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

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JORDAN FRIEDMAN, individually,
and on behalf of all others similarly
situated,

CASE NO. 12-CV-2837-IEG (BGS)

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**ORDER GRANTING MOTION TO
DISMISS**

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Plaintiff,

[Doc. No. 5]

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v.

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TORCHMARK CORPORATION;
UNITED AMERICAN INSURANCE
COMPANY; DOES 1 THROUGH 10,
inclusive, and each of them,

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Defendants.

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Presently before the Court is Defendant United American Insurance Company's ("Defendant") motion to dismiss Plaintiff Jordan Friedman's ("Plaintiff") complaint for failure to state a claim. [Doc. No. 5, Def.'s Mot. to Dismiss ("Def.'s Mot.")] For the following reasons, the Court **GRANTS** the motion.

BACKGROUND

Plaintiff alleges that Defendant is a major subsidiary of Torchmark Corporation,¹ and sells, services, and maintains health, life, and accident insurance policies for consumers. [Doc. No. 1, Compl. ¶ 6.] Plaintiff states that in or around October 2012, Defendant contacted Plaintiff on his residential home telephone

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¹ The Court previously dismissed Torchmark Corporation from this action for lack of jurisdiction. [Doc. No. 17.]

1 using a pre-recorded message. [Id. ¶¶ 9-10.] The message invited Plaintiff to
2 contact Defendant at a specific phone number to attend a “recruiting webinar” on
3 October 17, 2012 “wherein Plaintiff could learn about [Defendant’s] products and
4 services in order to sell said products and services to other Americans who are in
5 need of health or other similar insurance policies.” [Id. ¶ 10.] Plaintiff alleges that
6 Defendant “placed no less than two . . . such telephone calls to Plaintiff’s residential
7 home telephone leaving identical messages” [Id. ¶ 11.]

8 Plaintiff states that the calls placed by Defendant used an “automatic
9 telephone dialing system.” [Id. ¶ 15.] Plaintiff also alleges that the voice messages
10 left by Defendant used an “artificial or pre[-]recorded voice.” [Id. ¶ 16.] Plaintiff
11 further alleges that Defendant’s calls were not for emergency purposes. [Id. ¶ 17.]
12 Plaintiff is not a customer of Defendant, and has never purchased or used any goods
13 or services offered by Defendant. [Id. ¶ 12.] He also states that he has never
14 provided any personal information, including his home telephone number, to
15 Defendant, and that his home telephone number has been registered with the
16 National Do Not Call Registry since October 28, 2008. [Id. ¶¶ 12-13.]

17 Plaintiff filed the instant action on behalf of himself and others similarly
18 situated on November 27, 2012. The Complaint asserts only one cause of action for
19 violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et*
20 *seq.* [Id. ¶¶ 29-32.] Defendant subsequently filed the present motion to dismiss,
21 arguing that Plaintiff’s sole cause of action fails to state a claim upon which relief
22 can be granted under Federal Rule of Civil Procedure 12(b)(6). [Doc. No. 5, Def.’s
Mot.]

23 DISCUSSION

24 **I. Motion to Dismiss**

25 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
26 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
27 Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The court
28 must accept all factual allegations pleaded in the complaint as true, and must

1 construe them and draw all reasonable inferences from them in favor of the
2 nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th
3 Cir.1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain
4 detailed factual allegations, rather, it must plead “enough facts to state a claim to
5 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
6 (2007). A claim has “facial plausibility when the plaintiff pleads factual content
7 that allows the court to draw the reasonable inference that the defendant is liable for
8 the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing
9 Twombly, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely
10 consistent with’ a defendant’s liability, it stops short of the line between possibility
11 and plausibility of entitlement to relief.” Iqbal, 556 U.S. at 1949 (quoting
12 Twombly, 550 U.S. at 678).

13 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
14 relief’ requires more than labels and conclusions, and a formulaic recitation of the
15 elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (quoting
16 Papasan v. Allain, 478 U.S. 265, 286 (1986)) (alteration in original). A court need
17 not accept “legal conclusions” as true. Iqbal, 556 U.S. at 678. Despite the deference
18 the court must pay to the plaintiff’s allegations, it is not proper for the court to
19 assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that
20 defendants have violated the . . . laws in ways that have not been alleged.”
21 Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters,
22 459 U.S. 519, 526 (1983).

23 Further, a court generally may not consider materials beyond the pleadings
24 when ruling on a Rule 12(b)(6) motion. United States v. Ritchie, 342 F.3d 903,
25 907-08 (9th Cir. 2003). However, a court “may take judicial notice of matters of
26 public record . . . as long as the facts noticed are not subject to reasonable dispute.”
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1 Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012).²

2 As a general rule, a court freely grants leave to amend a complaint which has
3 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied
4 when “the court determines that the allegation of other facts consistent with the
5 challenged pleading could not possibly cure the deficiency.” Schreiber Distrib. Co.
6 v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

7 **A. Violation of the TCPA**

8 The TCPA provides:

9 It shall be unlawful for any person within the United States, or any
10 person outside the United States if the recipient is within the United
11 States-- . . . to initiate any telephone call to any residential telephone line
12 using an artificial or prerecorded voice to deliver a message without the
prior express consent of the called party, unless the call is initiated for
emergency purposes or is exempted by rule or order by the Commission
under paragraph (2)(B)”

13 47 U.S.C. § 227(b)(1)(B). 47 U.S.C. § 227(b)(2)(B) states that the Federal
14 Communications Commission (“FCC”) may exempt the following by regulation
15 when implementing this statute: “calls that are not made for a commercial purpose,”
16 and “such classes or categories of calls made for commercial purposes as the [FCC]
17 determines . . . will not adversely affect the privacy rights that this section is
18 intended to protect; and do not include the transmission of any unsolicited
19 advertisement.” 47 U.S.C. § 227(b)(2)(B).

20 “Pursuant to its delegated authority, the FCC has exempted from the general
21 prohibition on automated commercial calls those that both ‘do[] not include or
22 introduce an unsolicited advertisement or constitute a telephone solicitation[,]’ 47
23 C.F.R. § 64.1200(a)(2)(iii) (2011) (amended 2012), and do not adversely affect the
24 privacy rights of the called party, see In re Rules and Regulations Implementing the
25 Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd.

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27 ² Because the Court resolves this motion to dismiss without consulting the documents for
28 which judicial notice is sought, the Court declines to address the request for judicial notice. [Doc. No.
5-1, Request for Judicial Notice.]

1 14014, 14095 ¶ 136, 2003 WL 21517853 (F.C.C. July 3, 2003)” (“2003 Report and
2 Order”). Chesbro v. Best Buy Stores, L.P., 705 F.3d 913, 917 (9th Cir. 2012).

3 “[U]nsolicited advertisement’ means any material advertising the commercial
4 availability or quality of any property, goods, or services which is transmitted to any
5 person without that person’s prior express invitation or permission....” 47 U.S.C. §
6 227(a)(5). The term “telephone solicitation” is defined by the TCPA as “the
7 initiation of a telephone call or message for the purpose of encouraging the purchase
8 or rental of, or investment in, property, goods, or services, which is transmitted to
9 any person, but such term does not include a call or message (A) to any person with
10 that person’s prior express invitation or permission, (B) to any person with whom
11 the caller has an established business relationship, or (C) by a tax exempt nonprofit
12 organization.” 47 U.S.C. § 227(a)(4). “Neither the statute nor the regulations
13 require an explicit mention of a good, product, or service where the implication is
14 clear from the context.” Chesbro, 705 F.3d at 918.

15 “[A]pplication of the prerecorded message rule should turn, not on the
16 caller’s characterization of the call, but on the purpose of the message.” 2003
17 Report and Order at 14098 ¶ 141 (footnote omitted); see also Chesbro, 705 F.3d at
18 918. Therefore, a court must “turn to the calls at issue to determine whether they
19 demonstrate a prohibited advertising purpose.” Id.

20 In Chesbro, the Ninth Circuit held that calls which “were aimed at
21 encouraging listeners to engage in future commercial transactions with Best Buy to
22 purchase its goods . . . constituted unsolicited advertisements [and] telephone
23 solicitations” within the meaning of the TCPA. Chesbro, 705 F.3d at 919.

24 A Pennsylvania district court found that faxing unsolicited messages to a
25 former employer seeking to hire away the former employer’s current employees did
26 not constitute “unsolicited advertisements” under the TCPA. Lutz Appellate Servs.,
27 Inc. v. Curry, 859 F.Supp. 180 (E.D. Pa. 1994). The Lutz court stated that “[a]
28 company’s advertisement of available job opportunities within its ranks is not the

1 advertisement of the commercial availability of property.” Id. at 181. Citing United
2 States v. Knox, 32 F.3d 733 (3d Cir. 1994), which held that the words of a statute
3 must be interpreted in accordance with their ordinary meaning unless the context
4 indicates otherwise, the Lutz court explained that when “an employer places a ‘help
5 wanted’ ad, no one speaks or thinks of it as a property solicitation or an offer of
6 property.” Lutz, 859 F.Supp. at 181. The Lutz court concluded that the messages at
7 issue were “not unsolicited ‘material advertising the commercial availability or
8 quality of any property, goods or services’ within the ordinary meaning of those
9 words of the [TCPA].” Id. at 181-82. The court ultimately dismissed the plaintiff’s
10 complaint for failure to state a claim upon which relief can be granted under Federal
11 Rule of Civil Procedure 12(b)(6). Id.

12 Additionally, the FCC has issued a rule about calls regarding radio station
13 and television broadcaster messages. The FCC “concluded that if the purpose of the
14 message is merely to invite a consumer to listen to or view a broadcast, such
15 message is permitted under the rules as a commercial call that does not include or
16 introduce an unsolicited advertisement or constitute a telephone solicitation.” Leyse
17 v. Clear Channel Broadcasting Inc., 697 F.3d 360, 371 (6th Cir. 2012) (quoting
18 Rules and Regulations Implementing the Telephone Consumer Protection Act of
19 1991, 70 Fed. Reg. 19330-01, 19335 (Apr. 13, 2005) (“2005 Rules and
20 Regulations”). However, if the message encourages consumers to listen to or watch
21 programming for which they must pay, such messages would be considered
22 unsolicited advertisements. 2005 Rules and Regulations at 19335-36.

23 Defendant argues that Plaintiff fails to allege facts that constitute a violation
24 of the TCPA because the pre-recorded calls made to Plaintiff’s home were neither a
25 “telephone solicitation” nor an “unsolicited advertisement.” [Doc. No. 5, Def.’s
26 Mot. at 5.] In its motion, Defendant does not dispute that the calls were pre-
27 recorded and made to a residential telephone line without Plaintiff’s prior express
28 consent. Plaintiff argues that “[b]ecause Defendant left pre[-]recorded voice

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2 messages on . . . Plaintiff’s landline telephone (which were not exempted by the
3 FCC), and without prior express consent, Plaintiff states a claim against Defendant
4 under the TCPA.” [Doc. No. 10, Pl.’s Opp. at 8.] Plaintiff contends that the calls
5 were “a marketing tool designed to make Defendant money in the long run.” [Id.]

6 In light of relevant case law and regulations, Defendant’s calls to Plaintiff
7 regarding the recruiting webinar constitute neither unsolicited advertisements nor
8 telephone solicitations. Regarding unsolicited advertisements, the Court finds
9 persuasive the Lutz court’s conclusion that an offer of employment is not “material
10 advertising the commercial availability . . . of any property, goods, or services”
11 within the ordinary meaning of those words of the TCPA. 47 U.S.C. § 227(a)(4);
12 Lutz, 859 F. Supp. at 181-82. The messages in the instant case inviting Plaintiff to
13 attend a recruiting webinar wherein Plaintiff could learn about Defendant’s products
14 to potentially sell them [Doc. No. 1, Compl. ¶ 10] is similar to the offer of
15 employment in Lutz. Defendant’s message was not aimed at encouraging Plaintiff
16 to engage in future commercial transactions with Defendant to purchase its goods.
17 See Chesbro, 705 F.3d at 919. Rather, Defendant’s message informed Plaintiff
18 about a recruiting webinar that could have resulted in an opportunity to sell
19 Defendant’s goods, which is akin to an offer of employment.

20 Further, the FCC’s 2005 Rules and Regulations, although pertaining to
21 broadcasters, offer instructive guidance on the contours of “unsolicited
22 advertisement.” The 2005 Rules and Regulations distinguish between messages
23 that encourage consumers to listen to free broadcasts and messages that encourage
24 consumers to listen to programming for which they must pay. 2005 Rules and
25 Regulations at 19335-36. The latter constitutes unsolicited advertisements, whereas
26 the former does not. Here, Plaintiff does not allege that the messages encouraged
27 him to buy something. Rather, Plaintiff states that the recruiting webinar “may have
28 invited Plaintiff to attend for free” and was for the purpose of learning about selling
29 Defendant’s products to others. [Doc. No. 1, Compl. ¶ 10; Doc. No. 10, Pl.’s Opp.

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2 at 13.] Therefore, the present situation is not analogous to the situation which
3 constitutes unsolicited advertisements described in the 2005 Rules and Regulations
4 where messages encourage consumers to listen to programming for which they must
5 pay. See Rules and Regulations 2005 at 19335-36.

6 Defendant's calls also do not constitute telephone solicitations because they
7 were not made for the purpose of encouraging the purchase of property, goods, or
8 services. See 47 U.S.C. § 227(a)(4). The Ninth Circuit has construed the language
9 to mean that the messages were made for the purpose of encouraging the listener to
10 engage in future commercial transactions with the caller to purchase property,
11 goods, or services. Chesbro, 705 F.3d at 919. In the instant case, Plaintiff only
12 alleges that the messages invited Plaintiff to learn about Defendant's products in
13 order to potentially sell them to others. [Doc. No. 1, Compl. ¶ 10.]


14 Accordingly, as Plaintiff fails to allege that the messages constitute
15 unsolicited advertisements or telephone solicitations, he is unable to state a claim
16 under the TCPA.

16 CONCLUSION

17 For the reasons above, the Court **GRANTS** Defendant's motion to dismiss for
18 failure to state a claim. Plaintiff is **GRANTED** twenty-one (21) days from the date
19 this Order is filed to file a First Amended Complaint addressing the deficiencies of
20 the pleading set forth above.

21 **IT IS SO ORDERED.**

22 **DATED:** April 16, 2013

23 
24 **IRMA E. GONZALEZ**
25 **United States District Judge**