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

CHARLES BATHERSFIELD,
individually and on behalf of all those
similarly situated,

Plaintiff,

vs.

HEART & SOIL SUPPLEMENTS, LLC,
a Texas limited liability company,

Defendant.

CASE NO. 3:26-cv-01124-GPC-SBC

ORDER:

- **DENYING DEFENDANT'S
MOTION FOR JUDGMENT
ON THE PLEADINGS**
- **DENYING DEFENDANT'S
MOTION FOR EARLY
DETERMINATION THAT
CLASS CERTIFICATION BE
DENIED**

[ECF No. 14]

Before the Court is Defendant's Motion for Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c) and for an Early Determination that Class Certification be Denied. ECF No. 14. Plaintiff filed an opposition and Defendant replied. ECF Nos. 19, 21. For the reasons set forth below, the Court **DENIES** Defendant's Motion for Judgment on the Pleadings and **DENIES** Defendant's Motion for an Early Determination that Class Certification be Denied.

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FACTUAL BACKGROUND

The following facts are taken from Plaintiff's Complaint and are accepted as true for the purpose of resolving the instant motion.

This case arises from marketing text messages that Defendant and Counter-Complainant, Heart & Soil Supplements, LLC ("Heart & Soil"), sent to Plaintiff and Counter-Defendant Charles Bathersfield. ECF No. 1 ("Compl.") ¶¶ 7–8, 16.¹ The Telephone Consumer Protection Act ("TCPA") and its implementing regulations prohibit "telephone solicitations to residential telephone subscribers before 8 am and after 9 pm." *Id.* ¶ 13 (citing 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(1)). Plaintiff alleges that Heart & Soil sent him marketing text messages "on or about November 28, 2025[,] and January 15, 2026" at 6:11 a.m. and 5:14 a.m., respectively, in Plaintiff's local time. *Id.* ¶¶ 14–15. The messages were meant to "advertise, promote, and/or market Defendant's property, goods, and/or services." *Id.* ¶ 17. Plaintiff further alleges that he "never signed any type of authorization" that permitted Defendant to send the text messages (or "telephone solicitations") during those prohibited hours. *Id.* ¶ 21.

Plaintiff brings this putative class action on behalf of himself and "all other similarly situated persons" who received more than one marketing text message from Heart & Soil within a 12-month period before 8 a.m. or after 9 p.m. local time. *Id.* ¶ 23. Plaintiff seeks injunctive relief and statutory damages. *Id.* ¶ 6.

PROCEDURAL HISTORY

On February 23, 2026, Plaintiff filed this putative class action. ECF No. 1. Plaintiff alleges that Defendant violated the TCPA, 47 U.S.C. § 227(c), and its implementing regulation, 47 C.F.R. § 64.1200(c)(1). Compl. ¶¶ 34–40. On April 17, 2026, Defendant answered, asserting eleven affirmative defenses and two counterclaims. ECF No. 6. In Counterclaim I, Defendant seeks a declaratory

¹ The Court cites each document's own pagination. If a document lacks internal page numbers, the Court relies on the CM/ECF pagination at the top of the page.

1 judgment regarding the “legal relationship between prior express consumer consent
2 and the FCC’s quiet hours rules,” and in Counterclaim II, Defendant alleges a breach
3 of contract claim against Plaintiff. *Id.* at 28, 33–38. On May 22, 2026, Plaintiff moved
4 to dismiss Counterclaims I and II under Federal Rule of Civil Procedure 12(b)(6) or,
5 in the alternative, to strike Counterclaim I under Rule 12(f). ECF No. 12.² On June
6 19, 2026, Defendant filed its opposition. ECF No. 18. On July 3, 2026, Plaintiff filed
7 a reply. ECF No. 20.

8 On May 26, 2026, Defendant moved for Judgment on the Pleadings and for an
9 Early Determination that Class Certification be Denied. ECF No. 14. Plaintiff
10 opposed, Defendant replied, and Defendant later filed a Notice of Supplemental
11 Authority. ECF Nos. 19, 21, 22.

12 DISCUSSION

13 I. JUDGMENT ON THE PLEADINGS

14 Defendant moves for judgment on the pleadings as to Plaintiff’s Count I, which
15 alleges violations of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c)(1). ECF No. 14;
16 Compl. ¶¶ 34–40. Defendant argues that Plaintiff has failed to state a claim upon
17 which relief can be granted because text messages fall outside the scope of
18 § 227(c)(5)’s operative phrase “telephone call.” ECF No. 14 at 7–12. Additionally,
19 Defendant argues that, even if a text message is deemed a “telephone call,” Plaintiff’s
20 alleged prior express consent defeats the TCPA claim as a matter of law. *Id.* at 14–
21 19. In opposition, Plaintiff contends that § 227(c)(5) does cover text messages
22 because they qualify as a “‘call’ within the meaning of the TCPA.” ECF No. 19 at 3–
23 5. Plaintiff also argues that Defendant is not entitled to judgment as a matter of law
24 because consent is an affirmative defense that Defendant must prove, rather than an
25 element of Plaintiff’s claim. *Id.* at 8–9.

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28 ² Unless otherwise noted, “Rule” and “Rules” refer to the Federal Rules of Civil Procedure.

1 **A. Legal Standard as to Federal Rule of Civil Procedure 12(c)**

2 Federal Rule of Civil Procedure (“Rule”) 12(c) provides that “[a]fter the
3 pleadings are closed—but early enough not to delay trial—a party may move for
4 judgment on the pleadings.” Fed. R. Civ. P. 12(c).³ The standard for determining a
5 Rule 12(c) motion for judgment on the pleadings is the same as the standard for a
6 Rule 12(b)(6) motion to dismiss. *United States ex rel. Cafasso v. Gen. Dynamics C4*
7 *Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (Rule 12(c) is “functionally
8 identical” to Rule 12(b)(6), and “the same standard of review” applies to both
9 (quoting *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989))). On a
10 Rule 12(c) motion, “the allegations of the non-moving party must be accepted as true,
11 while the allegations of the moving party which have been denied are assumed to be
12 false.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th
13 Cir. 1989). “Judgment on the pleadings is proper when the moving party clearly
14 establishes on the face of the pleadings that no material issue of fact remains to be
15 resolved and that it is entitled to judgment as a matter of law.” *Id.* But judgment on
16 the pleadings “is not appropriate if the complaint raises issues of fact which, if
17 proven, would support recovery.” *High Sierra Hikers Ass’n v. Powell*, 150 F. Supp.
18 2d 1023, 1031 (N.D. Cal. 2001) (citing *Gen. Conf. Corp. of Seventh-Day Adventists*
19 *v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230–31 (9th Cir.
20 1989)).

21 “Documents attached to, incorporated by reference in, or integral to the
22 complaint may be properly considered under Rule 12(c) without converting the
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24 ³ Typically, when a defendant asserts counterclaims, the pleadings do not close until
25 the plaintiff answers them. *See Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir.
26 2005); *In re Outlaw Lab’y, LLP*, 463 F. Supp. 3d 1068, 1079 (S.D. Cal. 2020),
27 *modified on other grounds*, No. 3:18-CV-0840-GPC, 2020 WL 3840559 (S.D. Cal.
28 July 8, 2020). Here, Plaintiff had not answered Defendant’s counterclaims when
Defendant filed this motion, and he still has not. *See* ECF Nos. 12, 24. But an
unanswered counterclaim is “immaterial” when the motion “applies only to [the
plaintiff’s] complaint.” *Outlaw Lab’y*, 463 F. Supp. 3d at 1079. Because Defendant
seeks judgment only on Plaintiff’s Complaint, the motion is timely.

1 motion into one for summary judgment.” *Hupp v. San Diego Cnty.*, No. 12-CV-0492-
 2 GPC (RBB), 2014 WL 842927, at *2 (S.D. Cal. Mar. 4, 2014) (citing *Rose v. Chase*
 3 *Manhattan Bank USA, N.A.*, 396 F. Supp. 2d 1116, 1119 (C.D. Cal. 2005)). However,
 4 if a court considers matters beyond the pleadings, it must treat the motion for
 5 judgment on the pleadings as one for summary judgment. *Hal Roach Studios*, 896
 6 F.2d at 1550; Fed. R. Civ. P. 12(d).

7 **B. Analysis**

8 **1. Whether § 227(c)(5) extends to text messages.**

9 Section 227(c)(5) of the TCPA confers a private right of action on any person
 10 “who has received more than one *telephone call* within any 12-month period by or
 11 on behalf of the same entity in violation of the regulations prescribed under this
 12 subsection.” 47 U.S.C. § 227(c)(5) (emphasis added). The parties dispute whether a
 13 text message constitutes a “telephone call” within the meaning of § 227(c)(5). *See*
 14 ECF No. 14 at 7–12; ECF No. 19 at 3–5.

15 Plaintiff argues that the Ninth Circuit has held in *Satterfield v. Simon &*
 16 *Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009), and *Howard v. Republican Nat’l*
 17 *Comm.*, 164 F.4th 1119, 1123 (9th Cir. 2026), that a text message is a call under the
 18 TCPA, and that district courts in this Circuit have uniformly applied that holding to
 19 § 227(c)(5). ECF No. 19 at 3–4; *see, e.g., Miller v. S. Brown & Assocs., Inc.*, No.
 20 2:26-CV-01480-MWC-SSC, 2026 WL 2855518, at *4 (C.D. Cal. Sept. 22, 2026);
 21 *Hopkins v. Homelight, Inc.*, No. 26-CV-5017-BHS, 2026 WL 2017320, at *3 (W.D.
 22 Wash. July 13, 2026); *Taha v. Momentive Software, Inc.*, No. 8:25-CV-02330-DOC-
 23 JDE, 2026 WL 974297, at *2–3 (C.D. Cal. Mar. 11, 2026); *Wilson v. Cirkul Inc.*, No.
 24 6:25-CV-02036-AP, 2026 WL 1508003, at *3–5 (D. Or. Apr. 14, 2026). Defendant
 25 responds that *Howard* and *Satterfield* construed only § 227(b), that “telephone call”
 26 must carry its 1991 meaning, and that Congress added “text message” to other parts
 27 of § 227 (such as § 227(e)) but not to § 227(c)(5). ECF No. 14 at 7–12; ECF No. 21
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1 at 1–2. Defendant argues that since Congress used the term “telephone call” in §
2 227(c) rather than “any call,” it must have meant for them to work differently. ECF
3 No. 14 at 10.

4 This Court is bound by the decisions of the Ninth Circuit. *Hart v. Massanari*,
5 266 F.3d 1155, 1171 (9th Cir. 2001). “Once a [court of appeals] panel resolves an
6 issue in a precedential opinion, the matter is deemed resolved,” unless an en banc
7 court or the Supreme Court overrules it or Congress changes the law. *Id.* at 1171 &
8 n.28. When a district court confronts apparently controlling authority, it must “parse
9 the precedent in light of the facts presented and the rule announced.” *Hart*, 266 F.3d
10 at 1172. “Insofar as there may be factual differences between the current case and the
11 earlier one, the court must determine whether those differences are material to the
12 application of the rule or allow the precedent to be distinguished on a principled
13 basis.” *Id.*

14 Here, both sides address the reach of *Satterfield* and *Howard* in deciding
15 whether a text is a “telephone call” under § 227(c)(5). In *Satterfield*, the Ninth Circuit
16 addressed whether a text message constituted a “call” under 47 U.S.C.
17 § 227(b)(1)(A), which prohibits “any call” using an auto-dialer. 569 F.3d at 952
18 (citing 47 U.S.C. § 227(b)(1)(A)). The court recognized that Congress could not have
19 spoken clearly to this issue in 1991 because text messaging was unavailable in 1991.
20 *Id.* at 954. After conducting statutory construction analysis, the court held that a “text
21 message is a ‘call’ within the meaning of the TCPA.” *Id.* In its analysis, the court
22 also applied *Chevron* and held that the FCC’s reading of the term was reasonable and
23 entitled to deference. *Id.* at 952–54.

24 In 2026, in *Howard*, the Ninth Circuit reaffirmed its holding in *Satterfield*,
25 explaining that “the conclusion would be the same even in the absence of *Chevron*
26 deference.” *Howard*, 164 F.4th at 1123. There, the court explained that although
27 *Satterfield* deferred to the FCC under *Chevron*, it also relied on the tools of statutory
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1 construction that courts continue to apply even after *Loper Bright* overruled *Chevron*.
 2 *Id.*; *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). Specifically, the
 3 court relied on the “ordinary, contemporary, and common meaning” of “call,” which
 4 Webster’s Dictionary defined as “to communicate with or try to get into
 5 communication with a person by a telephone.” *Satterfield*, 569 F.3d at 953–54
 6 (quoting *Webster’s Third New International Dictionary* 318 (2002)).⁴ The *Satterfield*
 7 court found that it was undisputed that “text messaging is a form of communication
 8 used primarily between telephones.” 569 F.3d at 954.

9 In addition to interpreting the term “call,” the *Satterfield* court considered the
 10 purpose of the TCPA, which Congress “enacted to ‘protect the privacy interests of
 11 residential telephone subscribers.’” *Id.* at 954 (quoting S. Rep. No. 102-178, at 1
 12 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1968). *Howard* applied that purpose
 13 to text messages, explaining that an arriving text “frequently entails an immediate
 14 intrusion on privacy comparable to that associated with the ring of an incoming auto-
 15 dialed phone call.” 164 F.4th at 1124.

16 In both *Howard* and *Satterfield*, the Ninth Circuit held that a text message
 17 qualified as a call “within the meaning of the TCPA.” *Howard*, 164 F.4th at 1123;
 18 *Satterfield*, 569 F.3d at 952. Neither court limited that holding to § 227(b)(1)(A).⁵
 19 Nor is there any reason to do so given that “the words of a statute must be read in
 20 their context and with a view to their place in the overall statutory scheme.” *FDA v.*
 21 *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v.*
 22 *Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). Both § 227(b)(2)(B)(ii)(I) and
 23 § 227(c)(2) spell out Congress’s desire to protect the privacy rights of telephone
 24 subscribers. As a result, the reasoning in *Satterfield* and *Howard* applies naturally to
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26 ⁴ While *Satterfield* relied on the 2002 dictionary definition of “call,” *Howard* cited
 27 the 1981 definition that was in place in 1991 when the TCPA was enacted. *Howard*,
 164 F.4th at 1124.

28 ⁵ Both § 227(b)(1)(B) and § 227(c)(5) use the term “telephone call” although
Satterfield did not have occasion to interpret the term.

1 the whole statute, including § 227(c), so that a text message qualifies as a call under
2 that provision too. And given that no intervening en banc or Supreme Court decision
3 has overruled either case, and Congress has not changed the language at issue, both
4 decisions bind this Court and control its decision. *Hart*, 266 F.3d at 1171 (“[B]inding
5 authority is very powerful medicine.”).

6 Also, in parsing “the precedent in light of the facts presented and the rule
7 announced,” the Court concludes that the facts of this case closely resemble those of
8 *Howard* and *Satterfield*. *Hart*, 266 F.3d at 1172. In *Howard*, the defendant sent an
9 automated text message, containing written text and a video file, to the plaintiff’s
10 cellphone. 164 F.4th at 1120. In *Satterfield*, the defendant texted the plaintiff’s
11 cellphone an unwanted advertisement for a novel. 569 F.3d at 949. Here, Plaintiff
12 alleges that Defendant sent him text messages advertising its product during
13 prohibited hours. *See* Compl. ¶¶ 14–17. The cases differ in one relevant respect:
14 *Howard* and *Satterfield* arose under § 227(b), while in this case Plaintiff sues under
15 § 227(c)(5) and 47 C.F.R. § 64.1200(c)(1). *Id.* ¶¶ 35–40. However, that difference is
16 immaterial given the purpose of the TCPA to protect the privacy rights of residential
17 telephone subscribers. *Satterfield*, 569 F.3d at 954 (treating text message as a “call”
18 consistent with the statute’s declared purpose to protect privacy rights). The intrusion
19 *Howard* described—an arriving text that lights up the screen, sounds, or vibrates—
20 is the same intrusion that the early-morning texts allegedly caused Plaintiff. *Howard*,
21 164 F.4th at 1124. There is no principled basis to distinguish *Howard* by limiting the
22 invasion of privacy rights to recipients of unwanted calls to the exclusion of
23 recipients of unwanted text messages.

24 In a notice of supplemental authority, Defendant urges the Court to follow the
25 Seventh Circuit’s recent holding that a text message is not a “telephone call” under §
26 227(c)(5). ECF No. 22 at 1–4; *Steidinger v. Blackstone Med. Servs.*, 182 F.4th 532,
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534 (7th Cir. 2026). *Steidinger* does not change that result.⁶ A review of *Steidinger* does not persuade the Court that the Ninth Circuit would apply the reasoning of *Steidinger* to its interpretation of § 227(c)(5). The analysis conducted in *Steidinger* is not unlike that conducted by the court in *Satterfield* when it held that a “text” qualified as a “call” for purposes of the TCPA. *Compare Steidinger*, 182 F.4th at 535–36, with *Satterfield*, 569 F.3d at 952–54. Both cases recognized that texts did not exist in 1991 when the TCPA was enacted and proceeded to interpret the TCPA term applying canons of statutory construction. *Satterfield*, 569 F.3d at 954; *Steidinger*, 182 F.4th at 535. Further, *Satterfield*’s statutory construction of “any call” has equal force in interpreting “telephone call.”

Steidinger, unlike the Ninth Circuit, gives little weight to the purpose of the TCPA and affords no weight to the FCC interpretation. *Steidinger*, 182 F.4th at 539. *Steidinger*’s holding is primarily premised on its dictionary interpretation of “telephone call.” *Id.* at 535–36. Like *Satterfield*, the Seventh Circuit interprets a “call” to mean “to get or try to get into communication by telephone” and then adds the definition of “telephone,” “[a]n instrument for reproducing sounds at a distance.” *Id.* In so doing, *Steidinger* held that a “telephone call” was limited to communication via sound. *Id.* at 536. However, “telephone” adds nothing as a qualifier because a “call” by definition involves “communication by telephone.” *Id.* In interpreting “call” as “to communicate with or try to get into communication with a person by a telephone,” *Satterfield* necessarily accounted for the fact that telephones involve sound. It held that “[t]he language and purpose of the TCPA support the conclusion that the use of an ATDS to make any call, regardless of whether that call is communicated by voice or text, is prohibited.” *Satterfield*, 569 F.3d at 954.

⁶ This analysis also addresses the out-of-circuit district court decisions Defendant cites in footnote 1 of its reply brief. ECF No. 21 at 2 n.1.

1 *Satterfield* decided the case on the premise that “a voice message or a text message
2 are not distinguishable in terms of being an invasion of privacy.” *Id.* at 954.⁷

3 Lastly, Defendant argues that the major questions doctrine bars “Plaintiff’s
4 recovery” because the FCC extended § 227(c) to text messages without clear
5 congressional authorization. ECF No. 14 at 12–14; ECF No. 21 at 2–4. The major
6 questions doctrine applies to cases in which “agencies [are] asserting highly
7 consequential power beyond what Congress could reasonably be understood to have
8 granted.” *West Virginia v. EPA*, 597 U.S. 697, 724 (2022). In such cases, the agency
9 must “point to ‘clear congressional authorization’ for the power it claims.” *Id.* at 723
10 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). But neither
11 Plaintiff’s claim nor *Howard*’s holding rests on an FCC interpretation of the statute.
12 ECF No. 19 at 5; *Howard*, 164 F.4th at 1123 (concluding that the result “would be
13 the same even in the absence of *Chevron* deference”). Because the reach of § 227(c)
14 to text messages comes from the statute’s text, as the Ninth Circuit has construed it,
15 rather than from an agency’s expansion of it, Defendant’s argument fails.

16 Accordingly, Defendant is not entitled to judgment on the pleadings on this
17 ground.

18 **2. Whether consent can be decided on the pleadings.**

19 The FCC’s quiet-hours rule, promulgated under § 227(c), provides that “[n]o
20 person or entity shall initiate any *telephone solicitation*” to a “residential telephone
21 subscriber before the hour of 8 a.m. or after 9 p.m.” 47 C.F.R. § 64.1200(c)(1)
22 (emphasis added). The TCPA’s definition of “telephone solicitation,” 47 U.S.C. §
23 227(a)(4), excludes any call or message sent “to any person with that person’s prior
24 express invitation or permission.” *See also* 47 C.F.R. § 64.1200(f)(15)(i). In other
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26 ⁷ The U.S. Supreme Court has observed that “while every statute’s meaning is fixed
27 at the time of enactment, new applications may arise in light of changes in the world.”
28 *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018). In interpreting “call,” the
court in *Satterfield* arrived at a new application based on changes, i.e., the
introduction of texts to communicate via telephone. *See* 569 F.3d at 954.

1 words, messages sent to a recipient who has consented to them are not telephone
2 solicitations and thus fall outside the quiet-hours rule. The parties dispute whether
3 consent can defeat Plaintiff's TCPA quiet-hours claim at the pleading stage.
4 Defendant argues that Plaintiff's TCPA claim fails as a matter of law because, even
5 if text messages are calls under § 227(c)(5), Plaintiff consented to receive them when
6 he enrolled in Defendant's text-message program. ECF No. 14 at 14–19. Defendant
7 relies on two documents. The first is a letter from Postscript, Defendant's text-
8 messaging vendor, with a log of text messages (the "opt-in records"), attached as
9 Exhibit A to the Answer. ECF No. 6 at 5; ECF No. 6-1. The second is the Declaration
10 of G. David Carter. ECF No. 14-1; *see* ECF No. 14 at 4, 18. In response, Plaintiff
11 contends that consent is an affirmative defense that Defendant must prove, not an
12 element of Plaintiff's TCPA claim. ECF No. 19 at 8–9. Plaintiff also argues that
13 Defendant's documents cannot be considered on a Rule 12(c) motion. *Id.* at 6–8.

14 "Express consent is not an element of a plaintiff's prima facie case but is an
15 affirmative defense for which the defendant bears the burden of proof." *Van Patten*
16 *v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 & n.3 (9th Cir. 2017). Defendant
17 argues that "[l]ack of consent is an element of Plaintiff's quiet hours claim, not an
18 affirmative defense." ECF No. 21 at 5–6 n.3; *see also* ECF No. 14 at 14–15. In
19 Defendant's view, Plaintiff must allege that he did not consent to the text messages
20 to state a quiet-hours claim because the rule reaches only "telephone solicitation[s],"
21 and § 227(a)(4) excludes consented messages from that term. ECF No. 21 at 5–6 n.3.
22 That framing does not shift the burden. An exclusion from a statutory definition is
23 still an exception to the statute's coverage, and "those who set up such exception
24 must prove it." *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91 (2008)
25 (quoting *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910)); *see Wolfe v.*
26 *GoodVets Veterinary Servs., LLC*, No. CV-26-02836-PHX-MTL, 2026 WL
27 1862040, at *2–3 (D. Ariz. June 25, 2026) (placing the burden on the defendant to
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1 show “prior express invitation or permission” in a quiet-hours case). Defendant’s
2 own Answer treats consent the same way, pleading it as its First Affirmative Defense.
3 ECF No. 6 at 22. Plaintiff therefore need not plead the absence of consent, and
4 Defendant is entitled to judgment on that defense only if, on the face of the pleadings,
5 “no material issue of fact remains to be resolved.” *Hal Roach Studios*, 896 F.2d at
6 1550.

7 On a Rule 12(c) motion, the Court accepts the non-moving party’s allegations
8 as true and treats the moving party’s denied allegations as false. *Hal Roach Studios*,
9 896 F.2d at 1550. Because the Court has not ordered a reply to the Answer, *see* Fed.
10 R. Civ. P. 7(a)(7), the Answer’s allegations are “considered denied or avoided.” Fed.
11 R. Civ. P. 8(b)(6). Separately, the incorporation-by-reference doctrine is “a judicially
12 created doctrine that treats certain documents as though they are part of the complaint
13 itself.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). A
14 defendant may ask the court to incorporate a document into the complaint “if the
15 plaintiff refers extensively to the document or the document forms the basis of the
16 plaintiff’s claim.” *Id.* (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
17 2003)). Although *Khoja* arose under Rule 12(b)(6), its reasoning applies here because
18 the two rules apply the same standard. *See Cafasso*, 637 F.3d at 1054 n.4.

19 In this case, Plaintiff alleges that he “never signed any type of authorization
20 permitting or allowing Defendant to send them telephone solicitations before 8 am
21 or after 9 pm.” Compl. ¶ 21. Contrary to Defendant’s argument, ECF No. 21 at 5,
22 this is a factual allegation, not a legal conclusion, and the Court must accept it as true.
23 As to Defendant’s request that the Court consider the opt-in records, the Court cannot
24 incorporate them to contradict that allegation. *See Khoja*, 899 F.3d at 1002. Neither
25 condition for incorporation is met here. The Complaint never mentions the opt-in
26 records, and they do not form the basis of Plaintiff’s claim. At most, the opt-in records
27 create a “defense to the well-pled allegations in the complaint.” *Id.* Plaintiff also
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1 questions whether the opt-in records were properly authenticated, a dispute that
 2 independently bars incorporation. ECF No. 19 at 12; *see Knievel v. ESPN*, 393 F.3d
 3 1068, 1076 (9th Cir. 2005).

4 Defendant also argues that the opt-in records are part of the Answer under Rule
 5 10(c). ECF No. 21 at 4. But even if they are, the Answer's allegations about
 6 Plaintiff's enrollment are deemed denied, so the Court must treat them as false.⁸ As
 7 to the Carter Declaration, it is an extrinsic document (i.e., a document outside the
 8 pleadings), and the Court cannot consider it without converting the motion into one
 9 for summary judgment under Rule 12(d). *See Ritchie*, 342 F.3d at 907–08. The Court
 10 declines to do so.

11 Because the Court cannot consider the opt-in records at this stage, it does not
 12 reach the parties' dispute over whether consent to receive marketing messages
 13 extends to messages sent during quiet hours. *Compare* ECF No. 21 at 5–7, *with* ECF
 14 No. 19 at 10–11. Defendant is therefore not entitled to judgment on the pleadings on
 15 the basis of consent.

16 II. EARLY DETERMINATION ON CLASS CERTIFICATION

17 Defendant also moves for an early determination that class certification be
 18 denied. ECF No. 14. Defendant asks the Court to deny certification and strike the
 19 class allegations now, before any class discovery, on four grounds. *Id.* at 19–24.⁹ In
 20 response, Plaintiff argues that early determination “is not warranted” because
 21

22 ⁸ The counterclaims also rely on the opt-in records, and unlike the Answer's
 23 allegations, the counterclaims' allegations require a response. Fed. R. Civ. P.
 24 12(a)(1)(B). Plaintiff's silence on those allegations, however, is not an admission
 25 under Rule 8(b)(6) because he moved to dismiss the counterclaims instead of
 26 answering them, which postponed his time to respond. Fed. R. Civ. P. 12(a)(4); ECF
 27 Nos. 12, 24. The Court has since struck Counterclaim I and dismissed Counterclaim
 28 II with leave to amend in a separate order.

⁹ Plaintiff defines the proposed class as follows: “All persons in the United States
 who from four years prior to the filing of this action through the date of class
 certification (1) Defendant, or anyone on Defendant's behalf, (2) placed more than
 one marketing text message within any 12-month period; (3) where such marketing
 text messages were initiated before the hour of 8 a.m. or after 9 p.m. (local time at
 the called party's location).” Compl. ¶ 23.

1 Defendant waived its right to arbitrate by litigating this case and because a ruling on
 2 class certification would be premature before “meaningful class discovery.” ECF No.
 3 19 at 12–17.

4 **A. Legal Standard as to Federal Rule of Civil Procedure 23**

5 Rule 23 does not “preclude a defendant from bringing a ‘preemptive’ motion
 6 to deny certification.” *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939
 7 (9th Cir. 2009). “The only requirement is that the certification question be resolved
 8 ‘[a]t an early practicable time.’” *Id.* at 940 (quoting Fed. R. Civ. P. 23(c)(1)(A)).
 9 Within that timing requirement, “[d]istrict courts have broad discretion to control the
 10 class certification process.” *Id.* at 942.

11 When a defendant files a preemptive motion to deny certification, the plaintiff
 12 still bears “the burden to establish that the class certification requirements under Rule
 13 23 have been met.” *Victorino v. FCA US LLC*, 322 F.R.D. 403, 405 (S.D. Cal. 2017);
 14 *see Vinole*, 571 F.3d at 944 n.9. But “often the pleadings alone will not resolve the
 15 question of class certification and that some discovery will be warranted.” *Vinole*,
 16 571 F.3d at 942. “[T]he better and more advisable practice for a District Court to
 17 follow is to afford the litigants an opportunity to present evidence as to whether a
 18 class action was maintainable,” which in most cases requires “enough discovery to
 19 obtain the material, especially when the information is within the sole possession of
 20 the defendant.” *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977).
 21 Yet “where the plaintiffs fail to make even a prima facie showing of Rule 23’s
 22 prerequisites,” they must show “that discovery measures are likely to produce
 23 persuasive information substantiating the class action allegations.” *Id.*; *accord*
 24 *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

25 Rule 23(d)(1)(D) permits a court to “require that the pleadings be amended to
 26 eliminate allegations about representation of absent persons.” Fed. R. Civ. P.
 27 23(d)(1)(D). Under that rule and Rule 23(c)(1)(A), the district court “has authority to
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1 strike class allegations prior to discovery if the complaint demonstrates that a class
 2 action cannot be maintained.” *Hovsepien v. Apple, Inc.*, No. 08-5788 JF (PVT), 2009
 3 WL 5069144, at *2 (N.D. Cal. Dec. 17, 2009); *see also Kamm v. Cal. City Dev. Co.*,
 4 509 F.2d 205, 210–13 (9th Cir. 1975) (affirming order dismissing class action and
 5 striking class allegations without further discovery because the public record
 6 provided a sufficient basis to decide whether a class action was superior). But “[i]t is
 7 rare for a court to dismiss class allegations at the pleading stage prior to a motion for
 8 class certification.” *Yorba v. Gov’t Emps. Ins. Co.*, No. 24-CV-00031-GPC-VET,
 9 2024 WL 3448090, at *8 (S.D. Cal. July 17, 2024) (citing *Cholakyan v. Mercedes-*
 10 *Benz USA, LLC*, 796 F. Supp. 2d 1220, 1245 (C.D. Cal. 2011)); *see also In re Wal-*
 11 *Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007)
 12 (“[T]he granting of motions to dismiss class allegations before discovery has
 13 commenced is rare.”).

14 **B. Analysis**

15 Rule 23(a) establishes four requirements for class certification: numerosity,
 16 commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). In
 17 addition to meeting these four requirements, a plaintiff must “satisfy through
 18 evidentiary proof at least one of the provisions of Rule 23(b).” *Comcast Corp. v.*
 19 *Behrend*, 569 U.S. 27, 33 (2013). Defendant argues that class certification is “legally
 20 impossible on the face of the pleadings” for four reasons: (1) every class member is
 21 bound by the Terms of Service’s class-action waiver and arbitration clause; (2)
 22 individual questions of consent and location predominate over common questions
 23 under Rule 23(b)(3); (3) Plaintiff is not an adequate class representative under Rule
 24 23(a)(4); and (4) proposed class counsel is inadequate under Rule 23(g). ECF No. 14
 25 at 19–24.

26 Plaintiff has pleaded class allegations that track Rule 23’s requirements, but
 27 he has not yet moved for certification, and no class discovery has occurred. *See*
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1 Compl. ¶¶ 23–33. Although Plaintiff bears the burden on certification, *Vinole*, 571
2 F.3d at 944 n.9, he ordinarily should have an opportunity for discovery before that
3 burden is tested. *See Doninger*, 564 F.2d at 1313. The Court therefore does not ask
4 whether Plaintiff has satisfied Rule 23; it asks instead whether “the complaint
5 demonstrates that a class action cannot be maintained.” *Hovsepian*, 2009 WL
6 5069144, at *2. Each of Defendant’s four grounds fails that test because each depends
7 on facts outside the Complaint.

8 First, Defendant argues that class certification is “legally impossible” because
9 every putative class member agreed to a class-action waiver and a mandatory
10 arbitration clause by accepting Defendant’s Terms of Service. ECF No. 14 at 19–20.
11 In response, Plaintiff argues that Defendant waived its right to arbitrate by litigating
12 the merits rather than moving to compel arbitration. ECF No. 19 at 13–14. Plaintiff
13 also argues that whether every putative class member opted in and accepted the same
14 Terms of Service is a “threshold fact question” that requires discovery. *Id.* at 14. In
15 reply, Defendant clarifies that it does not seek to compel Plaintiff to arbitrate now.
16 ECF No. 21 at 10. Instead, it argues that the absent class members’ agreements to
17 arbitrate individually are “a contractual bar that makes class certification
18 inappropriate.” *Id.* (citing *O’Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th
19 Cir. 2018)).

20 A party seeking to enforce an arbitration agreement “has the burden of proving
21 the existence of an agreement to arbitrate by a preponderance of the evidence.”
22 *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). Here, Defendant
23 has not made that showing. The Complaint says nothing about the Terms of Service,
24 a class-action waiver, or arbitration, and the Terms are not in the record. Defendant
25 describes them as “Exhibit B” to its Answer, ECF No. 14 at 4, 20, but the only Exhibit
26 B in the record, an attachment to the Postscript letter, is a message log. ECF No. 6-1
27 at 5–25. Defendant’s own Answer also undercuts its premise that every class member
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1 agreed to the same terms. The Answer acknowledges that the inquiry may turn on
2 “whether the subscriber’s specific Terms of Service version included an arbitration
3 clause and class action waiver,” ECF No. 6 at 9, and it alleges that the “individual
4 arbitration provisions bind the majority of putative class members,” *id.* at 25.
5 Whether each class member assented to the Terms, and to which version, are
6 questions of fact, and the answers likely lie in Defendant’s own records. *See*
7 *Doninger*, 564 F.2d at 1313. *O’Connor*, on which Defendant relies, does not hold
8 otherwise. In *O’Connor*, the defendant had moved to compel arbitration, the
9 agreements were in the record, and the Ninth Circuit had already reversed the district
10 court’s refusal to enforce them. 904 F.3d at 1091–93. The Ninth Circuit reversed the
11 class certification orders because they rested on the district court’s contrary ruling
12 that the agreements were unenforceable. *Id.* at 1094–95. *O’Connor* therefore says
13 nothing about whether a defendant may defeat class allegations before discovery by
14 relying on an agreement it has not filed. Defendant may renew this argument at class
15 certification.¹⁰

16 Second, Defendant argues that two individualized questions would
17 predominate over any common ones. ECF No. 14 at 20–21. The first question is
18 whether each subscriber consented—an inquiry into when and how each subscriber
19 enrolled and whether each subscriber later opted out. *Id.* at 20. The second question
20 is whether Defendant texted any subscriber before 8 a.m. or after 9 p.m. in the
21 subscriber’s local time. *Id.* at 21. Plaintiff responds that discovery will answer both
22 questions: whether Postscript’s enrollment data resolve consent classwide, and
23 whether time-zone compliance can be shown with information that is in Defendant’s
24 exclusive possession. ECF No. 19 at 15.

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27 ¹⁰ Because Defendant does not move to compel arbitration, ECF No. 21 at 10, the
28 Court does not reach Plaintiff’s argument that Defendant waived any right to
arbitrate. *See* ECF No. 19 at 13–14.

1 Rule 23(b)(3) requires common questions of law or fact to “predominate over
2 any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). A
3 question is common when “the same evidence will suffice for each member to make
4 a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.”
5 *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation modified).
6 Whether consent and location can be proved with common evidence depends on how
7 Defendant’s platform recorded enrollment and location data, information in
8 Defendant’s sole possession. *See Doninger*, 564 F.2d at 1313. That question cannot
9 be answered on the pleadings, before any class discovery has occurred. *Cf. Vinole*,
10 571 F.3d at 943 (affirming a preemptive denial of class certification after the
11 plaintiffs had nearly ten months of discovery).

12 Third, Defendant argues that Plaintiff is an inadequate class representative for
13 two reasons. ECF No. 14 at 21. Defendant first argues that Plaintiff’s allegation that
14 he “never signed any type of authorization” is “materially false” because the opt-in
15 records show that he gave “prior express written consent” to the messages he
16 received. *Id.* A plaintiff who makes a false allegation “central to his theory of
17 liability,” Defendant contends, cannot “honestly and competently represent absent
18 class members.” *Id.* Defendant then argues that class members would suffer if
19 Plaintiff represented them because he is “subject to unique defenses that will
20 dominate this litigation.” *Id.* Plaintiff responds that his adequacy should be decided
21 at class certification because it raises “fact-specific questions not suited for resolution
22 at the pleading stage.” ECF No. 19 at 16 (citation modified).

23 Whether Plaintiff will “fairly and adequately protect the interests of the class”
24 is a question the Court cannot resolve on the pleadings. Fed. R. Civ. P. 23(a)(4). To
25 answer it, “courts must resolve two questions: (1) do the named plaintiffs and their
26 counsel have any conflicts of interest with other class members and (2) will the
27 named plaintiffs and their counsel prosecute the action vigorously on behalf of the
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1 class?” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (citation
2 modified). Here, both of Defendant’s arguments rely on facts that go beyond the
3 pleadings. The assertion that Plaintiff made a false allegation depends on considering
4 the opt-in records, which the Court has already declined to do. *See supra* Section
5 I.B.2. The second argument, that Plaintiff faces “unique defenses,” is in tension with
6 Defendant’s own position that every class member enrolled through the same process
7 and agreed to the same Terms of Service. ECF No. 14 at 19–20. If Defendant’s view
8 is correct, any defenses would be common to the class, not unique to Plaintiff. If not,
9 any differences among class members would emerge in discovery. Either way,
10 Plaintiff’s adequacy is a question for class certification.

11 Fourth, Defendant argues that proposed class counsel cannot adequately
12 represent the interests of the class and that counsel’s shortcomings make Plaintiff an
13 unsuitable class representative. ECF No. 14 at 22–24 (pointing to counsel’s volume
14 of TCPA filings, the orders to show cause issued in those cases, and the pre-filing
15 investigation in this case); ECF No. 21 at 7–9. Plaintiff responds that the argument is
16 premature because it rests on the Carter Declaration, and he has not had the chance
17 to depose Carter. ECF No. 19 at 17.

18 This argument is also premature. Rule 23(g) requires a court to appoint class
19 counsel when it certifies a class, Fed. R. Civ. P. 23(g)(1), and Plaintiff has not yet
20 sought certification. Even if the issue were timely, all of Defendant’s evidence comes
21 from the Carter Declaration and its attachments, which are outside the pleadings and
22 have not been tested. ECF No. 14-1. *In re Cavanaugh*, on which Defendant relies,
23 concerned a district court’s review of a lead plaintiff’s choice of counsel under the
24 Private Securities Litigation Reform Act, not a motion to deny certification before
25 discovery. 306 F.3d 726, 732–33 (9th Cir. 2002). And even there, the Ninth Circuit
26 cautioned that “the choice of counsel is only an indicator—and a relatively weak one
27 at that—of plaintiff’s fitness.” *Id.* at 733. Defendant may renew its challenge when
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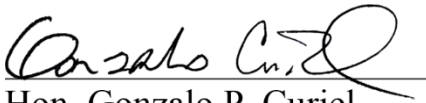
1 Plaintiff moves for class certification. For now, the Court declines Defendant's
2 request for an evidentiary hearing. ECF No. 21 at 9 n.4; *see Victorino*, 322 F.R.D. at
3 410 & n.3 (deferring a challenge to class counsel's adequacy until class certification
4 and declining to consider new evidence raised in a reply footnote that the opposing
5 party had no opportunity to address).

6 **CONCLUSION**

7 For the foregoing reasons, the Court **DENIES** Defendant's Motion for
8 Judgment on the Pleadings and **DENIES** Defendant's Motion for an Early
9 Determination that Class Certification be Denied.

10 **IT IS SO ORDERED.**

11 Dated: October 29, 2026

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13 Hon. Gonzalo P. Curiel
14 United States District Judge
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