

## Sheer Call Numbers Do Not Equate To An ATDS

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The bare allegation of a large number of calls received is not enough to infer the employment of an automatic telephone dialing system (ATDS) to make them. That was the recent ruling in *Hazan v. Wells Fargo & Co.*, 2018 U.S. Dist. LEXIS 72748, Civil Action No 18-10228 (MAS)(TJB) (Filed April 30, 2019), dismissing the plaintiff's TCPA claim as missing a key element.

After reportedly telling a Wells Fargo representative that he wanted no more calls to his cellphone, Mr. Hazan alleged he received, " 'at least 1,402 calls...and 20 voicemails.' " Arguing that such a volume of calls was unlikely to be manually dialed, Mr. Hazan claimed *ipso facto* it must have been an ATDS. Therefore, he had met the ATDS element of pleading a TCPA claim.

Not so fast, ruled Judge Michael Shipp of the District Court of New Jersey. A bare allegation that an ATDS was used does not satisfy the pleader's burden. While there are certain factual allegations that may give rise to an inference that a defendant used an ATDS to place calls (e.g., heard silence before a recording began with a pre-recorded voice), merely pointing to the number of calls alone was not enough in this case.

Mr. Hazan failed to even specify the time period in which the alleged 1,402 calls had occurred. The Court took it upon itself to do a rough computation of how many calls a day this might be over the 838-day period between the first alleged incident and the filing of the complaint. The 1,402 calls could be translated into "one or two manual calls per day," which did not justify the inference that an ATDS was involved.

Motion to dismiss for failure to state a claim was granted.

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