
7 sent the messages to complete a business transaction.

8 *Rotberg* is also distinguishable because the FAC does not suggest that any of the
9 text messages were opt-out confirmations. The FAC provides a screenshot of the third
10 text: “Circle K: Reply ‘YES’ to get offers via txt. Go to myck.site/Qb9PtF, Age-verify
11 18/21+ offers. Msg & Data rates may apply. Txt ‘STOP’ to Opt-Out. [phone number
12 redacted].” (Doc. 11 ¶ 22.) Although Defendant seeks to factually contradict this
13 allegation, claiming that the September 11, 2023 message actually “reads: ‘Circle K: Out-
14 Out [sic] confirmed. Thank you for responding. Msg and Data rates may apply. To Sign
15 Up in the future reply yes. [phone number redacted]’” (Doc. 13 at 2 n.1), the Court must
16 accept the contrary factual allegation in the FAC at this stage of the case.

17 2. Consent

18 Defendant’s final argument is that Plaintiff lacks statutory standing because her
19 phone number was entered into its system. In so arguing, Defendant urges the Court to
20 disregard Plaintiff’s allegations in the FAC that she did not provide her cell phone number
21 to Defendant, otherwise consent to receive Defendant’s texts, or have a business
22 relationship with Defendant.

23 At this stage of the proceedings, the Court must assume Plaintiff’s factual
24 allegations to be true. Thus, Defendant’s Rule 12(b)(6) statutory standing argument is
25 unavailing. *Cf. Chennette v. Porch.com, Inc.*, 50 F.4th 1217, 1225 (9th Cir. 2022) (“The
26 complaint alleges that some of the plaintiffs have placed their ‘residential’ cell phone
27 numbers on the national do-not-call registry. At the motion to dismiss stage and based on
28 the particular allegations in the plaintiffs’ complaint, plaintiffs’ phones are presumptively

1 residential for purposes of § 227(c). We therefore conclude that these plaintiffs have
2 standing to sue under § 227(c).”).

3 III. Motion To Strike Class Allegations

4 A. **Legal Standard**

5 Under Rule 12(f) of the Federal Rules of Civil Procedure, a court may strike from a
6 pleading “an insufficient defense or any redundant, immaterial, impertinent, or scandalous
7 matter.” *Id.* A statement is not immaterial if it “relates directly to the plaintiff’s underlying
8 claim for relief.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010).
9 A statement is not impertinent if it “pertains directly to the harm being alleged.” *Id.* Rule
10 12(f) is not a vehicle to challenge the legal sufficiency of claims or allegations. *Id.*

11 Motions to strike under Rule 12(f) are “viewed with disfavor and are not frequently
12 granted.” *Operating Eng’rs Local 324 Health Care Plan v. G & W Constr. Co.*, 783 F.3d
13 1045, 1050 (6th Cir. 2015); accord *Whittaker*, 2023 WL 167040 at *5 (“Motions to strike
14 are a drastic remedy and generally disfavored. Striking class allegations is particularly
15 disfavored before discovery may clarify class allegations.”) (cleaned up).

16 B. **The Parties’ Arguments**

17 Defendant argues that “Plaintiff’s class allegations should be stricken” because the
18 DNC Class “is fail-safe, lacks commonality, and fails to sufficiently allege numerosity.”
19 (Doc. 13 at 6, capitalization omitted.) Regarding the fail-safe argument, Defendant argues,
20 in reliance on *Olney v. Job.com, Inc.*, 2013 WL 5476813 (E.D. Cal. 2013), *Dixon v.*
21 *Monterey Financial Services, Inc.*, 2016 WL 3456680 (N.D. Cal. 2016), and *Tomaszewski*
22 *v. Circle K Stores, Inc.*, 2021 WL 2661190 (D. Ariz. 2021), that the DNC Class definition
23 “would require the Court to affirmatively establish each individual plaintiff’s lack of
24 consent” and “require class members to prevail on liability under the TCPA in order to be
25 members of the class, for once it is determined that a person who is a possible class member
26 cannot prevail against the defendant under the TCPA, they would drop out of the class.”
27 (*Id.* at 7-8.) Regarding commonality, Defendant argues that “[t]he question of consent is
28 not ‘common’ such that it can be ascertained on a class-wide basis” and requires “an

1 individualized inquiry.” (*Id.* at 8-9.) Regarding numerosity, Defendant notes that Plaintiff
2 concedes in the FAC that she “does not know the exact number of members in the [DNC]
3 Class” and contends that Plaintiff’s reference to just “two lawsuits filed in the past three
4 years (involving a total of three plaintiffs) . . . negates, rather than supports, the existence
5 of ‘hundreds’ of class members over the past four years.” (*Id.* at 9, citation omitted.)⁷

6 In response, Plaintiff argues that “motions to strike are a drastic remedy and
7 generally disfavored” and that “it is an open question as to whether it is ever proper to
8 strike class allegations under Rule 12(f).” (Doc. 14 at 9, cleaned up.) Plaintiff adds:
9 “[G]iven that courts regularly certify TCPA class actions, Defendant’s suggestion that
10 [she] cannot meet the elements necessary to certify her proposed TCPA class is not
11 credible.” (*Id.* at 11.) Plaintiff also argues that “striking [her] class allegations is
12 inappropriate . . . because [her] complaint gives adequate notice of the claim being
13 asserted” and because the class definition can be modified. (*Id.*, internal quotation mark
14 omitted.) Plaintiff then argues that “concerns about the potential fail-safe nature of the
15 proposed class are best resolved at the class certification stage, not through a motion to
16 strike,” but regardless, her “proposed class here is not a fail-safe class” because the
17 “definition is not a circular one that determines the scope of the class only once it is decided
18 that a class member was actually wronged.” (*Id.* at 12-13, cleaned up.) Plaintiff argues
19 that *Olney*, *Dixon*, and *Tomaszewski* are distinguishable because “in each of those cases,
20 the proposed class was defined in terms of consent of the texted party,” but “[h]ere, the
21 proposed definition does not mention anything about consent.” (*Id.* at 13. *See also id.* at
22 15 [discussing *Tomaszewski*].)⁸ Next, Plaintiff argues that “Defendant has not shown that

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24 ⁷ Defendant adds that “[t]he fact that Circle K sends . . . *additional* verification
25 messages *only after* a customer enters their phone number during a transaction or otherwise
26 signs up to receive messages online *confirms* that Circle K does not send messages to
‘numerous’ persons without first obtaining their prior express consent or having a pre-
existing relationship.” (*Id.*, emphasis in original.)

27 ⁸ Plaintiff also argues “Defendant’s assertion that the text messages at issue are not
28 telephone solicitations underscores that the proposed class is not fail-safe” because the
DNC Class members “will remain in the class *regardless* of whether this Court ultimately
finds in favor of Defendant on the issue of whether those text messages are telephone
solicitations under the TCPA.” (*Id.* at 14, internal citation omitted, emphasis in original.)

1 it is impossible for [her] to establish commonality” because “[t]his case presents a host of
2 common questions.” (*Id.* at 14-16.) Next, Plaintiff argues that “[n]umerosity is not an
3 element of [her] TCPA claim. Thus, she need not make a showing of numerosity at the
4 pleadings stage.” (*Id.* at 16.) Plaintiff further argues Defendant has not satisfied its burden
5 “to establish that it would be impossible for [her] to establish numerosity.” (*Id.* at 17.)
6 Plaintiff argues that “given that this is at least the third lawsuit against Defendant in the
7 past three years in this District alone for sending unsolicited telemarketing text messages
8 to consumers, and given that Defendant has thousands of stores in the United States that
9 likely participate in its Text Messaging Program, establishing numerosity will not be
10 impossible.” (*Id.*, internal citations omitted.) Last, Plaintiff seeks leave to amend “[s]hould
11 this Court find [her] amended complaint or class allegations deficient.” (*Id.*)

12 In reply, Defendant argues that “Plaintiff’s contention that someone else entered her
13 phone number only supports Circle K’s position that the class allegations should be stricken
14 if the claims are not dismissed in their entirety” because “the proposed class here—on its
15 face—is *not* capable of class-wide resolution.” (Doc. 15 at 4, emphasis in original.)
16 Defendant also argues that Plaintiff’s contention “that the class is not fail safe because the
17 proposed class does not include the buzzword ‘consent’” fails because “[p]rovision of a
18 phone number constitutes consent” and “also creates, when made during a purchase, a
19 business relationship.” (*Id.* at 5, citation omitted.) Regarding numerosity, Defendant
20 argues that “Plaintiff misstates her burden. It is not sufficient for Plaintiff to plead ‘mere
21 possibility,’ but instead Plaintiff’s allegations must be ‘plausible.’” (*Id.* at 6, citation
22 omitted.) Defendant then argues that “Plaintiff fails to meet her burden here” because she
23 “argues only that it will not be impossible to establish numerosity because of the existence
24 of three lawsuits against Circle K—with this being the third—over three years. Plaintiff
25 only otherwise states that Circle K has thousands of stores in the United States.” (*Id.* *See*
26 *also id.* at 6-7 [discussing cases “where a court struck class allegations based on a plaintiff’s
27 failure to make a *prima facie* showing of numerosity”].)

28 ...

1 **C. Analysis**

2 Although “[a] defendant may move to deny class certification before a plaintiff files
3 a motion to certify a class” under Federal Rule of Civil Procedure 23, *Vinole v.*
4 *Countrywide Home Loans, Inc.*, 571 F.3d 935, 941 (9th Cir. 2009), that is not the approach
5 Defendant took here. Instead, Defendant seeks to strike the class allegations in the FAC
6 pursuant to Rule 12(f). As the Court has previously noted, the limited categories of
7 information that may be struck pursuant to Rule 12(f) do not map neatly onto a class
8 allegation. *Canady v. Bridgcrest Acceptance Corp.*, 2022 WL 279576, *3 (D. Ariz. 2022).
9 Such an allegation is not a defense, is not redundant, is not impertinent, and is not
10 scandalous. At most, it might be said that a facially deficient class allegation is
11 “immaterial,” but even that is something of a stretch. *See generally* 1 Steven S. Gensler &
12 Lumen N. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary, Rule 23,
13 at 666-67 (2022) (characterizing as “problematic” the use of Rule 12(f) to strike class
14 allegations). Further, “[m]otions to strike class allegations are particularly disfavored
15 because it is rarely easy to determine before discovery whether the allegations are
16 meritorious.” *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 834 (D. Ariz. 2016). *See also*
17 *Baughman v. Roadrunner Communications, LLC*, 2013 WL 4230819, *2 (D. Ariz. 2013)
18 (“Motions to strike class allegations are disfavored because a motion for class certification
19 is a more appropriate vehicle in which to consider the issue.”) (cleaned up); *Varsam v.*
20 *Lab’y Corp. of Am.*, 120 F. Supp. 3d 1173, 1184 (S.D. Cal. 2015). Thus, courts have held
21 that resort to Rule 12(f) is improper “where the issues raised in the motion to strike are the
22 same ones that would be decided in connection with determining the appropriateness of
23 class certification under Rules 23(a) and 23(b).” *Rahman v. Smith & Wollensky Restaurant*
24 *Group, Inc.*, 2008 WL 161230, *3 (S.D.N.Y. 2008). *See also Whittlestone*, 618 F.3d at
25 974 (“Were we to read Rule 12(f) in a manner that allowed litigants to use it as a means to
26 dismiss some or all of a pleading (as Handi-Craft would have us do here), we would be
27 creating redundancies within the Federal Rules of Civil Procedure, because a Rule 12(b)(6)
28 motion (or a motion for summary judgment at a later stage in the proceedings) already

1 serves such a purpose.”).

2 Such is the case here. The bases for Defendant’s Rule 12(f) motion—fail-safe class,
 3 lack of commonality, and failure to show numerosity—are the same issues that will be
 4 decided when determining whether to grant class certification. Thus, Defendant’s reliance
 5 on Rule 12(f) is misplaced. *Tinnin v. Sutter Valley Med. Found.*, 647 F. Supp. 3d 864, 874
 6 (E.D. Cal. 2022) (“[T]he Court finds that the procedural mechanism of a motion to strike
 7 is not the appropriate means for addressing a fail-safe problem.”). *Cf. Kassman v. KPMG*
 8 *LLP*, 925 F. Supp. 2d 453, 464-65 (S.D.N.Y. 2013) (denying Rule 12(f) motion to strike
 9 class allegations because “KPMG’s objections go to whether Plaintiffs can satisfy the
 10 requirements of Rule 23(a)(2), (b)(2), and (b)(3),” which are “exactly the sorts of issues
 11 that would be litigated and decided in the context of a motion for class certification,” and
 12 were thus “procedurally premature”) (cleaned up); *Webb v. Circle K Stores Inc.*, 2022 WL
 13 16649821, *3 (D. Ariz. 2022) (“Circle K does not explain why this possibility that, at
 14 certification, a slightly more definite class definition will be needed establishes all class
 15 allegations should be stricken at the pleading stage. The proper stage for fine-tuning the
 16 class definition is certification, not pleading.”).⁹

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 22 ⁹ See also *Abrahamian*, 2024 WL 1092442 at *4 (“Comprehensive briefing of the
 23 issues surrounding the proposed class are not before the Court and it is premature to address
 24 the appropriateness of its scope.”) (cleaned up); *Nickerson v. Goodyear Tire & Rubber*
 25 *Corp.*, 2020 WL 4937561, *11 (C.D. Cal. 2020) (denying Rule 12(f) motion to strike class
 26 allegations—on the basis that the allegations are overbroad and lack commonality—as
 27 premature); *Legacy Gymnastics, LLC v. Arch Ins. Co.*, 2021 WL 2371503, *3-4 (W.D. Mo.
 28 2021) (denying Rule 12(f) motion to strike class allegations because “all of Arch’s Rule
 23(b) arguments would be better addressed at the class certification stage after discovery
 yields more information”); *Edwards v. Conn’s, Inc.*, 2020 WL 4018926, *3 (D. Nev. 2020)
 (denying motion to strike class allegations because “arguments regarding whether the
 proposed classes are improper fail-safes or overly broad are premature and more
 appropriately decided after Edwards moves for class certification”); *Larson v. Harman*
Mgmt. Corp., 2016 WL 6298528, *5 (E.D. Cal. 2016) (same); *Juarez v. Citibank, N.A.*,
 2016 WL 4547914, *5 (N.D. Cal. 2016) (same).

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Accordingly,

IT IS ORDERED that Defendant's motion to dismiss and/or to strike (Doc. 13) is **denied**.

Dated this 24th day of April, 2024.



Dominic W. Lanza
United States District Judge