

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

FEDERAL TRADE
COMMISSION,

Petitioner,

v.

XCAST LABS, INC.,

Respondent.

Case No. Misc. 21-1026 MWF (MRWx)
**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE**

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

SUMMARY OF RECOMMENDATION

The Federal Trade Commission wants to enforce a civil investigative demand (CID) issued to XCast Labs.

The Court (Magistrate Judge Wilner) concludes that the FTC is entitled to judicial enforcement of the CID. XCast failed to exhaust an available

1 administrative remedy to challenge the CID. As a result, the company has
2 waived consideration of its objections in this district court. Were the Court to
3 reach the merits of those objections, XCast has not convincingly demonstrated
4 that the FTC plainly lacks authority to investigate the business. Finally,
5 XCast's minimal evidentiary presentation has not proved that compliance
6 with the CID is unduly burdensome.

7 For these reasons, it is recommended that the FTC's application for an
8 order compelling compliance with the CID be granted.

9 **FACTS AND PROCEDURAL HISTORY**

10 According to the petition, the FTC has authorized a long-running
11 investigation into misconduct involving commercial telemarketers. In early
12 2021, the FTC issued a CID in that investigation against XCast, a
13 Los Angeles-based provider of Voice over Internet Protocol (VoIP) services.
14 (Docket # 1 at 4-5.) The CID sought a variety of business and customer
15 records and responses to interrogatories. (Docket # 1-2 at 16-18.) XCast
16 provided some of the records and information that the CID sought during the
17 spring and summer of 2021. (Docket # 1 at 9-10.)

18 However, the agency did not receive full responses from the company.
19 Because of this, the FTC filed this petition in August 2021. (*Id.* at 10-11.)
20 After video discussions with Judge Wilner, XCast supplemented its production
21 to the government to some degree. (Docket # 15-2 at 3-4; # 15-3 at 3.) The
22 agency believes that the company's responses are still deficient, though;
23 it continues to seek "full compliance with the CID." (Docket # 16 at 21.)

24 Judge Wilner received and considered several rounds of briefing from
25 the parties in the course of this enforcement action. (Docket # 1-1, 15, 16.)
26 That briefing also included supplemental submissions addressing XCast's
27 jurisdictional challenge to the ability of the FTC to investigate the company's
28

1 activities. (Docket # 17, 18, 19-1.) XCast acknowledged en passant that it did
2 not pursue administrative relief from the FTC regarding the scope or contents
3 of the CID before the agency commenced this federal enforcement action.

4 (Docket # 15 at 8.)

5 **RELEVANT FEDERAL LAW**

6 The parties essentially agree on the governing legal standard for this
7 Court to apply in evaluating a request to compel compliance with a federal
8 administrative subpoena or document demand. (Docket # 15 at 17.) The
9 key issues in the analysis are “(1) whether Congress has granted the authority
10 to investigate; (2) whether procedural requirements have been followed; and
11 (3) whether the evidence [sought by the subpoena] is relevant and material to
12 the investigation.” EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1076
13 (9th Cir. 2001) (citation omitted); EEOC v. Federal Express Corp., 558 F.3d
14 842, 848 (9th Cir. 2009) (same). “An affidavit from a government official is
15 sufficient to establish a prima facie showing that these requirements have
16 been met.” FDIC v. Garner, 126 F.3d 1138, 1143 (9th Cir. 1997).

17 If a subpoena satisfies this test, compliance should be ordered “unless
18 the party being investigated proves the inquiry is unreasonable because it is
19 overbroad or unduly burdensome.” EEOC v. Children’s Hospital Medical
20 Center of Northern California, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc)
21 (overruled on other grounds); EEOC v. VF Jeanswear LP, 769 F. App’x 477,
22 478 (9th Cir. 2019) (same).

23 * * *

24 The parties do not agree on whether XCast was obligated – and
25 subsequently failed – to exhaust administrative opportunities to challenge the
26 scope of the CID before this action was presented in district court.

1 The agency’s enabling statute (the FTC Act) states that a party
2 receiving a CID may file a petition with the FTC to modify or set aside a CID.
3 15 U.S.C. § 57b-1(f)(1-2). Agency regulations establish a pre-petition meet-
4 and-confer requirement, detailed rules regarding the timing and scope of
5 petitions, and a tight deadline by which the agency must typically rule on the
6 petition. 16 C.F.R. § 2.10(a) et seq.

7 15 U.S.C. § 57b-1(e) authorizes the FTC to file a petition in a federal
8 district court “for an order of such court for the enforcement” of a properly
9 issued CID. Neither the statute nor the agency’s regulations affirmatively
10 state that a CID recipient waives the ability to defend a CID enforcement
11 action if that party failed to pursue a CID-challenging petition with the FTC.

12 However, a hefty number of federal courts have concluded over the
13 years that the doctrine of administrative exhaustion “applies to FTC
14 investigatory proceedings.” FTC v. Complete Merchant Solutions, LLC, 2020
15 WL 2059847 at *8 (D. Ut. 2020) (collecting many cases); FTC v. Tracers
16 Information Specialists, Inc., 2016 WL 3896840 at *4 (M.D. Fla. 2016) (CID
17 recipient’s “failure to comply with the administrative procedure provided by
18 the statute and the implementing regulations bars [company’s] assertion of
19 substantive objections to the CID in court”); FTC v. O’Connell Associates, 828
20 F. Supp. 165, 168 (S.D.N.Y. 1993) (“there was an administrative mechanism
21 for him to utilize and he failed to do so”; court declined to address substance of
22 objections to CID).¹

23
24 ¹ In its briefing, the FTC also offered additional citations to district court
25 orders that purport to “find” that responding parties waived their right to oppose
26 enforcement actions based on a lack of exhaustion. See Docket 16 at 14 (citations to
27 orders in Bannon, Kushly, and Lambert).

28 Based on a review of the dockets and filings in those actions, it’s
apparent that the district courts merely endorsed proposed scheduling orders filed at
the outset of the cases that established case management deadlines for the

1 * * *

2 The recipient of an agency subpoena may challenge the agency’s
3 jurisdiction to regulate that party. The Ninth Circuit has stated that:

4 Questions of regulatory jurisdiction are properly
5 addressed at the subpoena-enforcement stage if [] they
6 are ripe for determination at that stage. Compliance
7 with a subpoena is a burden, and one that a person or
8 institution that can show it is not subject to the
regulatory regime in aid of which the subpoena was
issued should not be required to bear.

9 Karuk Tribe, 260 F.3d at 1078 (quotation omitted, emphasis added). The
10 circuit further describes a “narrow category of cases” in which a “pure
11 question of law [] which does not depend on a factual inquiry” can establish
12 that a federal agency is “not subject” to an agency statute, “and thus not
13 subject to investigation” by the agency. Id. at 1077-78.

14 However, the scope of a federal court’s inquiry regarding a jurisdictional
15 challenge to an administrative subpoena is “quite narrow.” Children’s
16 Hospital, 719 F.2d at 1428. As long as there is “some plausible ground for
17 jurisdiction, or to phrase it another way, unless jurisdiction is plainly lacking,
18 the court should enforce the subpoena.” Id. at 1430 (cleaned up, emphasis
19 added). “The ‘plainly lacking’ standard is necessarily a low bar to avoid
20 tasking courts and parties with resolving complex hypotheticals before an
21 agency even decides whether to take an enforcement action.” CFPB v. Future
22 Income Payments, LLC., 252 F. Supp. 3d 961, 966 (C.D. Cal. 2017) (vacated in
23 part on other grounds). A challenge to the “‘coverage’ of the [] applicable
24 statute” is, in effect, an invitation to engage in “a fact-intensive inquiry” that

25
26 _____
27 enforcement actions; they were not based on substantive, adversarial briefing of the
28 parties on the waiver issue. The Court politely declines the FTC’s invitation to
conclude that those ministerial orders have any persuasive authority.

1 is inappropriate at the subpoena enforcement stage of an investigation. Id.
2 at 967.

3 * * *

4 A district court’s evaluation of “whether evidence sought is relevant” or
5 “whether a subpoena is overly burdensome” often turns on “fact-intensive,
6 close calls.” McLane Co., Inc. v. EEOC, ___ U.S. ___, 137 S. Ct. 1159, 1167-68
7 (2017). For this reason, a district court’s decision whether to enforce or quash
8 an administrative subpoena is “reviewed for abuse of discretion.” Id. at 1168.

9 **ANALYSIS**

10 The Court concludes that the FTC is entitled to enforcement of the
11 remainder of the CID issued to XCast.

12 1. As an initial matter, the Court finds that XCast forfeited its
13 ability to oppose enforcement of the CID in federal court. The company
14 received notice of the administrative procedure to challenge the scope and
15 contents of the CID before the FTC. (Docket # 1-2 at 19.) Yet, it chose not to
16 avail itself of that remedy. Instead, after negotiations with the FTC staff
17 broke down, XCast waited until proceedings in this federal court to raise a
18 variety of objections to the investigative request, including the complicated
19 jurisdictional challenge asserted below. Ample authority supports the
20 conclusion that a party must present and exhaust those objections
21 administratively before coming to court. Complete Merchant Solutions, 2020
22 WL 2059847 at *8; Tracers Information Specialists, 2016 WL 3896840 at *4;
23 O’Connell Associates, 828 F. Supp. at 168.

24 XCast weakly surveys a variety of other federal statutory schemes that
25 do and do not expressly address exhaustion issues (prisoner litigation, the
26 NLRB and CFPB investigative procedures, etc.) to suggest that no such
27 requirement exists under the FTC Act. (Docket # 15 at 28-31.) That’s rather
28

1 unconvincing, especially given the weight of the case law and the existence of
2 the statutorily-established administrative petition remedy with the FTC. It
3 makes little sense to conclude that Congress set up an entirely optional route
4 for challenging an investigative demand that a party could voluntarily choose
5 to avoid. The reality is that XCast has not “us[ed] all steps that the agency
6 holds out [to] address[] the issues on the merits” regarding the CID. Sisley v.
7 DEA, 11 F.4th 1029, 1035 (9th Cir. 2021) (quotation omitted). Whether
8 mandated by statute, precedent, or “sound judicial discretion” (id.), the
9 company failed to present its complaint regarding the investigation to the
10 agency in the manner set forth in the statute. XCast cannot pursue its
11 unexhausted contentions in this district court.

12 2. Even if the company could properly present its objections in this
13 forum, its jurisdictional challenge is precisely of the nature that this district
14 court should not take up at this stage of the proceedings. In a nutshell, XCast
15 contends that it is a “common carrier” that is subject to federal regulation
16 exclusively by the FCC, not the FTC. (Docket # 15 at 18-19.) XCast points to
17 a variety of recent statutes, federal regulations, and industry statements to
18 support its assertion that the FTC “plainly lacks jurisdiction” to investigate
19 the company. (Id. at 17, 20-21.)

20 XCast’s position is nowhere as plain as it contends. To be sure, there
21 certainly is an overlap in regulatory authority in the telecommunications field
22 between the FCC and the FTC. The Ninth Circuit (sitting en banc) has noted
23 that the two agencies have “concurrent jurisdiction” and share “regulatory
24 oversight” over certain telecommunications companies. FTC v. AT&T
25 Mobility LLC, 883 F.3d 848, 862 (9th Cir. 2018) (en banc). There are, in
26 effect, “two cops on the beat” regulating those businesses; the FTC has
27
28

1 authority to “regulate common carriers’ non-common-carriage activities,”
2 while the FCC regulates the common carrier aspects of phone companies. Id.

3 But how to figure out where the line is between those activities? Here,
4 the bulk of the FTC’s investigative requests deal with consumer-facing issues:
5 telemarketing sales practices, monitoring of complaints and local regulatory
6 inquiries, customer account and payment information, use of the FTC’s
7 Do Not Call Registry, etc. (Docket # 1-2 at 14-18.) The FTC’s ability to
8 investigate and regulate such topics is clearly “plausible.” Children’s
9 Hospital, 719 F.2d at 1430. That’s particularly true given that “the FTC may
10 proceed against unfair [or deceptive] practices even if those practices violate
11 some other statute that the FTC lacks authority to administer.” AT&T
12 Mobility, 883 F.3d at 862 (quotation omitted). Conversely, the determination
13 of whether a VoIP provider falls wholly within the definition of a common
14 carrier “is a fact-dependent inquiry” that has been “long-contested” in the
15 industry and “raging for years.” FTC v. Educare Centre Services, Inc., 433 F.
16 Supp. 3d 1008, 1017-18 (W.D. Tex. 2020) (collecting cases, quotation omitted).

17 XCast may potentially be able to defend itself in substantive litigation
18 with the FTC by asserting that it is wholly exempt from FTC regulation. But
19 no aspect of the regulatory scheme (and certainly not the meager bits and
20 pieces of authority strung together in the company’s briefs) makes it plain
21 that the FTC has no legal authority over XCast. There is a widely known
22 factual dispute about what the company’s VoIP business actually is and how
23 close it falls under the common carrier umbrella. That is sufficient for the
24 FTC to get over the “low bar” of seeking compliance with its subpoenas “before
25 [it] even decides whether to take an enforcement action” against XCast.
26 Future Income Payments, 252 F. Supp. 3d at 966.

1 3. Finally, XCast does not convincingly demonstrate that it would be
2 unduly burdensome for the company to respond to the remainder of the FTC's
3 requests. The Court closely reviewed the declaration of Stephen Nelson, a
4 senior executive with the company, who provided the main evidentiary
5 support for the company's claim. Mr. Nelson states that he "would be the
6 person who would manage" the project of compiling responsive materials for
7 the FTC. (Docket # 15-2 at 5.) Mr. Nelson doesn't believe that some types of
8 materials that the agency seeks still exist. (If so, he can likely attest to that
9 in a manner acceptable to the FTC staff.)

10 However, "assuming" there are additional materials to locate,
11 Mr. Nelson broadly declares that they are in offices in California, Illinois, or
12 Iowa that "remain[] shuttered due to Covid restrictions." Because of family
13 health concerns, Mr. Nelson states that he is "restricted from travel per
14 medical directive" and cannot "do that work." He also asserts – without
15 support – that "it would be impossible for me to fulfill my many other job
16 responsibilities" if he were to try to comply with the FTC's document requests.
17 (Id. at 5-6.)

18 * * *

19 The Court will not order Mr. Nelson (or any other XCast employee or
20 attorney) to take any step that potentially jeopardizes their health. Like the
21 rest of society, the Court is well aware of the risks and consequences posed by
22 the ongoing coronavirus crisis. No federal investigation warrants the threat
23 of significant illness to Mr. Nelson or his family.

24 That said, however, most American businesses – and this district court
25 – have eventually found ways to safely resume operations by the end of the
26 second year of this pandemic. I accept that Mr. Nelson may not be the
27 optimal person to hunt through boxes of records due to his health concerns.
28

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

But I do not accept the blanket assertion that the company's records are

completely unavailable and inaccessible in the way that he suggests. All

forms of litigation (including document production) have continued almost

unabated since the outset of the crisis. Creative lawyers and company

personnel can undoubtedly get to and search their own materials today. As

the finder of fact and in an exercise of discretion, I conclude that XCast's

evidentiary showing is far too insufficient to establish that compliance with

the FTC's request is an impossibility or unduly burdensome. McLane Co., 137

S.Ct. at 1167-68.

CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an

order: (1) accepting the findings and recommendations in this Report;

(2) granting the FTC's application for an order compelling compliance with the

CID; and (3) ordering XCast to comply with the requests.



Dated: December 9, 2021

HON. MICHAEL R. WILNER

UNITED STATES MAGISTRATE JUDGE