

1 Allen Dreschel (*pro hac vice pending*)
ddreschel@ftc.gov
2 FEDERAL TRADE COMMISSION
3 600 Pennsylvania Avenue Northwest
Washington, D.C. 20580
4 Tel: (202) 326-2531; Fax: (202) 326-2477

5
6 Miles D. Freeman (Local Counsel)
mfreeman@ftc.gov; Cal. Bar No. 299302
7 FEDERAL TRADE COMMISSION
8 10990 Wilshire Boulevard, Suite 400
Los Angeles, CA 90024
9 Tel: (310) 824-4332; Fax: (310) 824-4380

10
11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14
15 _____) Case No. 2:21-mc-1026
16 FEDERAL TRADE)
17 COMMISSION,)
18 Petitioner,) **PETITION FOR SUMMARY**
19 v.) **ENFORCEMENT OF A CIVIL**
20) **INVESTIGATIVE DEMAND**
21 XCAST LABS, INC.,)
22 Respondent.)
23)
24 _____)

1 **Introduction**

2 Pursuant to 15 U.S.C. § 57b-1(e), the Federal Trade Commission (“FTC” or
3 “Commission”) hereby petitions this Court for an order requiring XCast Labs, Inc.
4 (“XCast”) to comply with a duly issued Civil Investigative Demand (“CID”). The
5 Commission issued a CID to XCast as part of a law-enforcement investigation into
6 whether certain persons or entities have initiated large volumes of illicit phone
7 calls with prerecorded telemarketing messages (“robocalls”). The CID directed
8 XCast to produce information and documents and respond to six general business
9 interrogatories by February 28, 2021.

10 Despite FTC staff granting an extension of the response deadline and
11 attempting to work cooperatively with XCast staff to solicit compliance, XCast’s
12 response remains severely deficient. At the time of this filing, XCast has been in
13 default of its obligations under the CID for more than five months. XCast has not
14 asserted any colorable legal basis for its noncompliance, and its refusal to fulfill its
15 obligations under the CID has hampered the Commission’s investigation into
16 illegal robocalls. Accordingly, the Commission requests that this Court order
17 XCast to respond in full to the CID within ten days or appear and show cause why
18 it should not comply with the CID in its entirety.¹

19 **Jurisdiction and Venue**

20 1. This Court has jurisdiction to enforce the Commission’s civil
21 investigative demands. 15 U.S.C. §§ 57b-1(e), (h); 28 U.S.C. §§ 1331, 1337(a),
22 and 1345.

23 2. Section 20(e) of the FTC Act, 15 U.S.C. § 57b-1(e), provides in
24 relevant part:

25
26
27 _____
28 ¹ An index of exhibits is included on the final page of this petition for ease of
reference.

1 Whenever any person fails to comply with any civil investigative
 2 demand duly served upon him under this section . . . the Commission
 3 . . . may file, in the district court of the United States for any judicial
 4 district in which such person resides, is found, or transacts business,
 5 and serve upon such person, a petition for an order of such court for the
 6 enforcement of this section.

7 3. Venue is proper in this judicial district because XCast resides, is
 8 found, and transacts business here. 15 U.S.C. § 57b-1(e); 28 U.S.C. § 1391.

9 Nature of Proceeding

10 4. A CID enforcement proceeding is properly instituted by a petition and
 11 is “summary in nature.” *Solis v. Forever 21, Inc.*, No. 12-cv-9188 (MMM), 2013
 12 WL 1319769, at *2 (C.D. Cal. Mar. 7, 2013) (quoting *EEOC v. Karuk Tribe*
 13 *Housing Auth.*, 260 F.3d 1071, 1078 (9th Cir. 2001)).²

14 5. “Judicial review of an administrative subpoena . . . is to be handled
 15 summarily and with dispatch.” *In re Off. of Inspector Gen., R.R. Ret. Bd.*, 933 F.2d
 16 276, 277 (5th Cir. 1991); see *Solis v. Forever 21, Inc.*, No. 12-cv-09188 (MMM),
 17 2013 WL 1319769, at *2 (C.D. Cal. Mar. 7, 2013) (“the very backbone of an
 18 administrative agency’s effectiveness in carrying out [its] congressionally
 19 mandated duties . . . is the *rapid exercise* of the power to investigate the activities
 20 of the entities over which it has jurisdiction.”) (emphasis in original) (quoting *Fed.*
 21

22
 23 ² The Commission has prevailed in summary CID enforcement proceedings that
 24 were instituted by petition in the Ninth Circuit. See, e.g., *FTC v. Kushly*, No. 20-
 25 mc-36 (SMB) (D. Ariz. Aug. 10, 2020), ECF No. 5 at 1-2 (ordering respondent to
 26 comply with an FTC CID within ten days or to appear and show cause for
 27 noncompliance); *FTC v. Redwood Sci. Tech.*, No. 17-cv-7921 (SJO) (PLA) (C.D.
 28 Cal. Mar. 6, 2018), ECF No. 20 at 1-2 (ordering respondent to show cause for
 noncompliance); *FTC v. IT Media*, No. 16-cv-9483 (CAS) (MRW) (C.D. Cal. Feb.
 2, 2017), ECF No. 18 at 1-2 (ordering respondent to comply with an FTC CID
 within ten days and or to appear and show cause for noncompliance).

1 *Maritime Comm'n v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975)); *FTC v.*
2 *TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (noting “the strong public interest
3 in having administrative investigations proceed expeditiously and without
4 impediment”).

5 6. Summary enforcement proceedings are “streamlined proceedings”
6 that generally do not involve discovery, testimony from parties or witnesses, or the
7 presentation of evidence. *Application to Enforce Admin. Subpoenas of SEC v.*
8 *Jones*, No. 13-cv-8314 (DDP) (EX), 2013 WL 6536085, at *2 (C.D. Cal. Dec. 13,
9 2013).³

10 **The Parties**

11 7. Petitioner, the Federal Trade Commission, is an independent agency
12 of the United States created by statute. 15 U.S.C. §§ 41-58. The FTC enforces
13 Section 5 of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive
14 acts and practices in or affecting commerce, and the Telemarketing Sales Rule, 16
15 C.F.R. § 310, which prohibits deceptive and abusive telemarketing practices.

16 8. Respondent, XCast Labs, Inc., is a Voice over Internet Protocol
17 (“VoIP”) services provider headquartered in Los Angeles, CA. VoIP technology
18 allows users to place and receive phone calls using an internet connection rather
19 than a traditional telephone line.

20 **The FTC’s Investigation and Civil Investigative Demand**

21 9. On April 1, 2016, the FTC issued a Resolution Directing Use of
22 Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers,
23

24 ³ The Federal Rules of Civil Procedure “apply to proceedings to compel . . . the
25 production of documents through a subpoena issued by a United States officer or
26 agency under a federal statute, except as otherwise provided by statute, by local
27 rule, or by court order in the proceedings.” FED. R. CIV. P. 81(a)(5). Courts treat
28 CIDs as a form of administrative subpoena. *See, e.g., FTC v. Ken Roberts Co.*, 276
F.3d 583, 584-87 (D.C. Cir. 2001); *CFPB v. Great Plains Lending*, No. 14-cv-
2090 (MWF), 2014 WL 12685941, at *2 (C.D. Cal. May 27, 2014).

1 Suppliers, or Others (“the Resolution”). The purpose of the investigations
2 authorized by the Resolution are:

3 To determine whether unnamed telemarketers, sellers, or others
4 assisting them have engaged or are engaging in: (1) unfair or
5 deceptive acts or practices in or affecting commerce in violation of
6 Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as
7 amended); and/or (2) deceptive or abusive telemarketing acts or
8 practices in violation of the Commission’s Telemarketing Sales Rule,
9 16 C.F.R. pt 310 (as amended), including but not limited to the
10 provision of substantial assistance or support – such as mailing lists,
11 scripts, merchant accounts, and other information, products, or
12 services – to telemarketers engaged in unlawful practices. The
13 investigation is also to determine whether Commission action to
14 obtain monetary relief would be in the public interest.

15 Pet. Ex. B at 37.⁴

16 10. On January 9, 2021, the Commission issued a CID pursuant to the
17 Resolution directing XCast to produce certain information and documents and
18 respond to six general business interrogatories within thirty days. *See* Pet. Ex. B.

19 11. The CID provides that XCast could file a petition to limit or quash the
20 CID with the Secretary of the FTC within twenty days of receipt of the CID. *See*
21 *id.* at 31.

22 12. The CID also provides that XCast must meet and confer with FTC
23 counsel to “discuss any questions . . . regarding this CID or any possible CID
24 modifications that could reduce [its] cost, burden, or response time[.]” *Id.* at 25.

25
26 ⁴ The exhibits to this petition contain limited redactions that cover material that
27 merits confidential treatment under Local Rule 5.2 and information that would
28 reveal the identities of targets of a nonpublic FTC investigation. *See* Ex. B. at 26,
Ex. D at 43, Ex. E at 45, Ex. F at 48-49 n.2, Ex. G at 61-62, and Ex. J at 74-75.

1 **Service of the CID**

2 13. After the Commission issued the CID on January 9, 2021, FTC staff
3 attempted to serve the CID via FedEx on XCast’s registered agent for service of
4 process at XCast’s principal place of business in Los Angeles. This package was
5 returned and marked “undeliverable.” *See* Pet. Ex. C.

6 14. According to Mr. Stephen Nelson, Senior Vice President of
7 Operations at XCast, no one was at XCast’s offices to receive mail because
8 company staff were working remotely due to the coronavirus pandemic. *See* Pet.
9 Ex. D at 43.

10 15. On January 26, 2021, Amber Williams, an investigator at the FTC,
11 emailed Mr. Nelson and explained that the FTC’s attempts to deliver the CID to
12 XCast’s offices by FedEx had failed. *See id.* at 44. Ms. Williams requested that Mr.
13 Nelson provide a mailing address for service of the CID. *See id.* On the same day,
14 Mr. Nelson responded: “You can send it to my home or send via email.” *Id.* at 43.

15 16. On January 28, 2021, Ms. Williams served the CID on Mr. Nelson via
16 email. *Id.*

17 17. Given the thirty-day response period, service on January 28, 2021
18 established a response deadline of February 28, 2021.

19 **XCast’s Initial Response**

20 18. On February 8, 2021, Valerie Verduce, counsel for the FTC,
21 participated in the required meet-and-confer session with Mr. Nelson of XCast by
22 telephone. Mr. Nelson asked for additional time to respond to the CID. On the
23 same day, the FTC served a letter on Mr. Nelson that extended the original
24 response deadline for Subsections II.C and II.D of the CID from February 28, 2021
25 until March 10, 2021. *See* Pet. Ex. E.

26 19. XCast did not file a petition to limit or quash the CID within twenty
27 days of service of the CID. *See* Pet. Ex. A at ¶ 9.

28

1 20. XCast failed to produce any response to the CID by the original
2 February 28 deadline. *See id.* at ¶¶ 9-10.

3 21. On March 5, 2021, XCast made its initial production, which was
4 severely deficient.⁵ *See id.* at ¶ 10.

5 22. On March 16, 2021, Ms. Verduce held a telephone conference with
6 Mr. Nelson about the extensive deficiencies in XCast’s production. *See id.* at ¶ 10.

7 23. On March 17, 2021, XCast produced a small amount of responsive
8 material as a supplement to its March 5 production. *See id.* at ¶ 11.

9 24. On March 22, 2021, Ms. Verduce held a telephone conference with
10 Mr. Edward Pennington, XCast’s newly retained counsel, about the status of
11 XCast’s production. During this call, Ms. Verduce reviewed the deficiencies in
12 XCast’s production in detail and explained that XCast must comply in full with the
13 CID. *See Pet. Ex. A* at ¶ 13.

14 25. On March 26, 2021, Mr. Pennington wrote that: “XCast believes that
15 it has complied with the CID to the extent allowed by law.” *See Pet. Ex. F* at 58.

16 **The FTC’s Efforts to Solicit Compliance with the CID**

17 26. On April 9, 2021, Allen Dreschel, counsel for the FTC, wrote a letter
18 to Mr. Pennington. *See Pet. Ex. G.* The letter stated that “XCast has been in default
19 of the CID for more than five weeks.” *Id.* at 60.

20 27. Additionally, this letter reviewed the CID’s specifications in detail,
21 identified each of the deficiencies in XCast’s production, and stated that the FTC
22 would consider seeking judicial enforcement of the CID if XCast did not provide
23 complete responses by April 16, 2021. *See id.* at 60-64.

24
25
26
27 _____
28 ⁵ The deficiencies in XCast’s production are set forth in full in ¶¶ 32-45, *supra*,
and in the Declaration of Amber Williams, *Pet. Ex. A* at ¶¶ 18-25.

1 28. On April 13, 2021, Mr. Pennington responded by letter and stated that
2 XCast would “continue its best effort to respond with additional information by
3 April 16th, 2021, or early next week at the latest.” Pet. Ex. H at 69.

4 29. On April 15, 2021, Mr. Dreschel replied by letter. *See* Pet. Ex. I. This
5 letter committed to postpone any consideration of judicial enforcement of the CID
6 until April 21, 2021 and reiterated that FTC staff expected full compliance with the
7 CID by no later than that date. *See id.* at 70-72.

8 30. On April 19, 2021, Mr. Pennington sent the first installment of an
9 additional production that took multiple weeks to retrieve owing to technical
10 difficulties from both parties. This production contained a trivial amount of
11 responsive material. *See* Pet. Ex. A at ¶ 16.

12 31. The cover letter that accompanied XCast’s April 19, 2021 production
13 stated that XCast had responded to the CID “to the very best of [its] ability.” Pet.
14 Ex. J at 73.

15 32. On August 2, 2021, Mr. Pennington sent a final production after
16 receiving notice that the FTC intended to seek judicial enforcement of the CID.
17 This production contained no new responsive material.

18 **Summary of Deficiencies in XCast’s Production**

19 33. In short, the CID seeks:

- 20 (a) account information for specified XCast customers,
21 (b) account information for XCast customers who use certain
22 means or sources of payment,
23 (c) certain customer and subscriber correspondence,
24 (d) certain XCast business records, and
25 (e) responses to six general business interrogatories.

26 *See* Pet. Ex. B at 26-30.

27 34. XCast’s production is substantially complete with respect to account-
28 related information (the first two categories identified above). However, XCast’s

1 production is severely deficient with respect to the remainder of the CID. *See* Pet.
2 Ex. A at ¶ 17.

3 35. For example, XCast only provided one document in response to the
4 specification that seeks several categories of XCast’s customer and subscriber
5 correspondence. *See* Pet. Ex. A at ¶ 20.

6 36. Similarly, the specifications that seek business records and responses
7 to interrogatories elicited severely deficient or evasive responses or no response at
8 all. *See* Pet. Ex. A at ¶¶ 22-23.

9 **XCast Failed to Provide Customer and Subscriber Correspondence**

10 37. Subsection II.C of the CID seeks certain customer or subscriber
11 correspondence related to complaints, subpoenas, civil investigative demands, or
12 other inquiries about illicit telecommunications activities, including complaints
13 received from or sent to customers or subscribers, and XCast’s responses to any
14 such complaints or inquiries. *See* Pet. Ex. B. at 28.

15 38. XCast produced a one-page document in response. This document is
16 an email from Mr. Stephen Nelson of XCast that “suspend[s] all business
17 relationships with” a customer and states that “XCast Labs, Inc. has received
18 several recent inquiries that implicate that customer “or its resellers, customers or
19 clients in suspected involvement in illegal activities.” *See* Pet. Ex. A at ¶¶ 20-21.

20 39. Despite multiple requests, XCast has not produced the inquiries that
21 detail these infractions as required by Subsection II.C of the CID, and the
22 Commission believes that there is considerably more responsive material that
23 XCast has withheld. *See* Pet. Ex. A at ¶¶ 20-21. XCast must respond in full to
24 Subsection II.C to comply with the CID.

25 **XCast Failed to Provide Business Records**

26 40. Subsection II.D of the CID seeks certain of XCast’s business records.
27 *See* Pet. Ex. B at 28-29.

28

1 41. Although Subsection II.D calls for *all* documents that pertain to
2 multiple aspects of XCast’s operations, XCast produced only a small number of
3 marginally responsive documents. Despite the fact that four specifications in
4 Subsection II.D direct XCast to produce certain internal company communications,
5 XCast has failed to produce any such communications. *See* Pet. Ex. A at ¶¶ 22-23.

6 42. Put another way, XCast has not responded to the vast majority of the
7 specifications in Subsection II.D. *See id.* XCast must respond in full to
8 specifications II.D.1-3, II.D.6-10, and II.D.12 to comply with the CID.

9 **XCast Has Failed to Respond Adequately to Interrogatories**

10 43. Subsection II.E of the CID contains six general business
11 interrogatories. *See* Pet. Ex. B. at 29-30.

12 44. On April 30, 2021, XCast produced a table that identified the majority
13 of its owners and their ownership interest (in percentage form) in XCast. The
14 remainder of XCast’s interrogatory responses were incomplete and evasive. *See*
15 Pet. Ex. A at ¶ 25.

16 45. For example, in response to the interrogatory that directed XCast to
17 “identify employees, managers, or officers responsible for legal compliance[.]”
18 XCast declined to identify any compliance staff. Instead, XCast deflected by
19 writing that certain of its employees must follow the company’s compliance
20 standards: “Every customer-facing employee is responsible for adhering to the
21 compliance standards. To learn more about XCast’s management team, visit
22 www.xcastlabs.com (About Us).”

23 46. This is a plainly inadequate response to Subsection II.E. XCast must
24 answer the interrogatories contained in specifications II.E.2-6 to comply with the
25 CID.

1 **XCast Has No Valid Legal Basis for its Noncompliance**

2 47. As explained in detail in the memorandum of law submitted along
3 with this petition (“Memorandum”), ECF No. 2, XCast has no valid legal basis on
4 which to refuse to comply fully with the CID. *See Mem.* at 4-6.

5 48. Despite being expressly informed of its right to do so, XCast chose
6 not to file a petition to limit or quash the CID with Commission. *See Pet. Ex. B.* at
7 23, 31. Because XCast failed to exhaust its administrative remedies, it has waived
8 any objections to compliance with the CID.⁶ *See Mem.* at 4-6.

9 49. Notwithstanding XCast’s failure to contest the CID through the proper
10 administrative process, counsel for XCast has attempted to justify XCast’s
11 noncompliance in letter correspondence with the FTC, asserting, among other
12 things, that compliance with the CID would violate the law and that the CID was
13 overly burdensome. *See Pet. Exs. F, H, J.*

14 50. However, XCast’s counsel declined to identify any specific provision
15 of law that compliance with the CID would violate.⁷ Also, as explained in greater
16 depth in the accompanying Memorandum, the CID is not unduly burdensome. *See*
17 *Mem.* at 10-12. Instead, the CID is narrowly tailored to elicit information that goes
18
19
20
21

22 ⁶ Additionally, the CID was validly issued; the Commission followed all
23 applicable laws and regulations when issuing the CID to XCast. *See Mem.* at 8-9.

24 ⁷ On April 13, 2021, after being invited by FTC counsel to identify specific
25 provisions of law XCast would violate by complying with the CID, XCast’s
26 counsel responded: “I have no inclination in this letter to engage in a disputatious
27 discussion or ‘citation war’ about the applicability of the forest of laws and
28 regulations surrounding our recent exchanges and events[.]” *Pet. Ex. H* at 3.

1 to the crux of the Commission’s investigation into illegal robocalling. *See* Pet. Ex.
2 A at ¶ 5; Mem. at 9-10.⁸

3 51. In any event, XCast must not be permitted to make an end run around
4 the statutory process and deadline for contesting the validity of a CID. When
5 XCast chose not to petition the Commission to limit or quash the CID, it waived its
6 ability to assert any challenges to the CID with this Court. *See* Mem. at 4-6.

7 **Prayer for Relief**

8 For all the reasons stated herein, the Commission invokes the aid of this
9 Court and prays for the immediate issuance of an order, substantially in the form
10 attached, directing XCast to respond in full to the CID within ten days or to appear
11 and show cause why it should not comply with the CID in its entirety, and any
12 other relief this Court may deem just and proper.


13
14
15
16
17
18
19
20
21
22
23 ⁸ XCast’s counsel’s correspondence is replete with unsupported
24 misrepresentations about the FTC, including, for example: that XCast had no
25 meaningful opportunity to meet and confer with the FTC, *see* Pet. Ex. J at 4; that
26 FTC counsel would abruptly end phone conversations when XCast staff asked
27 questions about the CID, *see* Pet. Ex. H. at 2; that “the communications pattern
28 [from the FTC] have been so unusual and haphazard that even if XCast had wanted
to exercise its right . . . to file a Motion to Quash the timeframes and notifications
were moving targets,” *see id.*; and so on. These assertions are untrue.

1 Dated: August 6, 2021

Respectfully submitted,

2
3 Reilly Dolan
4 Acting General Counsel

5 Michele Arington
6 Assistant General Counsel for Litigation

7
8 
9 _____
10 Allen Dreschel
11 FEDERAL TRADE COMMISSION
12 600 Pennsylvania Avenue Northwest
13 Washington, D.C. 20580
14 ddreschel@ftc.gov; (202) 326-2531

15 Miles D. Freeman (Local Counsel)
16 FEDERAL TRADE COMMISSION
17 10990 Wilshire Boulevard, Suite 400
18 Los Angeles, CA 90024
19 mfreeman@ftc.gov; (310) 824-4332

20
21 *Attorneys for Petitioner*
22
23
24
25
26
27
28

Index of Exhibits

The Commission submits the following exhibits to verify the Commission's allegations and to establish the *prima facie* case for enforcement of the CID:

- | | |
|------------|--------------------------------------------------------------------|
| Pet. Ex. A | Declaration of Amber Williams |
| Pet. Ex. B | Civil Investigative Demand to XCast (Jan. 8, 2021) |
| Pet. Ex. C | FedEx Receipt for Attempted Service of CID to XCast |
| Pet. Ex. D | Email from Amber Williams Serving the CID on XCast (Jan. 28, 2021) |
| Pet. Ex. E | Letter from Anna Burns to Edward Pennington (Feb. 8, 2021) |
| Pet. Ex. F | Letter from Edward Pennington to Valerie Verduce (Mar. 26, 2021) |
| Pet. Ex. G | Letter from Allen Dreschel to Edward Pennington (Apr. 9, 2021) |
| Pet. Ex. H | Letter from Edward Pennington to Allen Dreschel (Apr. 13, 2021) |
| Pet. Ex. I | Letter from Allen Dreschel to Edward Pennington (Apr. 15, 2021) |
| Pet. Ex. J | Letter from Edward Pennington to Allen Dreschel (Apr. 19, 2021) |

1 Allen Dreschel (*pro hac vice pending*)
ddreschel@ftc.gov
2 FEDERAL TRADE COMMISSION
3 600 Pennsylvania Avenue Northwest
Washington, D.C. 20580
4 Tel: (202) 326-2531; Fax: (202) 326-2477

5
6 Miles D. Freeman (Local Counsel)
mfreeman@ftc.gov; Cal. Bar No. 299302
7 FEDERAL TRADE COMMISSION
8 10990 Wilshire Boulevard, Suite 400
Los Angeles, CA 90024
9 Tel: (310) 824-4332; Fax: (310) 824-4380

10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13
14 _____)
15 FEDERAL TRADE)
COMMISSION,)
16)
17 Petitioner,)
18)
19 v.)
20 XCAST LABS, INC.,)
21 Respondent.)
22)
23 _____)

Case No. 2:21-mc-1026

**MEMORANDUM OF LAW IN
SUPPORT OF PETITION FOR
SUMMARY ENFORCEMENT OF
A CIVIL INVESTIGATIVE
DEMAND**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1

2 I. INTRODUCTION 1

3 II. SUMMARY OF FACTS 1

4 III. LEGAL STANDARD 2

5 IV. ARGUMENT..... 4

6

7 A. XCast Waived the Opportunity to Seek Judicial Relief from Complying

8 with the CID by Failing to Exhaust Administrative Remedies 4

9 B. The CID is Within the Commission’s Authority, Was Issued in Accordance

10 with Procedure, Seeks Relevant Information, and Is Neither Overbroad

11 Nor Unduly Burdensome 6

12 1. Congress Granted Authority to the Commission to Investigate Illegal

13 Telemarketing Schemes..... 7

14 2. The CID Follows All Applicable Procedural Requirements..... 8

15 3. The CID Seeks Evidence That Is Relevant and Material to the

16 Commission’s Investigation 9

17 4. The CID Is Neither Overbroad Nor Unduly Burdensome 10

18

19 V. CONCLUSION..... 12

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases	Page(s)
<i>CFPB v. Future Income Payments, LLC</i> , 252 F. Supp. 3d 961 (C.D. Cal. 2017).....	16
<i>EEOC v. Aaron Bros. Inc.</i> , 620 F. Supp. 2d 1102 (C.D. Cal. 2009)	15
<i>EEOC v. Cuzzens of Ga.</i> , 608 F.2d 1062 (5th Cir. 1979).....	9
<i>EEOC v. Karuk Tribe Hous. Auth.</i> , 260 F.3d 1071 (9th Cir. 2001)	7
<i>FDIC. v. Garner</i> , 126 F.3d 1138 (9th Cir. 1997)	8, 15
<i>FTC v. Complete Merchant Sols., LLC</i> , No. 19-cv-996 (HCN) (EJF), 2020 WL 2059847 (D. Utah Apr. 28, 2020)	11
<i>FTC v. Kushly, LLC</i> , No. 20-mc-36 (D. Ariz. Aug. 10, 2020).....	11
<i>FTC v. Lambert</i> , No. 19-cv-61867 (S.D. Fla. Oct. 1, 2019).....	11
<i>FTC v. O’Connell Assocs., Inc.</i> , 828 F. Supp. 165 (E.D.N.Y. 1993).....	11
<i>FTC v. Stephen Bannon</i> , No. 20-mc-111 (D.D.C. Nov. 18, 2020).....	11
<i>FTC v. Tracers Info. Specialists, Inc.</i> , No. 8:16-mc-18 (TGW), 2016 WL 3896840 (M.D. Fla. June 10, 2016)	11
<i>Khukhrov v. NLRB</i> , No. 17-mc-64 (SJO), 2017 WL 7806597 (C.D. Cal. June 27, 2017)	15
<i>Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co.</i> , 341 U.S. 246 (1951).....	9
<i>Natures Image, Inc. v. U.S. Dep’t of Lab.</i> , No. 19-mc-14 (KES), 2019 WL 4316514 (C.D. Cal. June 19, 2019).....	14
<i>NLRB v. N. Bay Plumbing</i> , 102 F.3d 1005, 1007 (9th Cir. 1996)	8
<i>NLRB v. Fresh & Easy Neighborhood Mkt., Inc.</i> , 805 F.3d 1155 (9th Cir. 2015)	7, 8, 9

1 *NLRB v. KB In & Out, Inc.*, No. 13-cv-2276 (ABC), 2013 WL 12155187
 2 (C.D. Cal. May 6, 2013) 8
 3
 4 *Solis v. Forever 21, Inc.*, No. 12-cv-9188 (MMM), 2013 WL 1319769,
 (C.D. Cal. Mar. 7, 2013)..... 8
 5
 6 *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1413 (9th Cir. 1993)..... 8
 7
 8 *United States v. Exxon Mobil Corp.*, 943 F.3d 1283, 1287 (9th Cir. 2019)..... 14
 9
 10 *United States v. Golden Valley Elec. Ass’n*, 689 F.3d 1108, 1113
 (9th Cir. 2012) *passim*
 11
 12 **Statutes**
 13 15 U.S.C. § 43 12
 14 15 U.S.C. § 45
 § 45(a) 5, 12
 15 15 U.S.C. § 46
 16 § 46(a) 12
 17 15 U.S.C. § 57
 § 57b-1 12
 18 § 57b-1(c)..... 13
 19 § 57b-1(f)(2) 8, 10, 11
 20 § 57b-1(e)..... 7
 21 15 U.S.C. §§ 6101-6108 12
 22 **Regulations**
 23 16 C.F.R § 2.10(a)(1) (2001) 10
 24 16 C.F.R. § 2.7 (2001) 13
 25 16 C.F.R. Part 310 (2010)..... 5
 26
 27
 28

1 **I. INTRODUCTION**

2 The Federal Trade Commission submits this memorandum of law in support
3 of its petition to enforce its Civil Investigative Demand against XCast Labs, Inc.¹
4 The Commission seeks judicial enforcement of a Civil Investigative Demand issued
5 to XCast as part of a law enforcement investigation into widespread illegal
6 robocalling activities. XCast has been in default of its obligations under the CID for
7 more than *five months* and has thwarted the Commission's investigation through
8 significant delay and noncompliance.

9 Accordingly, the Commission respectfully requests that this Court grant its
10 petition and enter an order directing XCast to come into full compliance with the
11 CID within ten days or appear and show cause why it should not comply with the
12 CID in its entirety.

13 **II. SUMMARY OF FACTS**

14 The Commission's investigation seeks to determine whether unidentified
15 persons or entities are involved in the initiation of telephone calls that delivered
16 prerecorded messages in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and
17 the Telemarketing Sales Rule, 16 C.F.R. Part 310 (2010). *See* Pet. Ex. B at 2.² In
18 furtherance of this investigation, the Commission issued a Civil Investigative
19 Demand directing XCast to produce certain information and documents and
20 respond to six interrogatories within 30 days. *See id.* at 2-6. The CID informed
21
22

23 ¹ All abbreviations used in the petition for summary enforcement of the CID
24 ("Petition"), ECF No. 1, are adopted herein. Unless otherwise indicated, quotation
25 marks and citations are omitted, and alterations are adopted.

26 ² The FTC incorporates the statement of facts about the contents of the CID, service
27 of the CID on XCast, XCast's response to the CID, FTC staff's efforts to solicit
28 compliance with the CID, and the extensive deficiencies in XCast's production to
date from its petition, ECF No. 1, at ¶¶ 9-45, into this memorandum.

1 XCast of its right to petition the Commission to limit or quash the CID within 20
2 days. *See id.* at 7.

3 XCast did not petition the Commission to limit or quash the CID, and
4 XCast's response to the CID is severely deficient. FTC staff made significant
5 efforts to solicit XCast's compliance, including:

- 6 • granting an extension of the original response deadline of the CID, *see*
7 Pet. Ex. E;
- 8 • holding multiple phone conferences with XCast's staff and counsel to
9 discuss the CID's requirements, *see* Pet. Ex A at ¶¶ 10, 12;
- 10 • sending a letter to XCast's counsel that detailed the deficiencies in
11 XCast's production, explained that XCast had no legitimate basis on
12 which to decline to respond to the CID, and stated that the FTC would
13 consider judicial enforcement of the CID if XCast did not come into
14 compliance, *see* Pet. Ex. G at 60-64; and
- 15 • committing to postpone seeking judicial enforcement of the CID to
16 give XCast more time to comply, *see* Pet. Ex. I at 70, 72.

17 More than five months have passed since the CID's return date, and XCast's
18 response remains grossly deficient.

19 III. LEGAL STANDARD

20 When "any person fails to comply with any civil investigative demand duly
21 served upon him[.]" the Commission "may file . . . a petition for an order of [a U.S.
22 district] court for . . . enforcement[.]" 15 U.S.C. §§ 57(b)-1(e).³ "Generally, one
23 who has neglected the exhaustion of available administrative remedies may not seek
24 judicial relief" from an administrative subpoena. *NLRB v. Fresh & Easy*
25 *Neighborhood Mkt.*, 805 F.3d 1155, 1159 (9th Cir. 2015) (quoting *EEOC v.*
26 *Cuzzens of Ga.*, 608 F.2d 1062, 1063 (5th Cir. 1979)). In the Ninth Circuit, the

27 _____
28 ³ Courts treat CIDs as a form of administrative subpoena. *See* Pet. at 3 n.3.

1 “general rule . . . favor[s] . . . enforcement of administrative subpoenas.” *EEOC v.*
2 *Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001).⁴

3 “The scope of the judicial inquiry in an . . . agency subpoena enforcement
4 proceeding is quite narrow.” *United States v. Golden Valley Elec. Ass’n*, 689 F.3d
5 1108, 1113 (9th Cir. 2012). “The critical questions are: (1) whether Congress has
6 granted the authority to investigate; (2) whether procedural requirements have been
7 followed; and (3) whether the evidence is relevant and material to the
8 investigation.” *Id.* When these three requirements are met, courts “must enforce
9 administrative subpoenas unless the evidence sought by the subpoena is plainly
10 incompetent or irrelevant to any lawful purpose of the agency,” *Id.* at 1112, or
11 where the subpoena recipient can show that the inquiry ““is unreasonable because it
12 is overbroad or unduly burdensome.”” *NLRB v. KB In & Out, Inc.*, No. 13-cv-2276
13 (ABC), 2013 WL 12155187, at *1 (C.D. Cal. May 6, 2013) (quoting *NLRB v. N.*
14 *Bay Plumbing*, 102 F.3d 1005, 1007 (9th Cir. 1996)). ““An affidavit from a
15 government official is sufficient to establish a prima facie showing that these
16 requirements have been met.”” *Solis v. Forever 21, Inc.*, No. 12-cv-9188 (MMM),
17 2013 WL 1319769, at *2 (C.D. Cal. Mar. 7, 2013) (quoting *FDIC v. Garner*, 126
18 F.3d 1138, 1143 (9th Cir. 1997)).⁵

19
20 _____
21 ⁴ “Enforcement of administrative subpoenas is necessary because . . . [i]t is beyond
22 cavil that the very backbone of an administrative agency’s effectiveness in carrying
23 out its congressionally mandated duties . . . is the rapid exercise of the power to
24 investigate the activities of the entities over which it has jurisdiction[.]” *Scalia v.*
25 *Katsilometes*, No. 4:20-cv-371 (DCN), 2020 WL 6140441, at *1 (D. Idaho Oct. 19,
2020) (quoting *Fed. Mar. Comm’n v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir.
1975)).

26 ⁵ *Cf. United States v. Dynavac, Inc.*, 6 F.3d 1407, 1413 (9th Cir. 1993) (holding, in
27 a proceeding to review a petition to compel an IRS summons, that the government’s
28 burden to support judicial enforcement of an administrative subpoena is a “slight
one.”).

1 **IV. ARGUMENT**

2 As demonstrated more fully below, XCast is barred from challenging judicial
3 enforcement of the CID because it chose not to exercise its right to petition the
4 Commission to quash or limit the CID. The FTC Act assigns to the Commission the
5 power to hear challenges to the validity of its CIDs and mandates that CID
6 recipients “shall comply with any portions of the demand not sought to be modified
7 or set aside.” 15 U.S.C. § 57b-1(f)(2). Allowing XCast to sidestep the statutorily
8 prescribed process for challenging a CID and wait to see whether the FTC seeks
9 judicial enforcement of a CID would subvert Congress’s design and impair the
10 FTC’s investigative capabilities. For these reasons, XCast’s failure to exhaust
11 administrative remedies is a standalone basis on which this Court may grant the
12 Commission’s petition.

13 Even if exhaustion of administrative remedies were not dispositive, the
14 Commission can make the requisite showing with respect to the three “critical
15 questions” courts consider to determine the validity of a CID. *Golden Valley Elec.*
16 *Ass’n*, 689 F.3d at 1113. As set forth more fully below and in the Declaration of
17 Valerie Verduce, the Commission has demonstrated: (1) that it is authorized to
18 investigate illegal robocalls, (2) that it followed all applicable procedural
19 requirements when issuing the CID, and (3) that the evidence it seeks through the
20 CID is relevant and material to the underlying investigation. Finally, the CID is not
21 overbroad or unduly burdensome. Accordingly, the Commission respectfully
22 requests that the CID be enforced without delay.

23 **A. XCast Waived the Opportunity to Seek Judicial Relief from**
24 **Complying with the CID by Failing to Exhaust Administrative**
25 **Remedies**

26 XCast has waived any challenge it may have made to the CID because it
27 chose not to avail itself of the Commission’s administrative process for contesting
28

1 the validity of a CID. “Generally, one who has neglected the exhaustion of available
2 administrative remedies may not seek judicial relief.” *Fresh & Easy Neighborhood*
3 *Mkt.*, 805 F.3d at 1159 (quoting *EEOC v. Cuzzens of Ga.*, 608 F.2d 1062, 1063 (5th
4 Cir. 1979)). The doctrine of exhaustion of administrative remedies is longstanding
5 and “fundamental to federal regulatory legislation.” *Montana-Dakota Util. Co. v.*
6 *Nw. Pub. Serv. Co.*, 341 U.S. 246, 260 (1951).

7 Consistent with the values underlying the doctrine of exhaustion of
8 administrative remedies, Section 20(f) of the FTC Act provides that a CID recipient
9 may file a petition with the Commission to “modify or set aside the [civil
10 investigative] demand” within 20 days, but otherwise “shall comply with any
11 portions of the demand not sought to be modified or set aside.” 15 U.S.C. § 57b-
12 1(f)(2). The Commission’s Rules of Practice give effect to this provision by
13 requiring a CID recipient to file a “petition to limit or quash any compulsory
14 process . . . within 20 days after service” setting forth “all . . . factual and legal
15 objections to the Commission compulsory process, including all appropriate
16 arguments, affidavits, and other supporting documentation.” 16 C.F.R § 2.10(a)(1).

17 The CID at issue here expressly informed XCast of its right to petition the
18 Commission to limit or quash the CID and cited 16 C.F.R § 2.10(a)(1). *See* Pet. Ex.
19 B at 7. Yet XCast elected not to file such a petition. Courts have held that CID
20 recipients that choose to forego the petition process are barred from contesting the
21 validity of a CID in court, including FTC-issued CIDs. For example, in *FTC v.*
22 *Tracers Information Specialists, Incorporated*, No. 8:16-mc-18 (TGW), 2016 WL
23 3896840, at *3 (M.D. Fla. June 10, 2016), the court held that a CID recipient’s
24 “failure to exhaust administrative remedies” by filing a petition to limit or quash
25 with the Commission “precludes [it] from raising objections to the judicial
26 enforcement of the CID.” Similarly, in *FTC v. Complete Merchant Solutions, LLC*,
27 No. 19-cv-996 (HCN) (EJF), 2020 WL 2059847, at *7 (D. Utah Apr. 28, 2020), the
28

1 court held that the respondent's failure "to comply with the FTC's required
2 administrative procedures . . . results in waiver of [respondent's] objections to the
3 subpoena." Finally, in *FTC v. O'Connell Associates, Incorporated*, 828 F. Supp.
4 165, 168 (E.D.N.Y. 1993), the court held that "[i]t is a well established proposition
5 of law that an individual is required to exhaust his administrative remedies before
6 coming to court for relief[.]" and "[i]t is also well settled that
7 this exhaustion requirement applies to FTC investigatory proceedings." A number
8 of other courts have reached the same conclusions. *See, e.g., FTC v. Stephen*
9 *Bannon*, No. 20-mc-111 (D.D.C. Nov. 18, 2020), ECF No. 5 at 2; *FTC v. Kushly,*
10 *LLC*, No. 20-mc-36 (D. Ariz. Aug. 10, 2020), ECF No. 5 at 2; *FTC v. Lambert*, No.
11 19-cv-61867 (S.D. Fla. Oct. 1, 2019), ECF No. 6 at 2-3.

12 Moreover, it would erode the integrity of the administrative process
13 envisioned by the FTC Act and the Commission's Rules of Practice if CID
14 recipients could ignore the statutory deadline for challenging a duly issued CID and
15 wait to see if the Commission seeks judicial enforcement of the CID before
16 mounting a challenge. Accordingly, having chosen not to exercise its right to
17 challenge the CID within the time and manner prescribed by statute, XCast has
18 forfeited any right to contest the validity of the CID in a court proceeding.

19 **B. The CID is Within the Commission's Authority, Was Issued in**
20 **Accordance with Procedure, Seeks Relevant Information, and Is**
21 **Neither Overbroad Nor Unduly Burdensome**

22 Should the Court conclude that XCast's failure to exhaust administrative
23 remedies is not a sufficient ground on which to grant this petition, the Court must
24 engage in the narrow inquiry prescribed to determine whether the CID is valid. *See*
25 *Golden Valley Elec. Ass'n*, 689 F.3d at 1113. The three "critical questions" in this
26 inquiry are: (1) the agency's authority to issue a CID, (2) the agency's adherence to
27 proper procedure in issuing the CID, and (3) the relevance of the information
28

1 sought by the CID. *Id.* As shown below, the Commission satisfies these three
2 factors. Additionally, the CID is neither overbroad nor unduly burdensome.

3 **1. Congress Granted Authority to the Commission to**
4 **Investigate Illegal Telemarketing Schemes**

5 The CID and the underlying investigation of illegal telemarketing activity are
6 squarely within the Commission’s authority. Section 5(a) of the FTC Act, 15 U.S.C.
7 § 45(a), charges the Commission with preventing unfair or deceptive acts or
8 practices in or affecting commerce. Moreover, the Telemarketing and Consumer
9 Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108, authorizes the
10 Commission to prevent deceptive or abusive telemarketing acts and practices like
11 the robocalling activity at the center of this investigation.

12 The Commission is authorized to conduct investigations to enforce these
13 laws. Sections 3 and 6(a) of the FTC Act, 15 U.S.C. §§ 43, 46(a), empower the
14 Commission to “prosecute any inquiry necessary to its duties in any part of the
15 United States” and to gather relevant information on any “person, partnership, or
16 corporation.” As mentioned elsewhere in these papers, Section 20(c) of the FTC
17 Act, 15 U.S.C. § 57c-1, provides that:

18 [w]henver the Commission has reason to believe that any person may
19 be in possession, custody, or control of any documentary material or
20 tangible things, or may have any information, relevant to unfair or
21 deceptive acts or practices in or affecting commerce . . . the
22 Commission may . . . issue . . . a civil investigative demand requiring
23 such person to produce such documentary material for inspection and
24 copying or reproduction, to submit such tangible things, to file written
25 reports or answers to questions, to give oral testimony concerning
26 documentary material or other information, or to furnish any
27 combination of such material, answers, or testimony.
28

1 Thus, Congress granted authority to the Commission to investigate illegal
2 telemarketing schemes and to use CIDs to carry out its investigations.

3 **2. The CID Follows All Applicable Procedural Requirements**

4 The Commission followed all procedures required by the FTC Act and its
5 implementing rules when it issued the CID. *See* 15 U.S.C. § 57b-1(c); 16 C.F.R. §
6 2.7 (2001). Specifically, a CID must:

- 7 1. describe with “definiteness and certainty” the documentary material
8 and information to be produced;
- 9 2. provide the respondent a “reasonable period of time” to respond to
10 these requests;
- 11 3. identify the nature of the conduct being investigated;
- 12 4. “identify the custodian to whom such material shall be made
13 available”;
- 14 5. be “signed by a Commissioner” who is “acting pursuant to a
15 Commission resolution”; and
- 16 6. be delivered “to the principal office or place of business of the
17 partnership, corporation, association, or other legal entity to be
18 served.”

19 15 U.S.C. § 57b-1(c); 16 C.F.R. § 2.7 (2001).

20 The CID satisfies these requirements. First, the CID specified with
21 “definiteness and certainty” the kinds of documents and information to be
22 produced. *See* Pet. Ex. B at 2-9. Second, the CID allowed for a “reasonable period
23 of time” to respond by providing a return date 30 days after issuance. *See id.* at 3.
24 Upon XCast’s request, FTC staff extended the response deadline by ten days for
25 certain subsections of the CID. *See* Pet. Ex. E. Third, the CID described the specific
26 nature of the FTC’s investigation and the law at issue. *See* Pet. Ex. B at 21, 26.

1 Fourth, the CID identified FTC investigator Amber Williams as the records
2 custodians to whom any responses were to be sent. *See id.* at 23. Fifth, the CID was
3 signed by Commissioner Rohit Chopra acting pursuant to Commission Resolution
4 Number 0123145, which authorizes the use of compulsory process to investigate
5 illicit telemarketing activity. *See id.* Finally, the CID was delivered to XCast’s
6 principal office, though no one was there to receive it during the office closures
7 caused by the coronavirus pandemic. *See Pet. Ex. B-C.* The FTC did not consider
8 the CID served (and did not consider the thirty-day response period active) until
9 Ms. Williams emailed the CID to Mr. Stephen Nelson, Senior Vice President of
10 Operations at XCast, at his invitation. *See Pet. Ex. D.*

11 Thus, the CID followed all applicable procedural requirements.

12 **3. The CID Seeks Evidence That Is Relevant and Material to**
13 **the Commission’s Investigation**

14 The CID seeks relevant information. “The relevance requirement is . . .
15 generously construed to afford the agency access to virtually any material that
16 might cast light on the matter under investigation.” *United States v. Exxon Mobil*
17 *Corp.*, 943 F.3d 1283, 1287 (9th Cir. 2019); *Natures Image, Inc. v. U.S. Dep’t of*
18 *Lab.*, No. 19-mc-14 (KES), 2019 WL 4316514, at *3 (C.D. Cal. June 19, 2019)
19 (“[s]o long as the material touches a matter under investigation, an administrative
20 subpoena will survive a challenge that the material is not relevant.”). Courts deny
21 challenges to administrative subpoenas on relevance grounds when the information
22 sought is not “plainly incompetent or irrelevant” to the investigation. *Golden*
23 *Valley*, 689 F.3d at 1113-14.

24 Here, the CID requires XCast to provide account information for persons or
25 entities suspected of involvement in illegal robocalling; customer and subscriber
26 correspondence related to complaints, subpoenas, civil investigative demands, and
27 other inquiries about illicit telecommunications activities; business records related
28

1 to complaints XCast receives from customers, XCast's responses to such
2 complaints, XCast's telecommunications compliance policies, and related internal
3 communications; and responses to six general business interrogatories. *See* Pet. Ex.
4 B. at 2-6. This information bears directly on the Commission's inquiry into
5 suspected illicit robocalling and telemarketing activity.

6 The CID readily satisfies the relaxed standard of relevance that applies in
7 administrative investigations.

8 4. The CID Is Neither Overbroad Nor Unduly Burdensome

9 Once the government satisfies the three "critical questions" of agency
10 authority to issue a CID, agency adherence to proper procedure in issuing the CID,
11 and the relevance of the information sought by the CID, *Golden Valley Elec. Ass'n*,
12 689 F.3d at 1113, "the burden shifts to the respondent to prove that the subpoena is
13 overbroad or unduly burdensome." *EEOC v. Aaron Bros. Inc.*, 620 F. Supp. 2d
14 1102, 1106 (C.D. Cal. 2009). "That burden is difficult to meet." *Id.*

15 "An administrative subpoena may not be so broad so as to be in the nature of
16 a 'fishing expedition.'" *Khukhrov v. NLRB*, No. 17-mc-64 (SJO), 2017 WL
17 7806597, at *5 (C.D. Cal. June 27, 2017) (quoting *Garner*, 126 F.3d at 1146).
18 "There must be a realistic expectation that something may be discovered." *Aaron*
19 *Bros. Inc.*, 620 F. Supp. 2d at 1106. To resist enforcement on overbreadth grounds,
20 the subpoenaed party must specifically identify how the subpoena constitutes a
21 fishing expedition. *Garner*, 126 F.3d at 1146.

22 Further, "[t]o show that an administrative subpoena imposes an undue
23 burden, a subpoenaed party cannot merely point to an agency's extensive requests
24 or assert that compliance would be costly." *CFPB v. Future Income Payments,*
25 *LLC*, 252 F. Supp. 3d 961, 970 (C.D. Cal. 2017), *order vacated in part on other*
26 *grounds*, No. 17-cv-303 (JLS), 2018 WL 7502720 (C.D. Cal. Dec. 18, 2018).
27 "Instead, the party opposing enforcement must supply evidence establishing that
28

1 compliance threatens to unduly disrupt or seriously hinder normal operations of a
2 business.” *Id.*

3 Here, XCast cannot meet its difficult burden of showing that the CID is
4 overbroad. The CID contains requests for six categories of information (name,
5 addresses, telephone call records, length and type of service, telephone number,
6 means and source of payment for service) about a small number of XCast
7 customers, thirteen other requests for information and documents, and six general
8 business interrogatories. *See* Pet. Ex. B at 2-6. The time period applicable to these
9 requests is limited to January 1, 2018 until the date of full compliance. *See id.* at 5.
10 As demonstrated in section II.C of this memorandum, these specifications relate
11 directly to the purpose of the agency’s investigation into illegal robocalling.
12 Moreover, the CID is narrowly tailored to elicit information about the central
13 conduct at issue in the agency’s underlying investigation.

14 For many of the same reasons, the CID is not unreasonably burdensome. The
15 CID seeks the discrete set of information and documents described above and is
16 temporally limited to the period after January 1, 2018 to the date of full compliance.
17 *See id.* at 2-6. Additionally, the CID prescribed a reasonable return date of thirty
18 days from the date of issuance. *See id.* at 2. This deadline allotted sufficient time for
19 XCast to assemble the required documents and prepare its interrogatory responses.
20 When XCast requested an extension of the return date, FTC staff immediately
21 granted a ten-day extension. *See* Pet. Ex. D.

22 Indeed, FTC staff have attempted to work cooperatively with XCast for
23 months after XCast missed its production deadline. FTC staff went to considerable
24 lengths to consult with XCast’s staff and counsel, itemize the deficiencies in
25 XCast’s production, and offered to postpone consideration of judicial enforcement
26 of the CID, all in an effort to ease XCast’s compliance burden. *See* Pet. Ex. A at 10,
27 12, 14-15; Pet. Exs. G, I. These actions are not consistent with a finding of undue
28

1 burden, and XCast will not be able to meet its heavy burden of showing that the
2 CID is unduly burdensome.

3 **V. CONCLUSION**

4 For the reasons stated herein, the Commission respectfully submits that this
5 Court should grant its petition and enter an order directing XCast to come into full
6 compliance with the CID within ten days or appear and show cause why it should
7 not comply with the CID in its entirety.

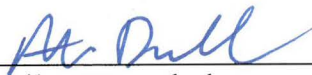
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: August 6, 2021

Respectfully submitted,

2
3 Reilly Dolan
4 Acting General Counsel

5 Michele Arington
6 Assistant General Counsel for Litigation

7
8 
9 _____
10 Allen Dreschel
11 FEDERAL TRADE COMMISSION
12 600 Pennsylvania Avenue Northwest
13 Washington, D.C. 20580
14 ddreschel@ftc.gov; (202) 326-2531

15 Miles D. Freeman (Local Counsel)
16 FEDERAL TRADE COMMISSION
17 10990 Wilshire Boulevard, Suite 400
18 Los Angeles, CA 90024
19 mfreeman@ftc.gov; (310) 824-4332

20
21
22
23
24
25
26
27
28 *Attorneys for Petitioner*

Exhibit A

1 Allen Dreschel (*pro hac vice pending*)
2 ddreschel@ftc.gov
3 FEDERAL TRADE COMMISSION
4 600 Pennsylvania Avenue Northwest
5 Washington, D.C. 20580
6 Tel: (202) 326-2531; Fax: (202) 326-2477

7 Miles D. Freeman (Local Counsel)
8 mfreeman@ftc.gov; Cal. Bar No. 299302
9 FEDERAL TRADE COMMISSION
10 10990 Wilshire Boulevard, Suite 400
11 Los Angeles, CA 90024
12 Tel: (310) 824-4332; Fax: (310) 824-4380

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

14 _____)
15 FEDERAL TRADE)
16 COMMISSION,)
17 Petitioner,)
18 v.)
19 XCAST LABS, INC.,)
20 Respondent.)
21 _____)
22)
23)

Case No. 2:21-mc-1026

**DECLARATION OF AMBER
WILLIAMS**

1 Pursuant to 28 U.S.C. § 1746, I declare as follows:

2 1. I am an investigator employed by the Federal Trade Commission in
3 Chicago, Illinois. I am one of the staff members conducting the investigation into
4 widespread illegal robocalling practices referenced in the accompanying petition
5 and memorandum of law. The Commission issued its CID to XCast to advance that
6 investigation.

7 2. I make this declaration to verify the facts set forth in the petition. *See*
8 ECF No. 1. I have read the petition and the exhibits and attest that the information
9 therein is true and that the exhibits are true and correct copies of the original
10 documents. The facts in this declaration are based on my personal knowledge or
11 information made known to me in the course of my official duties. All citations
12 below are to the exhibits to the petition.

13
14 **Background**

15 3. XCast Labs, Inc. is a telecommunications company that provides
16 Voice over Internet Protocol (“VoIP”) and related services. VoIP technology
17 allows users to place and receive phone calls using an internet connection rather
18 than a traditional telephone line. XCast is headquartered in Los Angeles, CA.

19 4. The Commission is conducting an investigation to determine whether
20 certain unidentified persons or entities are involved in the initiation of telephone
21 calls that delivered prerecorded messages, used spoofed caller identification
22 numbers, or were placed to numbers listed on the National Do Not Call Registry,
23 in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing
24 Sales Rule, 16 C.F.R. Part 310, and whether Commission action to obtain
25 monetary relief would be in the public interest. *See Ex. B. at 1.*

26 5. The Commission has reason to believe that the information sought
27 through the CID bears directly on its investigation.

28

1 6. Commissioner Rohit Chopra approved the issuance of the CID to
2 XCast and signed the CID. *See* Pet. Ex. B. at 3. The Commission issued its CID to
3 XCast on January 9, 2021 to advance its investigation into illegal robocall activity.
4 *See id.* at 1.

5 7. The CID required XCast to produce certain information and
6 documents and respond to six general business interrogatories. *See id.* at 2-6. The
7 CID also informed XCast that it could petition the Commission to limit or quash
8 the CID. *See id.* at 7. The CID directed XCast to respond in full within thirty days
9 of service. *See id.* at 3.

10 8. I served the CID on XCast on January 28, 2021. On February 8, 2021,
11 XCast sought, and FTC staff granted, an extension of the deadline for XCast to
12 respond to certain of the CIDs specifications.

13 9. XCast chose not to petition the Commission to limit or quash the CID.
14 XCast likewise failed to adhere to the original response deadline of February 28,
15 2021, or the extended response deadline of March 10, 2021.

16 10. XCast made an initial production on March 5, 2021; this production
17 was markedly deficient. On March 16, 2021, I participated in a telephone call with
18 Valerie Verduce, counsel for the Commission, and XCast staff about the wide-
19 ranging deficiencies in XCast's production. This phone conversation lasted for 39
20 minutes.

21 11. On March 17, 2021, XCast produced a small amount of responsive
22 material as a supplement to its March 5 production. XCast's production
23 nonetheless remained severely deficient.

24 12. On March 22, 2021, Ms. Verduce and I participated in a telephone
25 call with Mr. Edward Pennington, XCast's newly retained counsel, where we
26 discussed the deficiencies in XCast's production in detail. Ms. Verduce spoke with
27 Mr. Pennington for 20 minutes, and Mr. Pennington remained on the line with me
28 for another 18 minutes, for a total of 38 minutes.

1 13. On March 26, 2021, Mr. Pennington wrote a letter that stated: “XCast
2 believes that it has complied with the CID to the extent allowed by law.”

3 14. On April 9, 2021, Allen Dreschel, counsel to the Commission, wrote a
4 letter to Mr. Pennington reaffirming that XCast was in default of its obligations
5 under the CID. Mr. Dreschel’s letter once again detailed the deficiencies in
6 XCast’s production and explained that the Commission would consider judicial
7 enforcement of the CID if XCast did not comply with the CID in its entirety.

8 15. On April 13, 2021 Mr. Pennington responded, promising that “the
9 company will continue its best effort to respond with additional information by
10 April 16, 2021 or early next week at the latest.” On April 15, 2021, Mr. Dreschel
11 replied, committing to forbear from any consideration of judicial enforcement of
12 the CID until April 21, 2021. Mr. Dreschel also emphasized that FTC staff
13 expected full compliance with the CID by April 21, 2021.

14 16. XCast made this production in two installments. The first installment
15 was transmitted to the Commission on April 19, 2021; the second installment was
16 transmitted to the Commission on April 30, 2021. The second installment was
17 delayed by a period of several days because of technical problems on the part of
18 both the Commission and XCast. This production contained a small amount of
19 responsive material. The cover letter for this production stated that XCast had
20 complied with the CID to the best of its ability. *See* Pet. Ex. J.

21 17. After receiving notice that the FTC intended to seek a court order
22 enforcing the CID, XCast sent a final production on August 2, 2021. This
23 production contained no responsive material that had not already been submitted to
24 the FTC.

25 18. XCast has not produced additional materials since August 2, 2021. Its
26 response to the CID remains grossly deficient.

27 **The Deficiencies in XCast’s Response**
28

1 19. XCast has failed to respond adequately to Subsections II.C, II.D, and
2 II.E of the CID, which direct XCast to produce certain customer and subscriber
3 correspondence, certain business records, and answers to six general business
4 interrogatories.

5 20. Subsection II.C of the CID contains a single specification that directs
6 XCast to produce certain customer or subscriber correspondence related to
7 complaints, subpoenas, civil investigative demands, or other inquiries about illicit
8 telecommunications activities, including complaints received from or sent to
9 customers or subscribers, and XCast's responses to any such complaints or
10 inquiries. *See* Pet. Ex. B. at 8.

11 21. XCast produced a one-page document in response. This document is
12 an email from an XCast officer suspending XCast's relationship with a customer
13 and stating that XCast has received "several recent inquiries" that implicate that
14 customer in illegal activities. These "recent inquiries" must be produced to the
15 FTC under the plain terms of Subsection II.C of the CID. However, XCast has
16 refused to produce these inquiries.

17 22. This is an inadequate response to Subsection II.C. Furthermore, I
18 expect that there is a much larger body of responsive material to Subsection II.C
19 that XCast has yet to acknowledge or produce. XCast must respond in full to
20 Subsection II.C to comply with the CID.

21 23. Subsection II.D of the CID contains twelve specifications that direct
22 XCast to produce a variety of business records. *See* Pet. Ex. B. at 10-11. XCast
23 produced a trivial amount of responsive material. For example, four of the twelve
24 specifications in Subsection II.D compel XCast to produce certain internal
25 communications about potential illicit telemarketing activity. XCast declined to
26 produce a single internal communication. *See* Pet. Ex. B. at 9-10.

27 24. XCast has provided no response or an evasive response to the
28 following specifications: II.D.1, II.D.3, II.D.6-10, and II.D.12. XCast has provided

1 a partial response to specifications II.D.2 and II.D.5. XCast has responded to
2 specification II.D.4 and II.D.11. XCast must respond in full to specifications
3 II.D.1-3, II.D.6-10, and II.D.12 to comply with the CID.

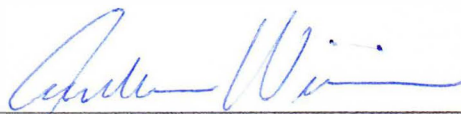
4 25. Subsection II.E contains six general business interrogatories. *See* Pet.
5 Ex. B. at 11-12.

6 26. In response, XCast produced a capitalization table that identified the
7 majority of its owners and the ownership interest (in percentage form) that each
8 holds in XCast. The remainder of XCast's interrogatory responses were incomplete
9 and evasive.

10 27. XCast has not offered any valid legal reason for its noncompliance
11 and has never filed a petition to limit or quash the CID. XCast's refusal to comply
12 has impeded the Commission's investigation into illegal robocalling and
13 telemarketing activities.

14 I declare under penalty of perjury that the foregoing is true and correct.

15
16
17
18 Executed on August 4, 2021.



Amber Williams
Investigator
Federal Trade Commission

Exhibit B



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

VIA FEDEX

XCast Labs, Inc., also d/b/a XCast Labs and Siptalk
c/o Eric Manlunas, Agent for Service of Process
1880 Century Park E, #1415
Los Angeles, CA 90067

January 8, 2021

Re: FTC Matter No. P207601

To whom it may concern:

The Federal Trade Commission (“FTC”) has issued the attached Civil Investigative Demand (“CID”) asking for information as part of a non-public investigation.¹ Our purpose is to determine whether unidentified persons or entities have initiated, caused the initiation of, or assisted the initiation of outbound telephone calls that delivered prerecorded messages, used spoofed caller identification numbers, or were placed to numbers listed on the National Do Not Call Registry, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. Part 310, and whether Commission action to obtain monetary relief would be in the public interest.

Please read the attached documents carefully. Here are a few important points we would like to highlight:

1. **Contact FTC counsel, Valerie M. Verduce, at vverduce@ftc.gov or (404) 656-1355, as soon as possible to schedule a telephone call to be held within 14 days.** During that telephone call, FTC counsel can address any questions or concerns you have regarding this CID, including whether there are changes to how you comply with the CID that would reduce your cost or burden while still giving the FTC the information it needs. Please read the attached documents for more information about that meeting.
2. **You must immediately stop any routine procedures for electronic or paper document destruction, and you must preserve all paper or electronic documents** that are in any way relevant to this investigation, even if you believe the documents are protected from discovery by privilege or some other reason.
3. **The FTC will use information you provide in response to the CID for the purpose of investigating violations of the laws the FTC enforces.** We will not disclose the information under the Freedom of Information Act, 5 U.S.C. § 552. We may disclose the information in response to a valid request from Congress, or

¹ This letter and the enclosed CID are being served on your registered agent.

Page 2

to other civil or criminal law enforcement agencies for their official law enforcement purposes. The FTC or other agencies may use and disclose your response in any civil or criminal proceeding, or if required to do so by law. However, we will not publicly disclose your information without giving you prior notice.

4. **Please read the attached documents closely.** They contain important information about how you should provide your response.

Please contact FTC counsel as soon as possible to set up an initial meeting. We appreciate your cooperation.

Very truly yours,

April J. Tabor
Acting Secretary of the Commission



CIVIL INVESTIGATIVE DEMAND

<p>1. TO</p> <p>XCast Labs, Inc., also d/b/a XCast Labs and Siptalk c/o Eric Manlunas, Agent for Service of Process 1880 Century Park E, #1415 Los Angeles, CA 90067</p>	<p>1a. MATTER NUMBER</p> <p>P207601</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

<p>LOCATION OF HEARING</p>	<p>YOUR APPEARANCE WILL BE BEFORE</p> <hr/> <p>DATE AND TIME OF HEARING OR DEPOSITION</p>
----------------------------	-------------------------------------------------------------------------------------------

- You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.
- You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.
- You are required to produce the tangible things described on the attached schedule. Produce such things to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS, ANSWERS TO INTERROGATORIES, REPORTS, AND/OR TANGIBLE THINGS MUST BE AVAILABLE
February 8, 2021 by 5:00 PM EST

3. SUBJECT OF INVESTIGATION
See attached Schedule and Resolution

<p>4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN</p> <p>Todd Kossow / Amber Williams Federal Trade Commission, Midwest Region 230 South Dearborn Street, Room 3030 Chicago, Illinois 60604</p>	<p>5. COMMISSION COUNSEL</p> <p>William Hodor (312-960-5592; whodor@ftc.gov) Valerie Verduce (404-656-1355; vverduce@ftc.gov) Federal Trade Commission, Midwest Region 230 South Dearborn Street, Room 3030 Chicago, Illinois 60604</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>DATE ISSUED</p> <p>01/08/2021</p>	<p>COMMISSIONER'S SIGNATURE</p> 
--------------------------------------	---------------------------------------------------------------------------------------------------------------------

<p>INSTRUCTIONS AND NOTICES</p> <p>The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.</p>	<p>YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS</p> <p>The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.</p> <p>The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.</p>
<p>PETITION TO LIMIT OR QUASH</p> <p>The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.</p>	<p>TRAVEL EXPENSES</p> <p>Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.</p>

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCSRulesofPractice>. Paper copies are available upon request.

Form of Certificate of Compliance*

I/We do certify that all of the documents, information and tangible things required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document or tangible thing responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to its submission and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

**FEDERAL TRADE COMMISSION (“FTC”)
CIVIL INVESTIGATIVE DEMAND (“CID”) SCHEDULE
FTC File No. P207601**

Meet and Confer: You must contact **FTC counsel, Valerie M. Verduce ((404) 656-1355; vverduce@ftc.gov)**, as soon as possible to schedule a telephonic meeting to be held within fourteen (14) days after You receive this CID. At the meeting, You must discuss with FTC counsel any questions You have regarding this CID or any possible CID modifications that could reduce Your cost, burden, or response time yet still provide the FTC with the information it needs to pursue its investigation. The meeting also will address how to assert any claims of protected status (*e.g.*, privilege, work-product, etc.) and the production of electronically stored information. You must make available at the meeting personnel knowledgeable about Your information or records management systems, Your systems for electronically stored information, custodians likely to have information responsive to this CID, and any other issues relevant to compliance with this CID.

Document Retention: You must retain all documentary materials used in preparing responses to this CID. The FTC may require the submission of additional Documents later during this investigation. **Accordingly, You must suspend any routine procedures for Document destruction and take other measures to prevent the destruction of Documents in Your possession, custody, or control** that are in any way relevant to this investigation, even if those Documents are being retained by a third-party or You believe those Documents are protected from discovery. *See* 15 U.S.C. § 50; *see also* 18 U.S.C. §§ 1505, 1519.

Sharing of Information: The FTC will use information You provide in response to the CID for the purpose of investigating violations of the laws the FTC enforces. We will not disclose such information under the Freedom of Information Act, 5 U.S.C. § 552. We also will not disclose such information, except as allowed under the FTC Act (15 U.S.C. § 57b-2), the Commission’s Rules of Practice (16 C.F.R. §§ 4.10 & 4.11), or if required by a legal obligation. Under the FTC Act, we may provide Your information in response to a request from Congress or a proper request from another law enforcement agency. However, we will not publicly disclose such information without giving You prior notice.

Manner of Production: Contact **Deputy Records Custodian, Amber Williams ((312) 960-5628; awilliams3@ftc.gov)**, by email or telephone at least five days before the return date for instructions on how to produce information responsive to this CID.

Certification of Compliance: You or any person with knowledge of the facts and circumstances relating to the responses to this CID must certify that such responses are complete by signing the “Certification of Compliance” attached to this CID.

Certification of Records of Regularly Conducted Activity: Attached is a Certification of Records of Regularly Conducted Activity. Please execute and return this Certification with Your response. Completing this certification may reduce the need to subpoena You to testify at future proceedings to establish the admissibility of Documents produced in response to this CID.

Definitions and Instructions: Please review carefully the Definitions and Instructions that appear after the Specifications and provide important information regarding compliance with this CID.

I. SUBJECT OF INVESTIGATION

Whether unidentified persons or entities have initiated, caused the initiation of, or assisted the initiation of outbound telephone calls that delivered prerecorded messages, used spoofed caller identification numbers, or were placed to numbers listed on the National Do Not Call Registry, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. Part 310, and whether Commission action to obtain monetary relief would be in the public interest. See also attached resolution.

II. SPECIFICATIONS

Applicable Time Period: Unless otherwise directed, the applicable time period for the requests set forth below is from January 1, 2018, until the date of full and complete compliance with this CID.

“**Subject Customer or Subscribers**” means any customer or subscriber associated with an account or service that the Company provides that meets one or more of the following conditions:

1. Is or has been associated with one or more of the following names:
 - A. ██████████, also known as ██████████ and ██████████; and
 - B. ██████████.;
2. Originated, initiated, or routed any of the following telephone calls using services the Company provided:

Item No.	Date/Time	To/Called Number	From/Calling Number/Caller ID Displayed
1	9/15/2020 16:15	9202516910	██████████
2	9/15/2020 14:48	9199869443	██████████
3	9/14/2020 17:46	6184190811	██████████
4	9/14/2020 18:04	5712248609	██████████
5	9/14/2020 18:11	9142629908	██████████
6	5/18/2020 15:01	3187072090	██████████
7	2/26/2019 17:31	5136142891	██████████
8	1/20/2020 14:49	8645976142	██████████

A. **Account Identifying Information:** Produce or provide the information requested below for each Subject Customer or Subscriber. For items 3 through 6 below, produce or provide the requested information for all services or accounts the Subject Customer or Subscriber maintains at the Company, segregated by each individual service or account.

1. Name(s);
2. Address(es) (including all physical, mailing, internet protocol, and email addresses);
3. Local and long distance telephone connection records (inbound and outbound), and records of session times and durations;
4. Length of service (including start date) and types of service utilized;
5. Telephone or instrument number(s) or other subscriber number(s) or identities, including any temporarily assigned network address or Internet protocol address and telephone automatic number identification (“ANI”); and
6. Means and source of payment for such service (including any credit card or bank account number).

If readily available, please send the information responsive to requests 1, 2, and 5 above within seven days of receipt of this CID. You may email this preliminary information to Deputy Records Custodian Amber Williams at awilliams3@ftc.gov before completing Your full response to the remaining items.

B. **Same Means and Source of Payment:** To the extent not already provided in Your response to Specification A, produce or provide the information requested below for any customer or subscriber who maintains an account or service at the Company that was paid for using the same means and source of payment listed in Your response to Specification A(6) above. Produce or provide the requested information for all services or accounts paid for using the same means and source of payment, segregated by each individual service or account.

1. Name(s);
2. Address(es) (including all physical, mailing, internet protocol, and email addresses);
3. Local and long distance telephone connection records (inbound and outbound), or records of session times and durations;
4. Length of service (including start date) and types of service utilized; and

5. Telephone or instrument number(s) or other subscriber number(s) or identities, including any temporarily assigned network address or Internet protocol address and telephone ANI.

C. Customer or Subscriber Correspondence: Produce Customer or Subscriber Correspondence that You maintain for Your own business purposes (excluding all non-content information such as email header information) relating to each Subject Customer or Subscriber or any other customer or subscriber Identified in any of Your responses to any complaints, subpoenas, civil investigative demands, or inquiries from telecommunications companies, providers of Voice over Internet Protocol (“VoIP”) services, or government agencies about unlawful telemarketing, autodialed telephone calls, calls delivering prerecorded messages, calls to numbers listed on the National Do Not Call Registry, or calls using spoofed caller ID numbers. For purposes of this specification, “Customer or Subscriber Correspondence” means Documents, such as complaints and Your responses to such complaints, that You directly or indirectly received from or sent to a customer or subscriber, including any complaints or inquiries to or by Better Business Bureaus or government agencies, and Your responses to those complaints or inquiries.

D. General Business Records Not Limited to Subject Customers:

1. Produce the contents of all complaints from any other telecommunications company, provider of VoIP services, individual consumer, or any other third party about calls originated by the Company; and your responses to those complaints. For purposes of this specification, redact and do not produce any email headers or other non-content portions of these communications.
2. Produce all internal documents related to training employees of the Company on addressing or responding to complaints from any other telecommunications company, provider of VoIP services, individual consumer, or any other third party about calls originated by the Company.
3. Produce the contents of all government inquiries, letters, civil investigative demands, and subpoenas about calls originated by the Company; and all responses to such inquiries, letters, civil investigative demands, and subpoenas. For purposes of this specification, redact and do not produce any email headers or other non-content portions of these communications.
4. Produce the contents of all subpoenas from private parties about calls originated by the Company; and all responses to those subpoenas. For purposes of this specification, redact and do not produce any email headers or other non-content portions of these communications.
5. Produce all of the Company’s written policies for compliance with the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.*, and other state and federal laws that regulate any of the following: telemarketing; autodialed calls; calls to

numbers on the National Do Not Call Registry; calls delivering prerecorded messages; calls using spoofed caller ID numbers.

6. Produce all internal documents related to training employees of the Company on compliance with the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.*, and other state and federal laws that regulate any of the following: telemarketing; autodialed calls; calls to numbers on the National Do Not Call Registry; calls delivering prerecorded messages; calls using spoofed caller ID numbers.
7. Produce all internal communications, retained for Your business purposes, in which employees of the Company discussed or mentioned calls originated through the Company's VoIP lines that were placed to numbers listed on the National Do Not Call Registry. For purposes of this specification, redact and do not produce any information that identifies a specific customer or subscriber.
8. Produce all internal communications, retained for Your business purposes, in which employees of the Company discussed or mentioned calls originated through the Company's VoIP lines that delivered prerecorded Telemarketing messages. For purposes of this specification, redact and do not produce any information that identifies a specific customer or subscriber.
9. Produce all internal communications, retained for Your business purposes, in which employees of the Company discussed or mentioned calls originated through the Company's VoIP lines that used spoofed caller ID numbers. For purposes of this specification, redact and do not produce any information that identifies a specific customer or subscriber.
10. Produce all internal communications, retained for Your business purposes, in which employees of the Company discussed or mentioned calls originated through the Company's VoIP lines that were dialed outside of permissible calling times. For purposes of this specification, redact and do not produce any information that identifies a specific customer or subscriber.
11. Produce all corporate organizational charts showing Your management structure.
12. Produce all documents and communications, retained for Your business purposes, related to monitoring, reviewing, or analyzing consumer complaints reported to the Federal Trade Commission. For purposes of this specification, redact and do not produce any information that identifies a specific customer or subscriber.

E. General Business Interrogatories

1. Identify all of Your owners and shareholders, stating the percentage ownership interest held by each of them.
2. Identify Your employees, managers, or officers responsible for legal compliance.

3. Identify all of Your employees, managers, or officers with authority to terminate business relationships with customers, subscribers, or users of Your VoIP services.
4. Identify all employees who are involved in receiving and responding to complaints about abusive, fraudulent, or unwanted telephone calls.
5. Describe in detail all of Your policies and practices for monitoring, reviewing, or analyzing consumer complaints published and released by the Federal Trade Commission at <https://www.ftc.gov/site-information/open-government/data-sets/do-not-call-data>.
6. Identify all of Your employees involved in monitoring, reviewing, or analyzing consumer complaints published and released by the Federal Trade Commission at <https://www.ftc.gov/site-information/open-government/data-sets/do-not-call-data>.

NOTICE: This CID does not seek any information that is prohibited from disclosure under the Cable Communications Policy Act of 1984 (“Cable Act”), 47 U.S.C. §§ 551 *et seq.*, the Satellite Television Extension and Location Act (“STELA”), 47 U.S.C. § 338(i), or the Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. §§ 2701 *et seq.* To the extent that You are, for purposes of ECPA, a provider of Electronic Communications Service or Remote Computing Service to a customer or subscriber about whom this CID seeks information, do not divulge a record or information pertaining to such customer or subscriber or the content of such customer’s or subscriber’s communications, other than the content, records, and information specifically requested in this CID. If You have any questions, please contact FTC counsel before providing responsive information.

III. DEFINITIONS

The following definitions apply to this CID:

D-1. **“Company,” “You,” or “Your”** means XCast Labs, Inc., also d/b/a XCast Labs and Siptalk, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, members, employees, agents, consultants, and other persons working for or on behalf of the foregoing.

D-2. **“CID”** shall mean the Civil Investigative Demand, including the attached Resolution and this Schedule, and including the Definitions, Instructions, and Specifications.

D-3. **“Customer or Subscriber Documents”** means documents that you directly or indirectly received from or sent to a customer or subscriber, including but not limited to contracts and correspondence, whether in the form of Electronically Stored Information or otherwise.

D-4. **“Document”** means the complete original, all drafts, and any non-identical copy, whether different from the original because of notations on the copy, different metadata, or otherwise, of

any item covered by 15 U.S.C. § 57b-1(a)(5), 16 C.F.R. § 2.7(a)(2), or Federal Rule of Civil Procedure 34(a)(1)(A).

D-5. “**Identify**” or “**the Identity of**” requires identification of (a) natural persons by name, title, present business affiliation, present business address, telephone number, and email address or, if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, and the identities of Your contact persons at the business or organization.

IV. INSTRUCTIONS

I-1. **Petitions to Limit or Quash:** You must file any petition to limit or quash this CID with the Secretary of the FTC no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition must set forth all assertions of protected status or other factual and legal objections to the CID and comply with the requirements set forth in 16 C.F.R. § 2.10(a)(1) (2). **The FTC will not consider petitions to quash or limit if You have not previously met and conferred with FTC staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.** 16 C.F.R. § 2.7(k); *see also* § 2.11(b). **If You file a petition to limit or quash, You must still timely respond to all requests that You do not seek to modify or set aside in Your petition.** 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10(b).

I-2. **Withholding Requested Material / Privilege Claims:** For specifications requesting production of Documents or answers to written interrogatories, if You withhold from production any material responsive to this CID based on a claim of privilege, work product protection, statutory exemption, or any similar claim, You must assert the claim no later than the return date of this CID, and You must submit a detailed log, in a searchable electronic format, of the items withheld that identifies the basis for withholding the material and meets all the requirements set forth in 16 C.F.R. § 2.11(a) (c). The information in the log must be of sufficient detail to enable FTC staff to assess the validity of the claim for each Document, including attachments, without disclosing the protected information. If only some portion of any responsive material is privileged, You must submit all non-privileged portions of the material. Otherwise, produce all responsive information and material without redaction. 16 C.F.R. § 2.11(c). The failure to provide information sufficient to support a claim of protected status may result in denial of the claim. 16 C.F.R. § 2.11(a)(1).

I-3. **Modification of Specifications:** The Bureau Director, a Deputy Bureau Director, Associate Director, Regional Director, or Assistant Regional Director must agree in writing to any modifications of this CID. 16 C.F.R. § 2.7(l).

I-4. **Scope of Search:** This CID covers Documents and information in Your possession or under Your actual or constructive custody or control, including Documents and information in the possession, custody, or control of Your attorneys, accountants, directors, officers, employees, service providers, and other agents and consultants, whether or not such Documents or information were received from or disseminated to any person or entity.

I-5. **Identification of Responsive Documents:** For specifications requesting production of Documents, You must identify in writing the Documents that are responsive to the specification. Documents that may be responsive to more than one specification of this CID need not be produced more than once. If any Documents responsive to this CID have been previously supplied to the FTC, You may identify the Documents previously provided and the date of submission.

I-6. **Maintain Document Order:** For specifications requesting production of Documents, You must produce Documents in the order in which they appear in Your files or as electronically stored. If Documents are removed from their original folders, binders, covers, containers, or electronic source, You must specify the folder, binder, cover, container, or electronic media or file paths from which such Documents came.

I-7. **Numbering of Documents:** For specifications requesting production of Documents, You must number all Documents in Your submission with a unique identifier such as a Bates number or a Document ID.

I-8. **Production of Copies:** For specifications requesting production of Documents, unless otherwise stated, You may submit copies in lieu of original Documents if they are true, correct, and complete copies of the originals and You preserve and retain the originals in their same state as of the time You received this CID. Submission of copies constitutes a waiver of any claim as to the authenticity of the copies should the FTC introduce such copies as evidence in any legal proceeding.

I-9. **Production in Color:** For specifications requesting production of Documents, You must produce copies of Advertisements in color, and You must produce copies of other materials in color if necessary to interpret them or render them intelligible.

I-10. **Electronically Stored Information:** For specifications requesting production of Documents, see the attached FTC Bureau of Consumer Protection Production Requirements (“Production Requirements”), which detail all requirements for the production of electronically stored information to the FTC. You must discuss issues relating to the production of electronically stored information with FTC staff **prior to** production.

I-11. **Sensitive Personally Identifiable Information (“Sensitive PII”) or Sensitive Health Information (“SHI”):** For specifications requesting production of Documents or answers to written interrogatories, if any responsive materials contain Sensitive PII or SHI, please contact FTC counsel before producing those materials to discuss whether there are steps You can take to minimize the amount of Sensitive PII or SHI You produce, and how to securely transmit such information to the FTC.

Sensitive PII includes an individual’s Social Security number; an individual’s biometric data; and an individual’s name, address, or phone number in combination with one or more of the following: date of birth, driver’s license or state identification number (or foreign country equivalent), military identification number, passport number, financial account number, credit card number, or debit card number. Biometric data includes biometric identifiers, such as

fingerprints or retina scans, but does not include photographs (with the exception of photographs and corresponding analyses used or maintained in connection with facial recognition software) or voice recordings and signatures (with the exception of those stored in a database and used to verify a person's identity). SHI includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

I-12. Interrogatory Responses: For specifications requesting answers to written interrogatories: (a) answer each interrogatory and each interrogatory subpart separately, fully, and in writing; and (b) verify that Your answers are true and correct by signing Your answers under the following statement: "I verify under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The verification must be submitted contemporaneously with Your interrogatory responses.

I-13. Submission of Documents in Lieu of Interrogatory Answers: You may answer any written interrogatory by submitting previously existing Documents that contain the information requested in the interrogatory so long as You clearly indicate in each written interrogatory response which Documents contain the responsive information. For any interrogatory that asks You to identify Documents, You may, at Your option, produce the Documents responsive to the interrogatory so long as You clearly indicate the specific interrogatory to which such Documents are responsive.

Federal Trade Commission - Bureau of Consumer Protection
Production Requirements

Revised July 2020

In producing information to the FTC, comply with the following requirements, unless the FTC agrees otherwise. If you have questions about these requirements, please contact FTC counsel before production.

Production Format

1. **General Format:** Provide load-ready electronic productions with:

- a. A delimited data load file (.DAT) containing a line for every document, unique id number for every document (DocID), metadata fields, and native file links where applicable; and
- b. A document level text file, named for the DocID, containing the text of each produced document.

Do not produce corresponding image renderings (e.g., TIFF or JPEG) for files in native format unless the FTC requests them. If the FTC requests corresponding image renderings, provide an Opticon image load file (.OPT) containing a line for every image file.

2. **Electronically Stored Information (ESI):** Documents stored in electronic format in the ordinary course of business must be produced in the following format:

- a. For ESI other than the categories below, submit in native format with all metadata and either document level extracted text or Optical Character Recognition (OCR). Do not produce corresponding image renderings (e.g., TIFF or JPEG) for files in native format unless the FTC requests them. If the FTC requests corresponding image renderings, they should be converted to Group IV, 300 DPI, single-page TIFF (or color JPEG images when necessary to interpret the contents or render them intelligible.)
- b. For Microsoft Excel, Access, or PowerPoint files, submit in native format with extracted text and metadata. Data compilations in Excel spreadsheets or delimited text formats must contain all underlying data, formulas, and algorithms without redaction.
- c. For other spreadsheet, database, presentation, or multimedia formats; instant messages; or proprietary applications, discuss the production format with FTC counsel.

3. **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business must be scanned and submitted as either one multi-page pdf per document or as 300 DPI single page TIFFs (or color JPEGs when necessary to interpret the contents or render them intelligible), with corresponding document-level OCR text and logical document determination in an accompanying load file.

4. **Document Identification:** Provide a unique DocID for each hard copy or electronic document, consisting of a prefix and a consistent number of numerals using leading zeros. Do not use a space to separate the prefix from numbers.

5. **Attachments:** Preserve the parent/child relationship by producing attachments as separate documents, numbering them consecutively to the parent email, and including a reference to all attachments.
6. **Metadata Production:** For each document submitted electronically, include the standard metadata fields listed below in a standard delimited data load file. The first line of the data load file shall include the field names. Submit date and time data in separate fields. Use these standard Concordance delimiters in delimited data load files:

Description	Symbol	ASCII Character
Field Separator	¶	20
Quote Character	␣	254
Multi Entry delimiter	®	174
<Return> Value in data	~	126

7. **De-duplication:** Do not use de-duplication or email threading software without FTC approval.
8. **Password-Protected Files:** Remove passwords prior to production. If password removal is not possible, provide the original and production filenames and the passwords, under separate cover.

Producing Data to the FTC

1. Prior to production, scan all data and media for viruses and confirm they are virus-free.
2. For productions smaller than 50 GB, submit data electronically using the FTC's secure file transfer protocol. Contact FTC counsel for instructions. **The FTC cannot accept files via Dropbox, Google Drive, OneDrive, or other third-party file transfer sites.**
3. If you submit data using physical media:
 - a. Use only CDs, DVDs, flash drives, or hard drives. Format the media for use with Windows 7;
 - b. Use data encryption to protect any Sensitive Personally Identifiable Information or Sensitive Health Information (as defined in the instructions), and provide passwords in advance of delivery, under separate cover; and
 - c. Use a courier service (e.g., Federal Express, UPS) because heightened security measures delay postal delivery.
4. Provide a transmittal letter with each production that includes:
 - a. Production volume name (e.g., Volume 1) and date of production;
 - b. Numeric DocID range of all documents in the production, and any gaps in the DocID range; and
 - c. List of custodians and the DocID range for each custodian.

Standard Metadata Fields

DAT FILE FIELDS	DEFINITIONS	POPULATE FIELD FOR:
DocID	Unique ID number for each document	All Documents
FamilyID	Unique ID for all documents in a family including parent and all child documents	All Documents
ParentID	Document ID of the parent document. This field will only be populated on child items	All Documents
File Path	Path to produced native file	All Documents
TextPath	Path to document level text or OCR file	All Documents
Custodian	Name of the record owner/holder	All Documents
AllCustodians	Names of all custodians that had copy of this record (populate if data was deduplicated or email threading was used)	All Documents
Source	Source of documents: CID, Subpoena, Third Party Data, etc.	All Documents
Filename	Original file name	All Documents
File Size	Size of documents	All Documents
File Extensions	Extension of file type	All Documents
MD5 Hash	Unique identifier for electronic data used in de-duplication	All Documents
PRODUCTION VOLUME	Production Volume	All Documents
HASREDACTIONS	Redacted document	All Documents
Exception Reason	Reason for exception encountered during processing (e.g., empty file, source file, password-protected file, virus)	All Documents
PRODBEG	Beginning production bates number	Documents with Produced Images
PRODEND	Ending production bates number	Documents with Produced Images
PRODBEG ATTACH	Beginning production family bates number	Documents with Produced Images
PRODEND ATTACH	Ending production family bates number	Documents with Produced Images
Page Count	The number of pages the document contains	Documents with Produced Images
From	Names retrieved from the FROM field in a message	Emails
To	Names retrieved from the TO field in a message; the recipient(s)	Emails
CC	Names retrieved from the CC field in a message; the copied recipient(s)	Emails
BCC	Names retrieved from the BCC field in a message; the blind copied recipient(s)	Emails
EmailSubject	Email subject line	Emails
Date Sent	The date an email message was sent	Emails
Time Sent	The time an email message was sent	Emails
Date Received	The date an email message was received	Emails
Time Received	The time an email message was received	Emails
Author	File Author	Loose Native Files and Email Attachments
Title	File Title	Loose Native Files and Email Attachments
Subject	File Subject	Loose Native Files and Email Attachments
Date Created	Date a document was created by the file system	Loose Native Files and Email Attachments
Time Created	Time a document was created by the file system	Loose Native Files and Email Attachments
Date Modified	Last date a document was modified and recorded by the file system	Loose Native Files and Email Attachments
Time Modified	Last time a document was modified and recorded by the file system	Loose Native Files and Email Attachments
Date Printed	Last date a document was printed and recorded by the file system	Loose Native Files and Email Attachments
Time Printed	Last time a document was printed and recorded by the file system	Loose Native Files and Email Attachments

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
 Maureen K. Ohlhausen
 Terrell McSweeney

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NONPUBLIC INVESTIGATION OF TELEMARETERS, SELLERS, SUPPLIERS, OR OTHERS

File No. 012 3145

Nature and Scope of Investigation:

To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended), including but not limited to the provision of substantial assistance or support — such as mailing lists, scripts, merchant accounts, and other information, products, or services — to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain monetary relief would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1 (as amended); and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.* and supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

Issued: April 1, 2016

CERTIFICATION OF COMPLIANCE
Pursuant to 28 U.S.C. § 1746

I, _____, certify the following with respect to the Federal Trade Commission's ("FTC") Civil Investigative Demand directed to XCast Labs, Inc., also d/b/a XCast Labs and Siptalk (the "Company") (FTC File No. P207601) (the "CID"):

1. The Company has identified all documents, information, and/or tangible things ("responsive information") in the Company's possession, custody, or control responsive to the CID and either:

- (a) provided such responsive information to the FTC; or
- (b) for any responsive information not provided, given the FTC written objections setting forth the basis for withholding the responsive information.

2. I verify that the responses to the CID are complete and true and correct to my knowledge.

I certify under penalty of perjury that the foregoing is true and correct.

Date: _____

Signature

Printed Name

Title

CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY

Pursuant to 28 U.S.C. § 1746

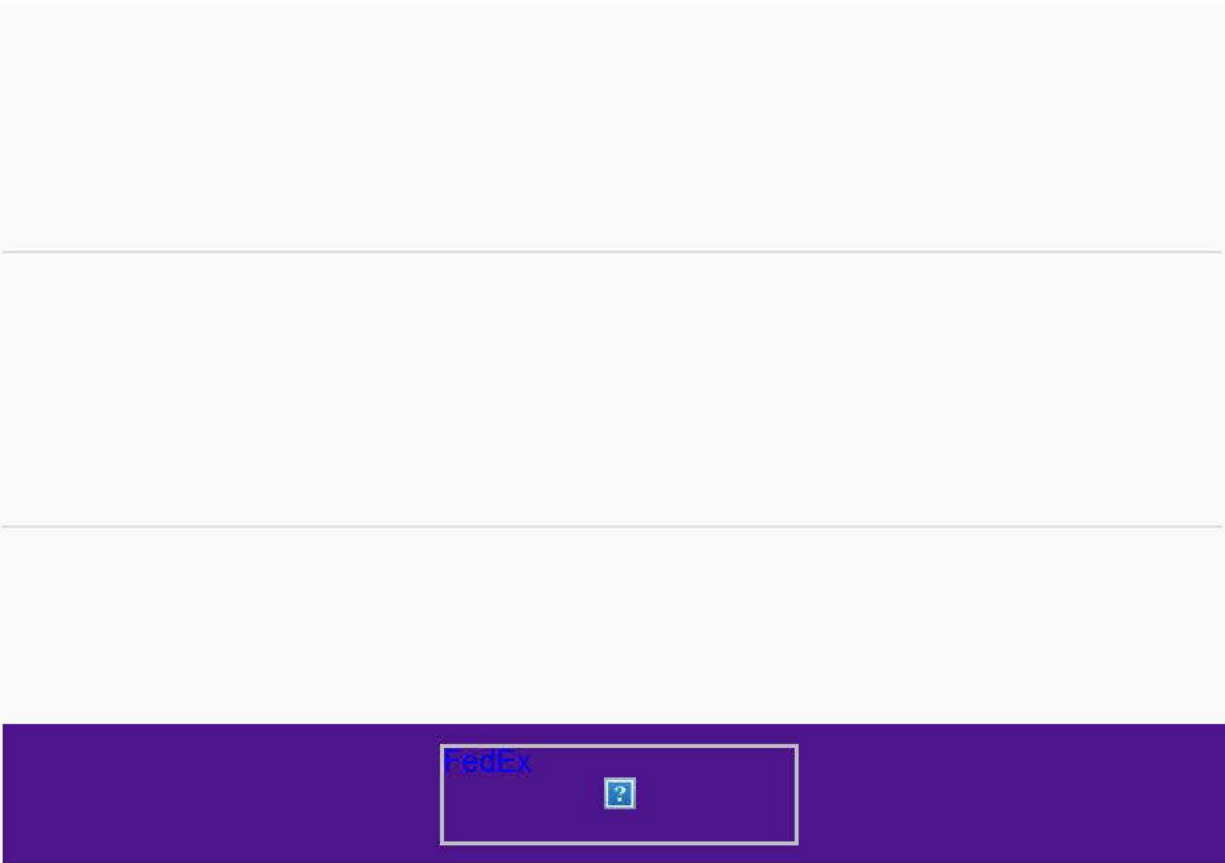
1. I, _____, have personal knowledge of the facts set forth below and am competent to testify as follows:
2. I have authority to certify the authenticity of the records produced by XCast Labs, Inc., also d/b/a XCast Labs and Siptalk (the “Company”) and attached hereto.
3. The documents produced and attached hereto by the Company are originals or true copies of records of regularly conducted activity that:
 - a) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
 - b) Were kept in the course of the regularly conducted activity of the Company; and
 - c) Were made by the regularly conducted activity as a regular practice of the Company.

I certify under penalty of perjury that the foregoing is true and correct.

Date: _____

Signature

Exhibit C



Hi. We were unable to complete delivery of your package.

Direct Signature Required



Unable to deliver shipment, returned to shipper
Recommended action : No action is required. The package is being returned to the shipper.



We made a final delivery attempt: 01/15/2021 11:32 AM. Pick up your package(s) today after 1:00pm at within 2 business days, or your packages(s) may be returned to the shipper.

SCHEDULED DELIVERY

Fri 1/15/2021
estimated between 9:40am and 2:30pm



DELIVERY EXCEPTION
MARINA DEL REY, CA

MANAGE DELIVERY

TRACKING NUMBER	772589715351
FROM	Federal 400 Seventh Street S.W. Washington, DC, US, 20024
TO	d/b/a XCast Labs and Siptalk XCast Labs, Inc. c/o Eric Manlunas 1880 Century Park E., # 1415 LOS ANGELES, CA, US, 90067
DOOR TAG NUMBER	DT105337405194
PURCHASE ORDER NUMBER	0612
REFERENCE	P207601 - 600390
SHIPPER REFERENCE	P207601 - 600390
SHIP DATE	Mon 1/11/2021 04:01 PM
DELIVERY LOCATION	MARINA DEL REY, CA
PACKAGING TYPE	FedEx Envelope
ORIGIN	Washington, DC, US, 20024
DESTINATION	LOS ANGELES, CA, US, 90067
SPECIAL HANDLING	Deliver Weekday Direct Signature Required
STANDARD TRANSIT	Wed, 01/13/2021 by 4:30pm
NUMBER OF PIECES	1

TOTAL SHIPMENT WEIGHT 0.50 LB
SERVICE TYPE FedEx 2Day

FedEx



Download the FedEx[®] Mobile app

Get the flexibility you need to create shipments and request to customize your deliveries through the app.

[LEARN MORE](#)

FOLLOW FEDEX



Please do not respond to this message. This email was sent from an unattended mailbox. This report was generated at approximately 4:28 PM CST 02/03/2021.

All weights are estimated.

To track the latest status of your shipment, click on the tracking number above.

Standard transit is the date and time the package is scheduled to be delivered by, based on the selected service, destination and ship date. Limitations and exceptions may apply. Please see the FedEx Service Guide for terms and conditions of service, including the FedEx Money-Back Guarantee, or contact your FedEx Customer Support representative.

© 2021 Federal Express Corporation. The content of this message is protected by copyright and trademark laws under U.S. and international law. Review our [privacy policy](#). All rights reserved.

Thank you for your business.

Exhibit D

From: [Williams, Amber](#)
To: [Stephen Nelson](#)
Cc: esears@xcastlabs.com
Subject: RE: FTC Matter No. P207601; CID to XCast Labs, Inc.
Date: Thursday, January 28, 2021 4:12:00 PM
Attachments: [image002.png](#)
[CID - XCast Labs, Inc. - P207601.pdf](#)

Hello Stephen,

I was recently informed that a copy of the Civil Investigative Demand (“CID”) was mailed to your agent for service of process. In the interest of time, however, I am providing a copy of the CID by electronic means attached here. The CID is time-sensitive and it contains important information and instructions. After you have had an opportunity to review the CID, please contact Valerie Verduce to discuss any questions or concerns.

Amber Williams

From: Williams, Amber
Sent: Tuesday, January 26, 2021 5:19 PM
To: Stephen Nelson <snelson@xcastlabs.com>
Subject: RE: FTC Matter No. P207601; CID to XCast Labs, Inc.

Hello,

Thank you for providing a current mailing address. I will have the CID packet mailed out to you soon.

Amber Williams

From: Stephen Nelson <snelson@xcastlabs.com>
Sent: Tuesday, January 26, 2021 3:36 PM
To: Williams, Amber <awilliams3@ftc.gov>
Cc: Eryn Sears <esears@xcastlabs.com>
Subject: Re: FTC Matter No. P207601; CID to XCast Labs, Inc.

Amber-

Our company is working remotely due to COVID-19.

You can send it to my home or send via email.

Stephen Nelson

[REDACTED]
Palm Desert, CA [REDACTED]

Thank You,
SN



STEPHEN NELSON
SENIOR VICE PRESIDENT, OPERATIONS

o 310-861-4770 | m 310-500-0150

e snelson@xcastlabs.com | w www.xcastlabs.com

From: "Williams, Amber" <awilliams3@ftc.gov>

Date: Tuesday, January 26, 2021 at 12:58 PM

To: Stephen Nelson <snelson@xcastlabs.com>, Eryn Sears <esears@xcastlabs.com>

Subject: FTC Matter No. P207601; CID to XCast Labs, Inc.

Hello,

The U.S. Federal Trade Commission has attempted to deliver a Civil Investigative Demand to XCast Labs, Inc. at mailing address 1880 Century Park E, #1415 Los Angeles, CA 90067 for Eric Manlunas, Agent for Service of Process.

I have confirmed with FedEx that the package was deemed undeliverable. Could someone associated with the company's legal division please provide a proper mailing address to serve the Civil Investigative Demand to appropriate persons at the company?

Thank you,

Amber L. Williams

Investigator

Federal Trade Commission

Midwest Regional Office

230 South Dearborn Street, Suite 3030

Chicago, Illinois 60604

(312) 960-5628

Exhibit E



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
SOUTHEAST REGION

225 Peachtree Street S.E – Suite 1500
Atlanta, Georgia 30303

Anna Burns
Director

(404) 656-1350
aburns@ftc.gov

February 8, 2021

VIA ELECTRONIC MAIL TO snelson@xcastlabs.com

Stephen Nelson
XCast Labs, Inc.,
d/b/a XCast Labs and Siptalk
[REDACTED]
Palm Desert, California [REDACTED]

Re: Civil Investigative Demand Issued to XCast Labs, Inc.,
d/b/a XCast Labs and Siptalk

FTC Matter No. P207601

Dear Mr. Nelson:

This letter is to respond to XCast Labs, Inc., d/b/a XCast Labs and Siptalk's request for an extension of time for producing materials responsive to the Civil Investigative Demand issued on January 8, 2021 ("CID"). Pursuant to Part 2.7(l) of the Commission's Rules of Practice, I am hereby extending the time prescribed for compliance with Subsections II.C and II.D of the CID until March 10, 2021.

Please address any questions you have regarding this letter to Valerie M. Verduce at (202) 730-5967 or vverduce@ftc.gov.

Sincerely,

/s/ Anna Burns

Anna Burns
Director, Southeast Region

Exhibit F

1055 Thomas Jefferson Street, NW
Suite 400
Washington, D.C. 20007
Tel: 202 263-4300
www.sgrlaw.com

SMITH, GAMBRELL & RUSSELL, LLP
Attorneys at Law

Edward A. Pennington
Direct Tel: 202-263-4307
Direct Fax: 202-263-4314
epennington@sgrlaw.com

March 26, 2021

VIA EMAIL (VVERDUCE@FTC.GOV)

Valerie Verduce
Federal Trade Commission, Midwest Region
230 South Dearborn Street, Room 3030
Chicago, Illinois 60604

Re: FTC Matter No. P207601

Dear Ms. Verduce,

Thank you, and Ms. Amber Williams, for taking the time to speak with me on Monday, March 22, 2021, about the CID directed at my client XCastLabs, Inc. (“XCast”). At a very high level, we have a disagreement about what XCast is required to produce, and a misunderstanding on the part of the FTC as to what XCast has in its possession. We understand that the FTC is investigating the activities of two particular XCast customers and their alleged use of eight particular phone numbers.

I asked you what the basis for the FTC’s request was for highly confidential and private information about XCast’s stockholders, and your response was essentially that the FTC was empowered by various statutes, and you proceeded to name a few. We believe that the contrary is true, and in fact, that it could be a crime for XCast to disclose some of the information demanded by the FTC.

You requested that I provide legal support for why we believe the FTC is not entitled to certain information, and I will do so below. I will also recount the communications between the FTC and XCast, and provide more information about the type of services provided by XCast in order to show that (1) it was never pointed out to XCast until very recently that they should seek legal advice when responding to the CID; (2) it was never pointed out to XCast that XCast had the right to challenge the contents of the CID; and (3) some of the information requested by the CID either never existed or was not required of XCast to be kept in its records; (4) XCast offices have been closed since March, 2020, and in the state of California where its

FTC Petition, Exhibit F

- 46 -



Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 2

headquarters is located it is unlawful for XCast personnel to leave their homes and would not be admitted to commercial buildings.

Background

XCast acknowledges that the FTC can and does conduct investigations for reasons totally unknown or unexplained to the company to whom the CID is sent.

On or about January 8, 2021, the Federal Trade Commission (FTC) sent a Civil Investigative Demand (CID), addressed to one Eric Manlunas, identified as Vice Chair on the XCast website. (www.xcastlabs.com) The letter was directed to XCast's corporate headquarters in Los Angeles. The letter was returned to the FTC and marked "undelivered" due to closure of the office. The aforementioned website clearly indicated the contact information to whom any enforcement or subpoenas service should be addressed.

On January 26, 2021, Stephen Nelson, Senior Vice President for Operations at XCast received an email from Ms. Williams, whom we know to be an investigator. Ms. Williams reported that a letter she had mailed had been returned and she inquired about the identity of the responsible designee. Notwithstanding the public availability of his contact information for subpoenas and enforcement inquiries, Nelson responded in 20 minutes after receiving Ms. Williams' email and indicated that any inquiry should be sent to him (at the email address clearly posted on the company website)

In his initial conversation with Ms. Williams, Mr. Nelson explained that all company offices had been closed since March 2020 due to the pandemic and that he was himself was under a California "Stay at Home" order. XCast's network engineering team is located in Chicago in one of the most severely Covid-impacted zip codes in the country. The company's billing operations are located one hour away from the site of the nationally publicized outbreak at the Tyson Plant in Iowa City in an area more recently struggling for survival during the most severe winter storm to impact the state.

These extraordinary factors notwithstanding, Mr. Nelson conveyed to Ms. Williams that XCast would be fully cooperative and that he would try his best to collect the information in a timely way.

Immediately--that same day--on January 26, 2021, Mr. Nelson contacted you at the number he was provided, as he was asked to do. Two days later, on January 28, 2021, Ms. Williams sent an email to Mr. Nelson indicating that in the interest of time, she would provide an electronic copy of the CID. Later that same day, Mr. Nelson formally acknowledged through an email that he had received the CID.

On February 5, 2021, eleven (11) days after Ms. Nelson had reached out to her, you returned his call. During this call, you and Mr. Nelson discussed these matters:

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 3

- Mr. Nelson revealed his confusion about the vagueness and scope of the inquiry since it appeared to be requesting information exceeded any previous inquiries, he has reviewed over the course of his ten years of service in this role at XCast. He further indicated that the burden of the review and production of records on the two identified customers over more than a three-year period would be substantial.¹
- Mr. Nelson has a clear memory that you agreed it was broad so understood he would need more time to gather the data.
- Mr. Nelson revealed he was uncertain about his responsibility to reveal private details about internal personnel matters, operations and ownership of a privately held company, but that he would look into it and provide appropriate information.
- You indicated you would *request* an extension on XCL's behalf, but that you could not authorize an extension. On February 8, 2021, Mr. Nelson was notified that an extension was granted until March 10, 2021. (Twenty-one working days, allowing for federal holiday.)
- At no time did Mr. Nelson suggest he was an attorney, and his job title would not have suggested that he was. At no time did you indicate this conversation should be conducted with an attorney.

Acting in good faith and making every effort to be cooperative, Mr. Nelson collected the information he understood was being requested for the two customers identified in the CID.

Mr. Nelson immediately reached out to XCast's small billing staff which is located in Iowa and asked them to begin this massive data retrieval for the two customers identified. (As is standard industry practice, XCast only stores accessible billing and CDR records for 120 days in addition to the current billing cycle. The FCC only requires carriers to retain CDR records for 18 months.)

Their extreme working conditions notwithstanding—including the fact that the key person responsible for CDR retrieval was stranded out of the country due to travel restrictions--the billing team set aside other pressing operational priorities to search through archival storage records to assemble the documents requested for the numbers identified in the CID and for the two customers XCast believed to be the subject of their inquiry.² This effort was well beyond

¹ XCast does not retain readily accessible CRDS beyond 120 days except for its current billing cycles. Nor are they required to do so by the rules and regulations set forth by the FCC which specifies the requirement to retain records for only 18 months. Even this retention specification is being widely challenged in the public forum as too onerous.

²The two customers in question are [REDACTED] and [REDACTED] (a) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 4

XCast's legal responsibility to produce these records, since XCast's obligation to retain CDRs is eighteen (18) months—and certainly not thirty-nine (39) months.

These facts notwithstanding and in an effort to be helpful, Mr. Nelson set about the considerable task of assembling the information that he and others involved in the information retrieval understood to be what was being required for the two companies identified in the CID.

The Company then made every effort to collect and present the narrative information in an “easy-to-read” format in a best effort to make it more approachable for someone who may not understand certain operational behavior and standards within carrier and VoIP environments. On March 8, 2021, XCast conveyed the information to you.

Response by FTC During March 16, 2021 Follow-up Call

On March 16, 2021 over a week later, Mr. Nelson was informed by you that you would like to have a follow-up discussion regarding XCast's CID response. The call was immediately scheduled and was conducted on an XCast conference bridge. Participants on the call were you, Ms. Williams, Mr. Nelson and Ms. Kelley, EVP for Business Development.

The call was initially cordial in that you asked for certain clarifications that Mr. Nelson provided. At one point, you asked Mr. Nelson to explain the difference between “wholesale and dialer.”³ (This question left Mr. Nelson somewhat baffled since any informed person about carrier traffic would presumably understand basic industry terms but he carefully explained the difference.)

You asked for more clarity on the ownership of the CDR numbers sent by Mr. Nelson previously. Particularly, you asked Mr. Nelson to confirm which numbers belong to Customer A; and which had been assigned to Customer B and you wished to have them distinguished. During the call, Mr. Nelson attempted to access the numbers to determine whether his files reflected that distinction and he confirmed that based on his real-time research, it appears that the first grouping of numbers he had previously sent were associated with Customer A. During the conversation, Mr. Nelson attempted to execute an on-line research of the data he had retrieved and was unable to respond conclusively to you in the moment. He therefore told you

³ Predictive dialers are used by many companies to reach out quickly and cost effectively for applications like emergencies, school closings, vaccine availability, pharmacy notices, auto issue recalls, even marketing messages where the list uses opt-in phone numbers. The list **creator** and the **list purchaser** have the obligation to scrub the list against the DNC list, the client's opt-in list in the case of entities such as enterprise calling for product marketing. XCast has no control over this process and has no information about the relationship between the list provider and the calling party.

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 5

that he would need to perform another scan in order to make the discrimination you had requested. (Mr. Nelson sent you most of this clarifying information even though you informed him that you only wanted to speak to XCast's attorney. This was the first indication from you that an attorney should be involved in the CID process.)

At one point, you began to express frustration—verging on intimidation—that XCast's responses had been incomplete and unresponsive to Exhibits C, D and E of the CID. Specifically, you said you could not understand how XCast would not have understood that Section C demanded comprehensive document production for every customer record for thirty-nine (39) months. Since the company had already produced more documents than it was required to maintain, Mr. Nelson and Ms. Kelley attempted to clarify and better understand what you were requesting—especially as they related to emails and recorded conversations and some imagined claims that might have been made by Better Business Bureau, etc. (Neither Mr. Nelson nor Ms. Kelley have ever been aware of any such claim of wrongdoing by XCast during their ten-year affiliation with the company.) And certainly, both of them are well aware that XCast had done nothing wrong.

In any example where XCast had learned of multiple allegations of misbehavior on the part of a customer or vendor, XCast had warned the customer or vendor—either telephonically or via email, that their service would be terminated. These customers—and XCast's actions—are available on the US Telecom Traceback portal that is available to you and anyone else at the FTC.

Rather than embarrass or confront you in the presence of others, Mr. Nelson did not point out the obvious requirements that XCast had no duty to retain such records over a period of time and that the exposure of such records could be a violation of numerous federal and states laws and could countermand specific commands from law enforcement agencies never to release such documents. Not incidentally, were XCast to respond to every request you appear to be making at that point would require XCast to literally “hack” into its customer's protected passwords. In any case, Mr. Nelson explained that the company's interpretation of the CID was that the inquiry was limited to the two parties identified.

You then claimed the language of the CID was clearly inclusive of a larger universe. When Mr. Nelson commented that he had initially commented to you in your original conversation that the inquiry seemed unusually broad, and you had agreed it was. You aggressively responded that: “I never said anything like that because I have been a lawyer for 30 years and would never make a comment like that.” This further astonished both Mr. Nelson and Ms. Kelley, who has been an executive in some major telecommunications company since the 1980s. Ms. Kelley then inquired about the grounds for such an inquiry and indicated that XCast would be happy to cooperate—as has been our tradition and reputation—but that from a business perspective she would like to better understand what the FTC was trying to obtain.

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 6

You then informed Mr. Nelson and Ms. Kelley that you needed to talk to the XCast attorney because “anyone with a legal background would understand what she wanted.” You then demanded to speak to XCast’s attorney by a date certain—implying “or else” something menacing was about to occur.

The FTC’s CID Goes Well Beyond What XCast Can and Legally Should Produce

The FTC initial interview overall challenged the integrity of XCast’s employees, and you did not seem to understand XCast’s obligation or limitations (legal and operationally) to produce the data you wanted. The threatening nature of your interrogation of non-attorney employees who at all times indicated a desire to cooperate contradicts the statutory mission of the FTC which is to

“Prevent business practices that are anti-competitive or unfair to consumers; To enhance consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”⁴

Of grave concern is the demand for personnel information from a private company for no reason explained to Mr. Nelson and Ms. Kelley. And, going so far, as to demand the disclosure of the names of XCast’s 50+ shareholders and their ownership position. (Of note: the person who manages XCast’s shareholder records was unavailable and has just returned from a long hospital stay where he was seriously ill with COVID.) Further, XCast outsources all of its personnel operations to a national company and would need to seek legal guidance from that company to approve the release of personnel records which are tightly regulated under the laws of the State of California.

You appear to be dissatisfied with how XCast has cooperated and responded to the CID. Mr. Nelson has been responding to these inquiries for a dozen years and has never been chastised for failure to be responsive nor the manner in which he responded. Nor has he ever implied to you or anyone else that he was an attorney, or was he ever been advised that any attorney should have been involved in XCast’s response. He is an active and well-regarded member of the US Traceback group, and to this point in time, has never been given an unreasonable request for information from a federal agency.

⁴ If this is how the FTC routinely behaves, it has not only failed miserably in fulfilling its statutory mission but has revealed an astonishing ignorance about the businesses it claims to serve and has seriously violated federal and state laws and the Constitution of the United States. This behavior is manifest in its demand for access and the ability to globally search for all documents, communications, financial affairs and personal records of a small privately held Corporation about whom no wrongdoing has ever been claimed or revealed to the company in any shape or form.

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 7

FTC's Apparent Lack of Understanding of XCast's Business Operations

During the March 7th call, you also demanded that XCast produce all “ZenDesk” records, falsely assuming that XCast was dependent on this CRM tool as its multi-channel customer platform. However, while XCast does use ZenDesk for some customer communication—including some Tier 2 and Tier 3 technical support and certain inquiries about billing status - the ZenDesk software allows its own subscribers to customize its data capture and reporting to meet its own internal business requirements, rather than some unforeseen need to produce data of interest to someone else.

Tier 2 and Tier 3 technical support records contained within the company's ZenDesk system might report things like “static on the line,” “dead ear,” “Calls dropping,” “PBX service platform down in the Region 1,” “we did not receive our bill,” “getting fast busy signals,” etc. Or, might even say “I got an unwanted call” from someone on your network.’ In such an example, the response would likely be “XCast does not originate phone calls so please contact your service provider.” A trace of such messages—even if available—would be useless since such tickets could be deleted and such messages would not be traceable back to the calling party. Employees also delete their emails, phone messages and texts whenever they choose.

XCast relies on numerous other tools and processes for handling trouble tickets—including the common practice of Help Desk Support employees standing up in their cubicle and talking to one another if they are in the same location; or by using any number of chat tools available to them, including Microsoft Teams, company conference bridges; Skype; emerging apps. Or, more recently their own cell phone texts during the remote workplace conditions for the last 13 months. XCast does not record its employee's conversations and would thus have nothing to produce if the CID asks for such communications.

Speculation and commentary about possible “suspicious” behavior is on-going and real-time among technical personnel associated with NOCS situations throughout a maze of national and international carrier highways. XCast does not record its conversations with customers or underlying carriers. XCast does not read or retain its employees' emails; XCast does not read then retain its employee's text messages; and certainly XCast does not record employees' phone conversations.

Operationally, XCast has little need to speak to their wholesale customers. Once a customer is established in the system, communication is mostly automated with pre-paid billing transactions and information about rate changes. If XCast learns of some infraction through the Traceback group, the offending customer or vendor is notified that they must correct their behavior or be suspended. If the infraction is not corrected, that company is notified that their service has been suspended or terminated.

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 8

XCast's Business Operations Do Not Coincide with Your Presumption

Significantly, XCast has its own omnichannel customer platform with highly sophisticated software designed to respond to its own business strategy to appeal to multiple communications markets. Specifically, XCast provides over 125 Resellers a “white label,” giving them their own product suite based on XCast’s PBX products and services. The white label customer can then be able to manage their own customer base through XCast’s omnichannel platform with their own private subscriber data and changes. Resellers are able to perform their own new customer setup, service ordering, customer information management and to extract what reports they find useful in their own business operations. *Such users have their own password—unknown to XCast—with the result that XCast has neither control nor access to the business operations of their customers⁵ including any communication they may have with their customers.* Clearly, XCast would not have any way to produce documents or information about customers they have no access to.

The CID is Unduly Burdensome

The TRACED ACT was enacted on December 30, 2019 for the purpose of deterring criminal robocall violations and to improve enforcement of section 227(b) of the Communications Act of 1934. The Act includes provisions for an Annual Report by the Federal Communications Commission to be submitted one year after enactment (December 30, 2020) to the Congress a report to include: (1) the number of complaints alleging that a consumer received a call violation of certain standards; (2) the number of complaints alleging a call in connection with misleading or inaccurate caller ID information; and (3) number of citations issued by the Commission pursuant to section 503(b) during the preceding calendar. And further, the TRACED ACT directed the Commission to prescribe regulations to implement any changes it might propose to institutionalize changes associated with the Act. In the March 16, 2021 call between XCast and you, XCast attempted to understand whether your questioning was tied to this data collection prescription or for some other reason. You refused to answer this question.

The TRACED ACT further directed the implementation of the STIR/SHAKEN authentication in the internet protocol networks—of which XCast Labs is an example. The deadline for companies like XCast to integrate STIR/SHAKEN has been extended to June 2022 for small common carriers. XCast has begun development of its authentication tools and is

⁵ While XCast’s Integrated Back Office system is a Microsoft Asp.Net application coded in C#, the construction of the underlying data base is a part of XCast suite of trade secrets. This is not an incidental fact. Even if XCast “hacked” into these accounts to access these records, it would be in violation of the Storage Communication Act which provides for significant felony charges for anyone who knowingly provides information restricted by this Act.

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 9

awaiting the award of its Certification—which will mean XCast met this authentication requirement one year before it was actually required. In the meanwhile, XCast has partnered with another company specializing in mitigation software aimed at detecting illegal calls.⁶

The TRACED ACT further required the FCC to conduct a study to determine whether a provider of such VoIP services would be required to retain records relating to each call transmitted over the covered VoIP service of such provider that are sufficient to trace such call back to the source of such call. The FCC is obligated to report to the Congress its recommendations. The Act allows for the registration of a Consortium of Private-Led efforts to trace back the original of suspected unlawful robocalls and the US Telecom Traceback group was later anointed for this purpose. XCast is an active member in this consortium.

**Understanding XCast’s Business Is Needed to Appreciate
How the CID Asks for Information Not Available to XCast.**

XCast has been a pioneer in VoIP services since 2002—serving small to mid-sized business with hosted PBX and SIP trunk. XCast has over 125 Resellers and over 100 Agents who sell our services to their individual customer base. It is not unusual for our Reseller or Agent partners to have carrier providers other than XCast serving the same customer within their base.⁷ While XCast has a handful of direct legacy customers—those who have been constant or intermittent customers over many years—the company’s core business model relies largely on delivery of services by our partners who offer an array of services.

XCast and its partners provide products and services to virtually all vertical business markets—from restaurants, hotels, financial services, police stations, hospitals, law offices, doctor’s offices, schools—as well as to local dry cleaners or corner grocery stores—as well as Call Centers. (Some of XCast’s Reseller and Agent Call Center customers include American Express, FedEx and, for that matter, the federal government.) This distribution model inherently limits XCast’s direct knowledge of our partner’s customer base activity.

All XCast employees are well-trained to protect privacy—especially emails which the company believes are protected by the Storage Communication Act (“SCA”). If the FTC is not familiar with this act, and demands production of information protected by the act, it has not only failed in fulfilling its statutory mission but has revealed a lack of understanding about the businesses it claims to serve. Literal compliance with the CID by XCast would be in violation of federal and state laws and the Constitution of the United States. An example of an improper demand of the CID would be to require XCast to globally search for all documents,

⁶ These tools are merely interim and far from reliable. None of the several vendors XCast reviewed provide fail-safe screening as their databases are compiled from many self-reporting sources which are inherently unable to distinguish between an unwanted and illegal call.

⁷ This would be likely in the case of Call Centers whose business is awarded to those with the most current competitive rate.

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 10

communications, financial affairs and personal records of a small privately held Corporation about whom no wrongdoing has ever been claimed or revealed to the company in any shape or form.

Most XCast employees are well aware of the SCA and Electronic Privacy rules as they have been educated repeatedly about the requirement for privacy. Every employee has signed a Proprietary and Confidentiality Agreement and understands they would be terminated immediately for conveying any improper subscriber information.

An end-user is not a direct customer of XCast's but is a customer of XCast's customer. As such, XCast does not have direct insight into XCast's customer's business operations. If, for instance, such a customer's customer operated a call center, XCast would have no way of knowing whether XCast's direct customer is making calls, or whether such calls are being generated by their customer or their customer's customer. Large call centers are likely to utilize more than one provider to ensure continuity of service and to maintain access to the most competitive rates for their traffic. XCast's partners will always be searching for the most competitive rate so may not always choose XCast as a preferred provider for any or all of its customers or for all of its calling traffic. XCast has no insight into the business model of Resellers or other partners or their customers.⁸

Almost all XCast's wholesale traffic is pre-paid. This means that whenever any customer's prepaid balance is depleted, the software within our network automatically shuts off their access. Thus, XCast's primary interaction with such end-users is usually limited to automated credit and billing transactions. Or, in the event, one of XCast's partners' customers experienced some technical issues associated with their calling, then someone on their technical team would create an on-line trouble ticket describing any network issue. These technical incidents are managed through our on-line automated management system or with direct conversation with XCast's Network Operations Center (NOC.) These communications are not recorded and not retained for the reason that they are transactional and multiple conversations with shifting information could change every few minutes. This is what routinely happens in a NOC environment.

Customer versus Vendor

It is important to clarify that XCast's business infrastructure distinguishes between activities associated with customers versus activities associated with vendors. In some instances, a company is both a customer and a vendor. Because wholesale business success is

⁸ For example: suppose a cable company utilizes Agents (which they do) to sell a cable company's broadband services; suppose that Agent sells a cable company's services to Company A which has several locations; suppose Company A's business model includes downstream customers like Starbuck's "hot spots" where the public can enter to use their own computer to perform any number of tasks—from searching the internet to actually making free calls on the internet. A cable company has neither interest nor ability to evaluate Company A's business model and activity or insight into what might be going on.

Valerie Verduce
 Federal Trade Commission, Midwest Region
 March 26, 2021
 Page 11

based on network quality and price competitiveness any perspective customer is constantly searching for the most competitive price. This price competitive fact underlies the transient movement of customers from one network to the other. Any given customer might have an agreement with XCast and run traffic for two weeks, then drop off and run no traffic for a month or never return. This is common because that customer likely has multiple underlying vendors—just like XCast does—and will always run their traffic at the most competitive rate. Also, competitive carriers frequently may change their rate plans every couple of weeks and these changes—along with network quality—create the underlying basis for the transient nature of any customer’s traffic.

Commentary about possible “suspicious” behavior on on-going among technical personnel associated with NOCS situations throughout a maze of national and international carrier highways. This means that a single call originating from any phone number may travel across many networks before it finally lands on its terminating site. Like other carriers, XCast is prohibited from “listening” to a call without a specific court order—like a FISA warrant. Anytime XCast receives an inquiry from any federal or state criminal group, XCast provides information that would otherwise be illegal to release.⁹ When an abuse is detected or reported, XCast has historically blocked calls or removed these phone numbers from its network or removed the customer who held that number.¹⁰

When a call “passes through” the XCast network—or any network—it does not mean that provider necessarily has any control over that specific call—or for that matter, any way to interfere with that call unless it was actually originated by XCast or one of its customers. Although XCast may “own” a phone number, it does not mean XCast originated that phone number. In fact, XCast does not originate phone calls. (Except in one exceptional case in 2009, XCast supported a unique calling event for a high-profile Hollywood media group which was the sole exception to its practice.)

XCast’s relationship with the US Telecom Association (and related TraceBack Group.)

In 2019, a consortium of telecom companies came together to create a traceback system based on an algorithm that better identify these patterns and researches the origination and termination in a timely and coordinate way. XCast made many well-documented attempts in 2019 to understand the work of this informal traceback group composed of members of a Washington lobbying group.

⁹ The cause of that inquiry is not revealed to XCast.

¹⁰However, there are legal restraints about how carriers might do this. For instance, the 4th Amendment prohibits certain actions that are based purely on “suspicion.”

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 12

After the TRACED ACT formally ordained the USTelecom group with full authority to capture suspicious call data, XCast has been with that group and has been helping the Traceback Group track any potential fraudulent call that might pass through the XCast network.¹¹

Whenever the Traceback Group identifies a phone number and any specific “suspicious”¹² calling event, they notify all carriers and ask them to research whether a particular calling number passed through their network and whether that number can be associated with any of its customers. XCast immediately responds—often within the hour—with the information and forwards it to the Traceback group. However, this practice is a stop-gap solution until a more comprehensive system can be implemented industry-wide.

US Telecom group has developed a proposed fraud detection solution called STIR/SHAKEN. XCast participated in some preliminary discussions about the development of this solution but is no longer able to participate in the testing of the technology because of certain restrictions established by the USTA TraceBack group that require participants in the development trials to be CLECs¹³. This discrimination eliminated many smaller carriers—like XCast—from participating in the trial.) STIR/SHAKEN is expected to be fully implemented by 2022.¹⁴

¹¹ Their inclusion in this group required XCast to join the Association and pay an annual membership fee.

¹² The meaning and evidence of “suspicious” was an initial objection XCast made to the US Telecom approach to demand for customer records. The passage of The TRACED ACT expanded the statutory reach of the traceback strategy beyond the US Telecom’s reliance on Sec.2222 of the Communications Act. This disregard for privacy would not likely be sustained in any court test of its constitutionality and infringement on 4th Amendment.

¹³ A Competitive Local Exchange Carrier (CLEC) is a local exchange carrier that competes with other established carriers and provides interstate exchange access services used to send voice traffic. This is one of many terms used to identify an organization offering local telephone services.

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 13

Public Policy Advocacy by XCast to reduce Fraud

XCast's leadership has repeatedly and publicly advocated for a massive, federally funded Public Service Announcement program (PSA) to better educate the public about how to manage unwanted calls and block calls from their devices. The company has also advocated for:

- Aggressive federal regulation and oversight;
- Public and free access to the DNC list so that carriers and customers can access without charge (would require additional funding for FTC);
- A comprehensive review (and change) of all communications law—starting with the Communication Act of 1934—to the present—to coordinate and modernize laws to reflect current technology and the need to protect privacy;
- Immediate federal coordination of the roll-out of STIR/SHAKEN to ensure proper information and procedures are in place to ensure that legitimate calls are not suddenly blocked, and consumers have no understanding of what has happened;
- Regulations that will ensure that costs associated with the implementation of STIR/SHAKEN are not passed along to the consumer.
- Oversight, review and protection of small businesses and carriers likely to be extinguished by smaller carriers due to their inability to financially adapt to these changes.

Conclusion

XCast believes that it has complied with the CID to the extent allowed by law. XCast is also willing to work with the FTC to provide further information where FTC believes further compliance with the CID is required. XCast has a history of working to achieve the goals of the FTC and the FCC in protecting consumers from unwanted, illegal robo and spoofing call, and will continue to do so. However, XCast cannot provide information it neither possesses nor exposes it to potential criminal prosecution or civil liability. I am ready and able to conduct further telephonic conferences to achieve satisfaction by the FTC that XCast is in compliance with the CID.

Sincerely,

/Edward A. Pennington/

Edward A. Pennington

Valerie Verduce
Federal Trade Commission, Midwest Region
March 26, 2021
Page 14

cc: Amber Williams - awilliams3@ftc.gov

Exhibit G



United States of America
FEDERAL TRADE COMMISSION
Bureau of Consumer Protection

Bureau of Consumer Protection
Division of Marketing Practices

April 9, 2021

Via Email

Mr. Edward A. Pennington
Smith, Gambrell & Russell, LLP
1055 Thomas Jefferson Street Northwest
Suite 400
Washington, D.C. 20007
epennington@sgrlaw.com

Allen Dreschel
Federal Trade Commission
400 Seventh Street Southwest
Mail Stop 8528
Washington, D.C. 20024
ddreschel@ftc.gov

**Re: Federal Trade Commission Matter No. P207601
Civil Investigative Demand**

Dear Mr. Pennington:

This letter concerns the Civil Investigative Demand (“CID”) that was served on XCast Labs, Inc. on January 28, 2021 with an original response deadline of February 28, 2021.

XCast has been in default of the CID for more than five weeks. Below, I review the history of engagement between the FTC and XCast with respect to this matter and the severe deficiencies in XCast’s production to date. I also discuss XCast’s unfounded assertion that it has complied with the CID to the extent permitted by law.

In short, the FTC expects XCast to come into full compliance with the CID by April 16, 2021. If XCast declines to comply, the FTC will have little choice except to consider seeking judicial enforcement of the CID.

I. Background

Following service of the CID, Valerie Verduce conferred with Steve Nelson of XCast by telephone on February 8, 2021. Mr. Nelson asked for additional time to respond to the CID. On February 8, the FTC served a letter on Mr. Nelson that extended the original response deadline for Subsections II.C and II.D of the CID until March 10, 2021.

XCast failed to produce any response to the CID by the February 28 deadline. On March 5, 2021 XCast made its initial production. On March 16, 2021, Valerie Verduce held a telephone conference with Steve Nelson, Eryn Sears, and Susan Kelley about XCast’s submission.

On March 17, 2021 XCast produced certain IP addresses and payment-related information as a supplement to its March 5 production.¹ On March 22, 2021, Valerie Verduce held a telephone conference with you about the status of XCast's submission. On March 26, 2021, you wrote that "XCast believes that it has complied with the CID to the extent allowed by law."

II. XCast Has Failed to Provide Adequate Responses to the CID

A. XCast Has Failed to Provide Account-Related Information for Specified Customers or Subscribers

Subsection II.A of the CID seeks certain account-related information for [REDACTED], [REDACTED], any accounts associated with [REDACTED] and [REDACTED], and any account that originated, initiated, or routed eight specified telephone calls while using XCast services.²

XCast produced the bulk of the relevant information for [REDACTED] and [REDACTED] on March 5, 2021 and supplemented its production with information about the means and source of payment used by [REDACTED] and [REDACTED] on March 17, 2021. With respect to the customer or subscriber accounts linked to the eight telephone calls identified in the CID, XCast's submission is incomplete. XCast provided call detail records for these phone numbers but failed to specify, for example, the name, addresses, length of service, types of service, and means and source of payment for each phone number.

B. XCast Has Failed to Provide Account-Related Information for Customers or Subscribers Who Use Certain Means or Sources of Payment

Subsection II.B of the CID seeks certain account-related information about XCast customers or subscribers who used the same method or source of payment as those identified in response to Subsection II.A.

XCast neither produced any information nor explicitly responded to the specifications in Subsection II.B. The FTC has not received account information for any customers or subscribers who used the same means and source of payments as [REDACTED] and [REDACTED] or a statement that no such customers or subscribers exist. XCast has likewise failed to respond to Subsection II.B with respect to those accounts linked to the eight telephone calls identified in Subsection II.A.

¹ Additionally, on March 10, 2021, XCast produced a certificate of compliance as required by the CID. These three productions (March 5, March 10, and March 17) represent the full extent of XCast's response to the CID to date.

² Specifically, Subsection II.A seeks the name, addresses, local and long distance telephone connection records, records of session times and durations, length of service (including start date) and types of service utilized, telephone or instrument number(s) or other subscriber number(s) or identities, and the means and source of payment, including any credit card or bank account number, for each of the above-referenced XCast customers or subscribers.

C. XCast Has Failed to Provide Customer or Subscriber Correspondence

Subsection II.C of the CID seeks certain customer or subscriber correspondence related to complaints, subpoenas, civil investigative demands, or other inquiries about illicit telecommunications activities, including complaints received from or sent to customers or subscribers, and XCast's responses to any such complaints or inquiries.

XCast produced a one-page document in response. This document is an email from Mr. Stephen Nelson of XCast dated September 15, 2020 that "suspend[s] all business relationships with [REDACTED]." The email acknowledges that "XCast Labs, Inc. has received several recent inquiries that implicate [REDACTED] or its resellers, customers or clients in suspected involvement in illegal activities." These "infractions include . . . 5 offenses – Automated, record voice calls to wireless numbers not permitted without consent. Toll-free callback number not provided in voicemail."

However, XCast has not produced the inquiries that detail these infractions as required by the plain text of the CID. Therefore, this document alone confirms that XCast has not completed its production with respect to Subsection II.C. of the CID. XCast must produce not only the items referenced in this document, but all customer or subscriber correspondence that falls within Subsection II.C's specifications to come into compliance with the CID.

D. XCast Has Failed to Provide Business Records

Subsection II.D of the CID seeks certain of XCast's business records.³

Although Subsection II.D calls for *all* documents that pertain to multiple aspects of XCast's operations, XCast produced just three pages of material in response. One of these pages purports to be an organizational chart, yet it includes no names of XCast personnel, only corporate positions. Another single page contains two paragraphs of "contract language" that largely pertain to customer compliance with the Telephone Consumer Protection Act, a paragraph about screening criteria by which XCast evaluates its customers for compliance with

³ Specifically, Subsection II.D calls for: all complaints about calls originated by XCast and XCast's responses; all internal documents about training XCast employees on addressing or responding to complaints; all government inquiries about calls originated by XCast and XCast's responses; all subpoenas from private parties about calls originated by XCast and XCast's responses; all written policies for compliance with the Telemarketing Sales Rule and certain other telecommunications laws; all internal documents related to training employees on compliance with the Telemarketing Sales Rule and certain other telecommunications laws; all internal communications about calls originated by XCast to numbers on the national Do Not Call registry; all internal communications about calls originated by XCast that delivered prerecorded messages; all internal communications about calls originated by XCast that used spoofed caller ID numbers; all internal communications about calls originated by XCast that were dialed outside of permissible calling times; all corporate organizational charts, and all documents related to consumer complaints reported to the Federal Trade Commission.

“the US TRACED Act, TSPA, and FCC guidelines,” and a few sentences on the company’s policies and procedures for unspecified “call violation[s].” The final page contains promotional articles that variously describe XCast as among the “10 Most Admired Companies of the Year 2021” and “America’s First in VoIP Communications.” These three pages are plainly insufficient as a response to Subsection II.D.

E. XCast Has Failed to Respond Adequately to General Business Interrogatories

Subsection II.E of the CID contains six general business interrogatories.⁴

Though five of the interrogatories require XCast to identify its owners, shareholders, and certain personnel, XCast failed to identify a single owner, shareholder, or employee in response. And in response to the interrogatory that calls for a description of XCast’s policies for monitoring, reviewing, or analyzing consumer complaints published by the FTC, XCast stated only that it outsources this work to a third party, which it declined to identify. This is an inadequate response to Subsection II.E.

III. XCast Has No Legal Basis on Which to Decline to Respond to the CID

XCast asserts that it has complied with the CID to the extent allowed by law. Among the principal reasons XCast has offered to justify this position is the view that compliance with the CID would be burdensome and violative of “federal and state laws and the Constitution of the United States.” These claims are without merit.

First, the CID informed XCast that it could raise any legal objections by filing a petition to limit or quash the CID with the Secretary of the FTC within twenty days of receipt of the CID. XCast did not file any such petition. Additionally, the CID provides that XCast must “meet and confer” with FTC counsel to “discuss any questions . . . regarding this CID or any possible CID modifications that could reduce [its] cost, burden, or response time[.]” Following a meet-and-confer session on February 8, 2021, the FTC extended the deadline for XCast to respond to the portions of the CID that seek customer or subscriber correspondence and business records until March 10, 2021.

Thus, not only has XCast had multiple opportunities to object to the burden posed by the CID, it has also enjoyed an accommodation designed to allow sufficient time for it to respond. Nonetheless, XCast has failed to provide adequate responses to the CID even now, several weeks

⁴ These interrogatories include: identify all owners and shareholders and their percentage ownership interests; identify all personnel responsible for legal compliance; identify all personnel with authority to terminate business relationships; identify all employees who are involved in receiving and responding to complaints about abusive, fraudulent, or unwanted calls; describe all policies and practices related to consumer complaints published by the FTC, and identify all employees involved in monitoring, reviewing, or analyzing consumer complaints published by the FTC.

after the extended deadline. Under these circumstances and at this late date, XCast has forgone the opportunity to continue to confer with the FTC about the burdensomeness of the CID.

Second, XCast has neither properly raised nor supported its claims that complying with the CID would violate the law. A legal objection of this kind may only be raised in a petition to limit or quash the CID, and XCast chose not to file such a petition. Moreover, XCast has failed to identify any conflict between its obligations under the CID and any specific provision of law.⁵

In short, XCast has not offered any legitimate basis that would excuse its obligation to respond in full to a lawfully issued CID.

IV. Conclusion

If XCast does not provide complete responses to the remaining specifications by April 16, 2021, the FTC will consider seeking judicial enforcement of the CID.⁶ Finally, given the circumstances of this case, I would appreciate if we could correspond about this matter by letter or email.

Sincerely,

/s/ Allen Dreschel

Allen Dreschel

cc: Valerie Verduce
William Hodor
Amber Williams

⁵ Mr. Pennington's recent letter refers to "Electronic Privacy rules" and the "Storage Communication [*sic*] Act" without elaborating on how responding to the CID would violate these legal provisions. In any event, we are unaware of which "Electronic Privacy rules" XCast believes apply here, and the CID fully complies with the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*

⁶ This letter does not constitute a modification of the terms of the original CID or the FTC's modification letter of February 9, 2021; rather, it demands that XCast come into compliance with the terms of the CID and subsequent modification letter.

Exhibit H

1055 Thomas Jefferson Street, NW
Suite 400
Washington, D.C. 20007
Tel: 202 263-4300
www.sgrlaw.com

SMITH, GAMBRELL & RUSSELL, LLP
Attorneys at Law

Edward A. Pennington
Direct Tel: 202-263-4307
Direct Fax: 202-263-4314
epennington@sgrlaw.com

April 13, 2021

VIA EMAIL

Mr. Allen Dreschel
Federal Trade Commission
400 Seventh Street SW
Washington, D.C. 20024

Re: Federal Trade Commission Matter No. P207601

Dear Mr. Dreschel:

Thank you for your prompt and courteous response to my letter of April 9, 2021 regarding the aforementioned matter. I hasten to quickly acknowledge your letter to indicate that my client XCastLabs (XCast) will do all that it can to provide what additional information it has at its disposal. That said, I wanted to preliminarily set your expectations about what the company could provide and indicate that we still have lingering misunderstandings about the dates, timeframes and manner in which the Company learned of this matter and how FTC staff behaved and how XCast actually responded.

XCast was disappointed that the Commission responded to its best efforts in the way that it has and that some of the conclusions drawn from the company's March 8, 2021 response may be misunderstood or flat-out wrong.

These misunderstandings may well be because XCast was given no opportunity whatsoever to raise clarifying questions because, when they were raised, Ms. Verduce told Mr. Nelson and Ms. Kelley that "anyone with legal knowledge would understand what was required and that only an attorney could understand their inquiry." It acknowledges that the CID Instructions Section requires that any request to limit or quash says in bold letters: "**...if you have not previously met and conferred with FTC staff, absent extraordinary circumstances,¹ will consider only issues raised during the meet and confer process.**"

¹ If these conditions could not be called "extraordinary," one would be hard-pressed to create a better example. Not only was Mr. Nelson unable to access company records, he was also aiding his elderly mother who had recently been released from

Mr. Allen Dreschel
April 13, 2021
Page 2

However, the communication patterns surrounding this notice and discovery have been so unusual and haphazard that even if XCast *had* wanted to exercise its right to file a Motion to Quash the timeframes and notification were moving targets.²

The Company's representatives³ on the March 16th call had little opportunity to "confer" about anything since Ms. Verduce abruptly ended their call when they asked a question. Further, when I was able to speak directly with her on March 22, 2021, she actually hung up the phone during our short conversation—creating a unique, first-time experience in my over 30 years as a practicing attorney.

Your letter appears to be chastising XCast for submitting "promotional materials" even though the CID had requested such collateral. XCast included these materials for the reason and fact that it has no other hard copy materials. It does not now—nor has it ever—engaged in telemarketing so has no need for such material. It has not attended a trade show or industry event in years. XCast's success has been solely dependent on its career-spanning network of telecom veterans and reputation as a leading source for B2B enterprise PBX-systems and SIP trunking connectivity. Its "marketing or promotional tools" are only available on its website as we indicated earlier.

XCast was unable to create an organizational chart that suited the FTC for the reason and fact that there was no organizational chart to send. In fact, Mr. Nelson had to engage someone to create the functional chart he was able to send. There were no names attached for the reason and fact that the Company's personnel management is outsourced and he needed to contact the Insperity attorney to determine whether California law would allow the release of these names in this manner. In any case, all the key personnel are clearly identified on the website—including their names, their backgrounds, their roles, their contact information and in most cases a picture of their faces.

These facts aside, let me clarify that XCast only has 30 employees--over ninety percent of whom have worked together for at least ten years and some for over 20 years--so they have no difficulty in understanding who is responsible for what. There is not an old-fashioned hierarchical working environment where rolls are dictated by organizational structures.

XCast is not ATT; it is not Verizon; it is not Sprint; it is not RingCentral-- any one of which has thousands of employees and legal departments with ten times more personnel

hospital and extended nursing care as she recovered from COVID while he was also providing home schooling and emotional support to three under-age children in his care.

² In fact, XCast has never filed such a Motion in its history for the reason and fact that it has always been totally cooperative with any enforcement inquiry it has ever received.

³ Please note that Ms. Eryn Sears was not a participant in this message as your letter mentions.

Mr. Allen Dreschel
April 13, 2021
Page 3

dedicated to responding to an FTC CID—including for example, the exemption requirements you cited—such as The Cable Communications Act and the “STELLA.” That said, I can reveal that a major national cable company relies on XCast's technology to deliver dial tone to remote parts of the country and that company has recently evaluated XCast and determined it has met their high standards for data security. As well, a federal contractor associated with the delivery of Defense and FEMA-related satellite services has occasionally depended on XCast's patented technology. During the catastrophic Puerto Rico hurricane, XCast technology enabled free satellite calls within days and long before any other provider could restore their poles or cell towers.

Finally, the protestation that XCast failed to provide shareholder information was explained during our previous response. In our March 8th submission, the company indicated there were no dominant shareholders and that employees were able to participate in its ESOP. These are true and accurate facts. Mr. Nelson had no access to information about individual investors for the reason and the fact that the Board member who maintains the ownership records was seriously ill in the hospital with COVID and only within recent days has been asked to produce an updated table. (This information will be provided to you privately as soon the ownership table is updated and available.)

While I have no inclination in this letter to engage in a disputatious discussion or “citation war” about the applicability of the forest of laws and regulations surrounding our recent exchanges and events, I do opine that these are areas around which many informed and reasonable commentators have strongly disagreed and this is far from “settled law.” The maze of often conflicting rules and regulations governing the communications environment—including privacy, record retention, regulatory requirements and in technology itself—should be rather obvious. One recent head-spinning and potentially cataclysmic event resulting from the US Supreme Court's unanimous April 1, 2021 decision in *Facebook v. Duguid* that could paradoxically invite a new flood of robocalls by legitimating the very practice you are trying to investigate.

I would also be remiss not to reveal my client's observation that there is a troubling conflict in FTC's values and policy and the agency's incongruity about XCast's document retention and your recent demands for document retention and production. FTC's former Chair Edith Ramirez frequently advocated against retention of business records and warned against data mining—calling out such behavior as great threats to individual privacy and national security. From her Aspen Institute address:

“The indiscriminate collection of data violates the First Commandment of data hygiene. Thou shall not collect and hold onto personal information unnecessary to an identified

Mr. Allen Dreschel
April 13, 2021
Page 4

purpose. Keeping data on the off-chance that it might prove useful is not consistent with best practices.”⁴

Ms. Ramirez’s mantra is known throughout the industry and to XCast’s co-Founder and Chair, Patricia Mathis⁵ who has joined in this same public advocacy. In recent years she visited oversight committee staff and Members of Congress to aggressively encourage a comprehensive review of communications law that would not only address the hodgepodge of confusing and conflicting communications laws and regulations but also to warn that technology has long since outpaced the ability to properly govern and regulate.

She has been a frequent and outspoken advocate for additional funding for FTC to provide totally free access to the DNC file so that small companies would not need to rely on the now-emerging private cottage industries--with the result that as these costs rise, they will inevitably extinguish the ability of smaller companies to have a fair chance at competition—a central mission of the Commission to protect. Then, as these costs increase, they will then be passed along to the consumer the FTC is mandated to protect.

Ironically, the events and circumstances of our current conversation and our efforts to respond to you by April 16th have interrupted and shifted critical attention and resources away

⁴ Edith Ramirez. The Privacy Colleges of Big Data: A view from the Lifeguard’s Chair. Keynote Address to Technology Policy Institute Aspen Forum (August 19, 2013.)

⁵ Given your interest in learning more about XCast’s employees and founders—which is not advertised on its website about which we would not have commented absent the FTC’s interest in learning more about its founders—Patricia Mathis has appeared many times before Congress in public hearings as an expert witness. She has been honored by four previous Presidents of the United States for her leadership of national task forces and specifically celebrated in the Rose Garden by two presidents from different political parties for her outstanding contribution to public service. She is one of the founders of the Merit Systems Protection Board and co-author of the Merit Principles which govern the conduct of Federal employees. She conducted the massive study of Fraud, Waste and Mismanagement in the federal government that became the foundation for the passage of the Whistle Blower Protection Act. Her pioneering research on sexual harassment in the workplace is cited as the foundational premise around which sexual harassment is now described as “any unwanted” sexual behavior. During a long career of public service, she has taken The Oath many times so she clearly understands what it means to “defend and protect” the Constitution. She is keenly aware that the Founders determined that the Fourth Amendment was enacted to end any inclination the government might have to break the door down simply because something outside “smelled suspiciously like molasses.” She also has a multidisciplinary post graduate education in law, literature, theology and psychology (including a specialty in Philosophy of Mind showcased in her work as Vice President of Boston University.) For over 40 years she has not only been a thought leader in the development of communications software, she has served as a Trustee of four major university-- including current service on one of the most renowned institutions in the world. I mention this only to say that while she was not immediately aware of the earliest events (because she was resting after breaking her foot), once Mr Nelson and Ms Kelly reached out to her to seek her guidance about how to interpret certain language following their March 16th meeting, it required nearly an hour of their combined attempts to decipher what you recently described as “Plain Text.” The ambiguity—at least to them--of certain grammatical antecedents was likely the result of an original—and perhaps ongoing--misunderstanding about the business categories under inquiry.

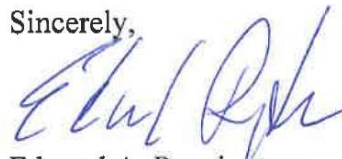
Mr. Allen Dreschel
April 13, 2021
Page 5

from the company's current primary focus: to ensure that its STIR/SHAKEN integration can be completed by June 2021—a process delayed by the FCC's and industry own rules which denied XCast (and similarly situated small companies) to participate in the STIR/SHAKEN trials and consequentially delayed efforts to begin this critical integration until April 1, 2021.

Notwithstanding XCast's considerable disappointment with how the FTC has handled this inquiry, the company will continue its best effort to respond with additional information by April 16th, 2021 or early next week at the latest.⁶

Thank you for any thoughtful consideration and reflection you and your staff can give to this matter.

Sincerely,



Edward A. Pennington
Partner

EAP/cgb

⁶ This will include the results of Mr. Nelson's additional research that will identify another customer associated with one of the 8 phone numbers that was not properly identified by the agency's forensic analyst.

Exhibit I



United States of America
FEDERAL TRADE COMMISSION
Bureau of Consumer Protection

Bureau of Consumer Protection
Division of Marketing Practices

April 15, 2021

Via Email

Mr. Edward A. Pennington
Smith, Gambrell & Russell, LLP
1055 Thomas Jefferson Street Northwest
Suite 400
Washington, D.C. 20007
epennington@sgrlaw.com

Allen Dreschel
Federal Trade Commission
400 Seventh Street Southwest
Mail Stop 8528
Washington, D.C. 20024
ddreschel@ftc.gov

**Re: Federal Trade Commission Matter No. P207601
Civil Investigative Demand**

Dear Mr. Pennington:

I write in response to your letter of April 13, 2021, on the subject of XCast Labs, Inc.'s noncompliance with the Civil Investigative Demand ("CID") that was served on XCast on January 28, 2021, with an original response deadline of February 28, 2021.

As an initial matter, I appreciate that XCast is undertaking an effort to produce additional materials in response to the CID. On April 9, 2021, I wrote that the FTC would have to consider seeking judicial enforcement of the CID if XCast did not respond in full by April 16, 2021. You responded that "the company will continue its best effort to respond with additional information by April 16th, 2021 or early next week at the latest." As a courtesy, and in light of your representation that the company will attempt to produce additional materials by April 16, 2021, or early next week at the latest, I will forbear from any consideration of judicial enforcement of the CID until Wednesday, April 21, 2021.¹

¹ This additional period of forbearance follows service of the CID on January 28, 2021; a meet-and-confer session between XCast staff and FTC staff on February 8, 2021; an extension of the original February 28, 2021 response deadline for certain specifications of the CID until March 10, 2021; the passage of the initial response deadline with no production from XCast; untimely and severely deficient productions from XCast on March 5, 2021, March 10, 2021, and March 17, 2021; and my letter of April 9, 2021, which reiterated the deficiencies in XCast's production and committed to forbearance of judicial enforcement of the CID until April 16, 2021.

You also wrote that you “wanted to preliminarily set [my] expectations about what the company could provide[.]”² However, XCast has offered no legitimate basis on which to decline to respond in full to the CID.³ Accordingly, I expect that XCast will provide complete responses to the CID.

On another note, I appreciate your acknowledgment that XCast elected not to file a petition to quash or limit the CID. However, your claim that “the communication patterns surrounding this notice and discovery have been so unusual and haphazard that even if XCast had wanted to exercise its right . . . to file a Motion to Quash the timeframes and notifications were moving targets[.]” is incorrect. You (and Mr. Nelson of XCast) have acknowledged that the CID was served on XCast on January 28, 2021. The CID states that XCast may file a petition to limit or quash the CID with the Secretary of the FTC within twenty days of receipt of the CID. Thus, your contentions that the deadline by which XCast could petition to quash or limit the CID was a “moving target” or that communications about the deadline were “haphazard” are unavailing.

Finally, I cannot credit your assertion that “XCast was given no opportunity whatsoever to raise clarifying questions” about the CID. Your letter of April 13, 2021 does not acknowledge that FTC staff and XCast staff engaged in the required meet-and-confer session by telephone on February 8, 2021. XCast staff had an opportunity to ask clarifying questions about the CID at that time. On March 16, 2021, FTC staff held another telephone conference with XCast staff to discuss the deficiencies in its production during which XCast staff were free to ask any clarifying questions about the CID.⁴ On March 22, 2021, you spoke by telephone with FTC staff and had yet another opportunity to seek clarification about the CID.⁵

² I could not ascertain from the remainder of your letter the extent of the materials that XCast intends to produce by April 16, 2021 or early next week.

³ Out of an abundance of caution, FTC staff have repeatedly invited you to identify a conflict between XCast’s obligations under the CID and a specific provision of law, rather than assert that compliance with the CID would be unlawful in some unspecified way. On April 13, 2021, you wrote that you “have no inclination . . . to engage in a disputatious discussion or ‘citation war’ about the applicability of the forest of laws and regulations surrounding our recent exchanges and events[.]” Thus, once again, you have not identified any conflict between XCast’s obligations under the CID and any specific provision of law. In any event, legal objections of this sort may only be properly raised in a petition to quash or limit the CID, as explained in my letter of April 9, 2021.

⁴ You wrote that XCast’s “representatives on the March 16th call had little opportunity to ‘confer’ about anything since Ms. Verduce abruptly ended their call when they asked a question.” This is untrue. The FTC has telephone call records that demonstrate that the March 16, 2021 conference lasted 39 minutes. During the call, FTC staff and XCast staff discussed the deficiencies in XCast’s production at length.

⁵ On March 22, 2021, you spoke with Valerie Verduce and Amber Williams for 38 minutes, including speaking with Williams, an FTC investigator, for 18 minutes without an attorney on the call.

I take exception to the spurious suggestion that FTC staff exhibited unprofessional conduct on these calls. At minimum, any such assertion is incongruous with the fact that, during the meet-and-confer session of February 8, 2021, XCast asked for an extension to the original response deadline and was granted the extension on the same day. Indeed, FTC staff have been accessible and accommodating throughout this matter. However, more than six weeks have passed since the original response deadline, and XCast's production remains substantially noncompliant with the CID.

Once again, as a courtesy, I will postpone consideration of seeking judicial enforcement of the CID until Wednesday, April 21, 2021, but expect full compliance with the CID by no later than that date.⁶

Sincerely,

/s/ Allen Dreschel

Allen Dreschel

cc: Valerie Verduce
William Hodor
Amber Williams

⁶ This letter does not modify the terms of the CID or the subsequent letter that extended the response deadline for certain specifications of the CID. XCast remains in default of its obligations under the CID.

Exhibit J

1055 Thomas Jefferson Street, NW
Suite 400
Washington, D.C. 20007
Tel: 202 263-4300
www.sgrlaw.com

SMITH, GAMBRELL & RUSSELL, LLP
Attorneys at Law

Edward A. Pennington
Direct Tel: 202-263-4307
Direct Fax: 202-263-4314
epennington@sgrlaw.com

April 19, 2021

VIA EMAIL

Mr. Allen Dreschel
Federal Trade Commission
400 Seventh Street SW
Washington, D.C. 20024

Re: Federal Trade Commission Matter No. P207601

Dear Mr. Dreschel:

Background. This letter follows my April 13, 2021 correspondence regarding the aforementioned subject matter. In that letter, I indicated the commitment of XCast Labs (XCast) to make its best effort to further facilitate your investigation of the referenced matter. To be clear, XCast is still working under the same extreme and truly extraordinary circumstances I have previously described in substantial detail.

I also acknowledge your letter of dated April 15, 2021 and thank you for your promptness in extending the deadline for “any consideration of judicial enforcement of the CID until Wednesday, April 21, 2021.” Again, XCast has devoted considerable effort to meet your earlier deadline and is doing everything humanly possible to support your efforts. Our response today indicates that XCast has achieved that goal to the very best of their ability.

After considerable discussion about your information needs and the company’s ability to respond to them in a timely way, XCast made the determination that its commitment can best be expressed by providing you full online access to certain of its internal records.

I understand that this process may provide you more information than you actually want or need, but I believe the organization of the on-line material is such that it will be relatively easy for your investigative team to navigate and extract the remaining administrative information that you have requested. As we mentioned before, XCast is a technology centric enterprise and utilizes a contemporary business platform that allows most of our customer base to manage their own business transactions through XCast’s portals.



Mr. Allen Dreschel
 April 19, 2021
 Page 2

To implement your access and attempt to address your information needs, XCast has established a unique portal for FTC's sole use that will be available only to your investigative team for a limited period of time. For general orientation purposes, I am attaching an exhibit which depicts the various files that will become available to Ms. Amber Williams on Tuesday, April 20, 2021 at 9 am. PST. (noon EST.)

XCast has not been able to identify any subpoenas or related investigations associated with the two accounts on which the FTC is focused, other than those reported through the US Telecom Traceback platform. Mr. Nelson discussed these incidents with Ms. Verdure and Ms. Williams during the March 16th call. Mr. Nelson also reported during that conversation that [REDACTED] service had been terminated on September 15, 2020. [REDACTED] [REDACTED]—one of XCast's vendor/carriers--was under investigation for suspected illegal activity and XCast then terminated their service immediately.

XCast has performed additional analysis on the eight (8) numbers provided to XCast in the original CID and that were discussed during the March 16, 2021 call.

During the course of the March 16, 2021 conversation with Ms. Verdure, she asked Mr. Nelson to identify which call record could be associated with either [REDACTED] or [REDACTED]. Mr. Nelson confirmed that the first (5) numbers listed on the CID were associated with [REDACTED].

Ms. Verdure indicated that this information aligned with what the FTC forensic analyst had also concluded. Ms. Verdure then asked Mr. Nelson about the remaining numbers. She also asked if Mr. Nelson could confirm whether any other number listed in the CID could be associated with either [REDACTED] or [REDACTED]. Mr. Nelson indicated he would perform additional researches that he could not conduct during the call.

I can confirm that Mr. Nelson has performed and completed the additional researches. As I mentioned in my Tuesday, April 13, 2021 letter, his follow-up research revealed that the record listed as #7 in the CID was not assigned to either [REDACTED] nor [REDACTED]. The call record listed as #7 on the CID request has been identified by XCast as belonging to a current XCast customer. (Sun Telecom Limited.) Mr. Nelson's research could not find any association between records of SunTelecom with any of the parties mentioned here or with any other XCast record. Specifically:

Item No.	Date/Time	To/Called Number	From/Calling Number/Caller ID Displayed	
1.	9/15/2020 16:15	9202516910	4142405286	[REDACTED]
2.	9/15/2020 14:48	9199869443	9802171862	[REDACTED]
3.	9/14/2020 17:46	6188410811	3312552040	[REDACTED]
4.	9/14/2020 18:04	5712248609	7575307340	[REDACTED]
5.	9/14/2020 18:11	9142629908	6099132029	[REDACTED]
6.	5/18/2020 15:01	3187072090	4066409033	UNKNOWN
7.	2/26/2019 17:31	5136142891	5136143087	SunTelecom
8.	1/20/2020 14:49	8645976142	8642077701	[REDACTED]

Mr. Allen Dreschel
April 19, 2021
Page 3

Mr. Nelson has now compiled all CDRs for the preceding 18 months that are associated with Record #7 in the CID (the recently identified account, Sun Telecom, Limited.) Mr. Nelson will be prepared to transport these records (associated with SunTelecom) to Ms. Williams as soon as she sends an email to him any time after Tuesday, April 20, 2021 at 9 am PST (noon EST) at snelson@xcastlabs.com. He will also provide the same contact and financial information about Sun Telecom Limited as he conveyed for both [REDACTED] and [REDACTED].

XCast has not discovered any similarity between Sun Telecom Limited and the previously named parties—or any other “matching means or sources of payment” that might be linked to Sun Telecom Limited or “using in [any of the three cases] any similarity in their credit card processing or wiring instructions.” Other than the information available to XCast through its participation in the US Telecom Traceback portal, XCast has not received subpoenas or similar inquiries about [REDACTED] or [REDACTED]. The US Telecom Traceback portal did reveal traffic issues regarding [REDACTED] and [REDACTED], the two companies with whom XCast no longer does business. Mr. Nelson discussed these incidents with Ms. Verduce and Ms. Williams during the March 16, 2021 call.

During that call, Mr. Nelson suggested that in the interest of time and Ms. Verduce’s likely ability to have immediate access to TraceBack records she might download the reports she needed directly from the US Telecom TraceBack portal. Mr. Nelson subsequently made a request to the portal staff to ask them to create a special report that depicted the details associated with reported TraceBack matters associated with the named parties. He has now received their report and that report will be conveyed to Ms. Williams once he receives the required portal details from Ms. Williams.¹

XCast received a CID on February 22, 2021 from the Missouri Attorney General’s Office requesting subscriber information associated with the following number:

9/3/2020 @ 10:31am CST From 5738874552 to 5736900551

Mr. Nelson conducted the necessary research that allowed him to determine that the aforementioned phone number was associated with its customer, Sun Telecom. Mr. Nelson was directed to not disclose this information except as required by law. Mr. Nelson then sent the information he researched via email to the designated party at the Missouri Attorney General’s office on February 22, 2021.

When Mr. Nelson received the inquiry from the Missouri Attorney General’s office, he applied XCast’s internal reputational scoring screening process to evaluate the extent of any

¹ These reports include details on the “Hop Provider” associated with each record. These records report the number of devices, usually routers, through which a piece of data travels through. Each time a packet of data moves from one router or device to another, it is considered one HOP. The TraceBack reports reveal traffic movement from origination to termination.

Mr. Allen Dreschel
April 19, 2021
Page 4

adverse pattern of behavior associated with Sun Telecom and did not find any pattern of reported bad behavior.

XCast's limitations in producing certain business records identified in the original CID have already been explained in considerable detail. By providing the Commission with exceptional on-line access to its Administrative files, this problem should hopefully be resolved.

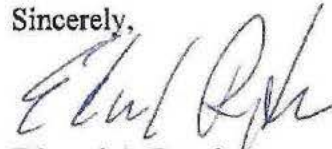
Ms. Williams should expect to receive on Tuesday, April 20, 2021 (no later than noon EST) from Ms. Eryn Sears (esears@xcastlabs.com) the instructions and password for accessing the designated XCast internal records.

The on-line portals that will become available to you on Tuesday, April 20, 2021, should enable the Commission to answer any other general business questions that remain unanswered.

It is still our belief that had the March 16, 2021 meeting actually been a "meet and confer" opportunity, our communication would have been far less tangled and more efficient and productive. The meaning of "to confer" presumes--at least in my vocabulary and experience-- a free exchange of information and ideas and requires listening, talking and the demonstration of some effort to understand what one another is saying. Once Ms. Verduce refused to answer what Mr. Nelson and Ms. Kelley believed were necessary clarifying questions and she then made the claim that "any attorney would understand," the foundational requirement for real dialogue collapsed. And it is a fact that Ms. Verduce hung up the phone during the conversation I attempted to have with her, leaving me to continue the conversation with Ms. Williams. In over 30 years of working with opposing counsel from private and public entities, that has never happened to me before or since.

XCast has always been willing to cooperate but has struggled to have the FTC understand what it has, and what it does not have, and what its legal obligations are. Privacy issues are extremely important to the FTC, the FCC and to the general public, and have been the subject of many recent hearings on Capitol Hill. It is also not easy for a smaller company like XCast, who competes in a world with players like the wireless carriers who have seemingly infinite resources, to drop everything and respond to an expansive, overly broad CID that asks for things XCast does not have. Having said that, XCast has clearly demonstrated not only its goodwill and best effort – but its exceptional commitment--to assist the Commission in our shared objective to end any inappropriate behavior by anyone.

Sincerely,



Edward A. Pennington
Partner

Attachment - Exhibits

EXHIBIT



Administrative Records

XCL Confidential: April 2021

Products and Technology

Documents:

1. Intellectual Property - Patents

Videos:

1. PBX
2. Sip Trunk
3. Contact Center
4. Microsoft Teams Integration

Corporate Records

Documents:

1. Board of Directors
2. Officers
3. Cap Table
4. Org Chart

Contracts and Customer Relations

Documents:

1. Master Services Agreement (MSA)
2. Customer Profiles:
 - a. Retail
 - b. Reseller
 - c. Wholesale

Employee Records

Documents:

1. Employee Job Descriptions
2. Employee Confidentiality Agreement
3. Training:
 - a. Employee Handbook
 - b. Robocall Mitigation & Stir/Shaken Training for Chicago Engineering Team

Policy and Procedures

Documents:

1. Disaster Recovery Policy and Procedure
2. Wholesale Business Process
3. SipTalk Terms and Conditions
4. Privacy & Protection of Customer Records
5. FTC Consumer Complaints – Corporate Policy & Procedure
6. Implementation of Stir/Shaken
7. Protection of Employee Records
8. Privacy Statement



XCL Confidential: April 2021

Orientation Modules

PRODUCTS

Videos:

1. PBX
2. Sip Trunk
3. Contact Center
4. Microsoft Teams Integration

SALES

Video: "White Label Reseller" 5:51 min

CARRIER RELATIONS

Video: "Carrier Relations Overview" 3:12 min

WHOLESALE

Video: "Wholesale Overview" 3:34 min

Documents:

1. Wholesale Agreement
2. Wholesale Order Process
3. Wholesale Business Process Flow Chart
4. Wholesale IP Test Form

TECHNOLOGY

Video: "Network Redesign" 5:05 min

Documents:

1. Network Architecture 2019

ORDER ENTRY/ PROVISIONING

Video: "How to Enter Orders in IBO" 27 min

Documents:

1. PBX Order Form
2. Sip Trunk Order Form
3. LNP Guidelines for Resellers

Training Website: www.getstartedxcl.com

Password: beginxcl

CUSTOMER SUPPORT

Videos: (Customer Training)

1. "Managing Trouble Tickets" 3:05 min
2. "Network Architecture" 13:13 min
3. "Technology Overview" 5:27 min

Documents:

1. PBX User VCP Manual
2. Sip Trunk Admin VCP Manual

OPERATIONS

Video: "Operations Overview" 3:11 min

Documents:

1. SWADMIN_Manual

IBO

Video: "How to enter orders in IBO" 27 min

Documents:

1. IBO User Manual for Resellers
2. WL Reseller – API Specification

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Allen Dreschel (*pro hac vice pending*)
ddreschel@ftc.gov
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue Northwest
Washington, D.C. 20580
Tel: (202) 326-2531; Fax: (202) 326-2477

Miles D. Freeman (Local Counsel)
mfreeman@ftc.gov; Cal. Bar No. 299302
FEDERAL TRADE COMMISSION
10990 Wilshire Boulevard, Suite 400
Los Angeles, CA 90024
Tel: 310-824-4322; Fax: 310-824-4380

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FEDERAL TRADE)
COMMISSION,)
)
Petitioner,)
)
v.)
)
XCAST LABS, INC.,)
)
Respondent.)

Case No. 2:21-mc-1026

**[PROPOSED] ORDER
COMPELLING XCAST LABS TO
COMPLY WITH THE FEDERAL
TRADE COMMISSION'S CIVIL
INVESTIGATIVE DEMAND OR
SHOW CAUSE**

1 Petitioner, the Federal Trade Commission (“FTC” or “Commission”), under
2 the authority conferred by Section 20 of the FTC Act, 15 U.S.C. § 57b-1, has
3 invoked the aid of this Court for an order requiring Respondent, XCast Labs,
4 Incorporated (“XCast”) to comply with a civil investigative demand (“CID”).

5 The Court has considered the Commission’s Petition for Summary
6 Enforcement of a Civil Investigative Demand (“Petition”) and the papers filed in
7 support thereof, and it appears to the Court that the Commission has shown good
8 cause for entry of this Order.

9 Therefore, **IT IS ORDERED** that XCast shall:

10 1. Provide: (a) complete responses to specifications II.C., II.D.1-4,
11 II.D.6-10, II.D.12, and II.E.2-6 of the CID within ten days after the entry of this
12 order; and (b) a sworn certification as to the completeness of the responses;

13 **OR**

14 2. By that date, file its opposition to the Petition via this Court’s
15 Electronic Case Filing system. As Respondent did not file a petition to limit or
16 quash the CID, any opposition must demonstrate good cause for the failure to raise
17 such objections previously. Absent such good cause shown, no objections that
18 could have been, but were not, raised in an administrative petition to quash shall be
19 considered.

20 **IT IS FURTHER ORDERED** that, in the event XCast files an opposition
21 to the Petition, a representative or representatives for XCast, shall appear
22 at: _____ a.m./p.m. on the _____ day of _____, 2021, in Courtroom
23 No. ____, of the _____

24 located at _____,

25 to show cause why this Court should not enter an order, subject to the penalty of
26 contempt, directing them to comply with the CID. Unless the Court determines
27 otherwise, all issues raised by the Petition and supporting papers, and any
28 opposition to the Petition will be considered at the hearing on the petition, and the

1 allegations of the Petition shall be deemed admitted unless controverted by a
2 specific factual showing.

3 **IT IS FURTHER ORDERED** that, pursuant to Federal Rule of Civil
4 Procedure 81(a)(5), this is a summary proceeding and no party shall be entitled to
5 discovery without a specific showing of need and without further order of the
6 Court. The dates for a hearing and the filing of papers established by this Order
7 shall not be altered without prior order of the Court upon good cause shown.

8 **IT IS FURTHER ORDERED** that, pursuant to Federal Rule of Civil
9 Procedure 81(a)(5), a copy of this Order and copies of said Petition and all other
10 papers filed herein (to the extent not previously served) shall be served on XCast
11 or its counsel by the Commission using as expeditious means as practicable.

12
13 **SO ORDERED**, on this ___ day of _____, 2021.

14
15 _____
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28