

**ATTACHMENT B**

**XCASTLABS' JULY 2023 COUNTER CLAIM AGAINST FTC**

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**UNITED STATES DISTRICT COURT**

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**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

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UNITED STATES OF AMERICA

Case No. \_\_\_\_\_

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Plaintiff,

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v.

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XCAST LABS, INC.

**ANSWER, AFFIRMATIVE  
DEFENSES, AND  
COUNTERCLAIMS OF XCAST  
LABS, INC.**

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Defendants.

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**NOW COMES** Defendant XCAST LABS, INC. (“Defendant” or “XCAST”),  
23 by and through its undersigned counsel, and for itself alone answers the Complaint  
24 of Plaintiff UNITED STATES OF AMERICA (“Plaintiff” or “USA”) as provided  
25 herein.

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1. Answering the allegations in Paragraph 1, XCAST states that  
27 Paragraph 1 does not make an allegation but merely states the legal grounds under  
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1 which Plaintiff brings the action, but admits that Plaintiff brings the action under the  
2 laws stated therein.

3 **SUMMARY OF ALLEGATIONS**

4 2. Answering the allegations of paragraph 2, XCAST denies that it has  
5 assisted in any way the delivery of “billions of illegal robocalls,” denies that it  
6 assists anyone or any entity in “making telemarketing calls to consumers,” is  
7 without sufficient information to form a belief as to whether any of its customers  
8 placed calls to numbers placed on the National Do Not Call Registry, denies that it  
9 failed to disclose the name of a seller, denies that it claimed false affiliations, denies  
10 that it made false and misleading statements to induce purchases or contributions,  
11 and denies that it transmitted false or deceptive caller ID numbers, and denies each  
12 and every other allegation in paragraph 2.

13 **JURISDICTION AND VENUE**

14 3. Answering the allegations of paragraph 3, XCAST denies each and  
15 every allegation contained therein.

16 4. Answering the allegations of paragraph 4, XCAST admits that venue is  
17 proper in this Court, but denies that venue is properly based on 15 U.S.C. § 53(b).

18 5. Answering the allegations of paragraph 5, XCAST admits each and  
19 every allegation contained therein.

20 **COMMERCE**

21 6. Answering the allegations of paragraph 6, XCAST admits each and  
22 every allegation contained therein.

23 **THE TELEMARKETING SALES RULE AND THE NATIONAL DO**  
24 **NOT CALL REGISTRY**

25 7. Answering the allegations of paragraph 7, XCAST admits each and  
26 every allegation contained therein.

27 8. Answering the allegations of paragraph 8, XCAST admits each and  
28 every allegation contained therein.

1           9.     Answering the allegations of paragraph 9, XCAST admits each and  
2 every allegation contained therein.

3           10.    Answering the allegations of paragraph 10, XCAST admits each and  
4 every allegation contained therein.

5           11.    Answering the allegations of paragraph 11, XCAST admits each and  
6 every allegation contained therein.

7           12.    Answering the allegations of paragraph 12, XCAST admits each and  
8 every allegation contained therein.

9           13.    Answering the allegations of paragraph 13, XCAST admits each and  
10 every allegation contained therein.

11          14.    Answering the allegations of paragraph 14, XCAST admits each and  
12 every allegation contained therein.

13          15.    Answering the allegations of paragraph 15, XCAST admits each and  
14 every allegation contained therein.

15          16.    Answering the allegations of paragraph 16, XCAST admits each and  
16 every allegation contained therein.

17          17.    Answering the allegations of paragraph 17, XCAST admits each and  
18 every allegation contained therein.

19          18.    Answering the allegations of paragraph 18, XCAST admits each and  
20 every allegation contained therein.

21          19.    Answering the allegations of paragraph 19, XCAST admits each and  
22 every allegation contained therein.

23          20.    Answering the allegations of paragraph 20, XCAST admits each and  
24 every allegation contained therein.

25          21.    Answering the allegations of paragraph 21, XCAST lacks knowledge  
26 or information sufficient to form a belief as to the truth of the allegations and,  
27 placing its denial on that ground, denies each and every allegation contained there.  
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**CONSUMER INJURY**

46. Answering the allegations of paragraph 46, XCAST denies each and every allegation contained therein.

47. Answering the allegations of paragraph 47, XCAST denies each and every allegation contained therein.

**THIS COURT’S POWER TO GRANT RELIEF**

48. Answering the allegations of paragraph 48, XCAST denies each and every allegation contained therein.

49. Answering the allegations of paragraph 49, XCAST denies each and every allegation contained therein.

50. Answering the allegations of paragraph 50, XCAST denies each and every allegation contained therein.

**PRAYER FOR RELIEF**

**AND**

**DEMAND FOR JURY TRIAL**

The prayer for relief and demand for jury trial contain no allegations that required denial or admission.

**AFFIRMATIVE DEFENSES**

Without conceding that any of the following necessarily must be pleaded as an affirmative defense, or that any type of the following is not already at issue by virtue of the foregoing denials, and without prejudice to XCAST’s right to plead and assert additional; defenses as discovery into the facts pf the matter warrant, XCAST asserts the following affirmative defenses:

**First Affirmative Defense (Lack of Subject Matter Jurisdiction)**

This matter comes from complaints levied by the Federal Trade Commission (FTC) against XCAST. XCAST was not afforded an opportunity to defend itself before any administrative body associated with the FTC, against claims that are

1 completely misdirected at XCAST, a telecom carrier, instead of a telemarketing  
2 company. XCAST has violated no underlying orders of the FTC and therefore,  
3 Plaintiff does not have authority to assert alleged violations against XCAST, and has  
4 not rule to point to that XCAST has violated.

5 **Second Affirmative Defense (Lack of Constitutional Authority)**

6 XCAST has a portion of its business which functions as a common carrier.  
7 Common carriers are regulated by the Federal Communications Commission  
8 (“FCC”) and not the FTC. XCAST has violated no rules or regulations imposed by  
9 the FCC. Plaintiff has no authority to assert FTC regulations on an FCC regulated  
10 entity.

11 **Third Affirmative Defense (Failure to State a Claim)**

12 The complaint fails to identify a single specific instance of an illegal robocall  
13 originated by XCAST. Plaintiff falsely claims that XCAST, incredulously, made  
14 billions of robocalls, and presumed that they or a substantial portion of them are  
15 illegal, without identifying one single instance of a consumer receiving an illegal  
16 robocall from XCAST.

17 **Fourth Affirmative Defense (Do Not Call Registry Not Required)**

18 XCAST is not required to subscribe to the Do Not Call Registry, and  
19 therefore cannot be in violation of any requirements to adhere to it.

20 **Fifth Affirmative Defense (Denial of Due Process)**

21 XCAST was not given notice that it was under any kind of investigation  
22 regarding robocalls until presented with a draft complaint by the FTC in December  
23 of 2023. The FTC conducted a Civil Investigative Demand (“CID”) prior to the  
24 filing of this Complaint but did so without ever indicating that XCAST was being  
25 investigated. XCAST has responded to numerous subpoenas and CID’s in the past  
26 to voluntarily assist law enforcement and intelligence agencies when seeking  
27 information using presumably proper channels.  
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**Sixth Defense (Lack of Jurisdiction over Carrier Traffic)**

The FTC has no jurisdiction to regulate how calls are transmitted and can only subject a call to its jurisdiction if the call is read or heard to determine its content. Telecom carriers are forbidden by privacy laws to read or hear calls without a subpoena or other legal means. The FTC and the FCC are under the same constraints when it comes to privacy.

**COUNTERCLAIMS**

For its counterclaims against Plaintiff, XCAST assert the following:

**INTRODUCTION**

1. The FTC is on a mission to stop illegal robocalling. No one can dispute that robocalls can be a source of annoyance and potentially a device used by scammers to defraud consumers.
2. According to the FTC’s website, “if you answer the phone and hear a recorded message instead of a live person, it’s a robocall.”
3. According to the FTC, “if you’re getting a lot of robocalls trying to sell you something, odds are the calls are illegal.”
4. The FTC further states that many calls “are also probably scams.” But there is no certainty that the calls are scams.
5. By using terms like “odds are” and “probably,” the FTC acknowledges that not all robocalls are illegal or unwanted. In fact, the vast majority are legal.
6. Many robocalls are often useful, necessary and welcomed. Examples include prerecorded calls from local governments announcing public health issues (e.g., water contamination) and weather warning (e.g., hurricane alerts). Schools send prerecorded messages announcing emergencies (e.g., shelter in place), and

1 closings (e.g., inclement weather). Doctor's offices send prerecorded messages to  
2 patients reminding them of appointments or changing times and dates of  
3 appointments.

4 7. XCAST includes in its customer base businesses and governmental  
5 agencies who send useful and wanted prerecorded messages. XCAST itself is not a  
6 telemarketer and makes no robocalls of any kind.

7 8. The FTC has falsely accused XCAST of facilitating the delivery of  
8 "billions" of "robocalls" in a draft complaint delivered to XCAST in mid-December,  
9 2022, and repeated now in this complaint.

10 9. XCAST has done none of the things the FTC accuses XCAST of doing.  
11 After receiving the draft complaint from the FCC, XCAST was told that XCAST  
12 could not challenge the accusations made in the draft complaint, but could only  
13 negotiate a settlement that included (1) admitting to wrongs it did not commit; (3)  
14 taking on activities that, in the FTC's misinformed view, would identify and screen  
15 illegal robocalls; (3) falsely admit to FTC jurisdiction to impose rules and remedies  
16 on an FCC regulated common carrier such as XCAST; and (4) pay unspecified  
17 monetary damages.

18 10. Citing statutory language that entitles the FTC to impose \$50,000  
19 penalties for each infraction, even one billion illegal robocalls would amount to a  
20 \$50 trillion fine. That alone speaks to how misplaced an FTC statutory scheme  
21 simply does not apply to an FCC regulated common carrier like XCAST.

## 22 **PARTIES**

23 11. Plaintiff XCAST is a Delaware corporation having its corporate  
24 headquarters at 1880 Century Park E., Los Angeles, California 90067.

25 12. The FTC is an independent agency of the United States Government  
26 created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC  
27 Act, 15 U.S.C. § 45(a) which prohibits unfair or deceptive acts or practices in or  
28 affect commerce.



1           19. XCAST staff tried to explain that much of what the FTC sought did not  
2 exist, mainly because XCAST was not a telemarketing company. XCAST made  
3 available to the FTC staff attorney a large collection of documents, including  
4 subpoenas and CID, through an internet connection. XCAST did not mark the  
5 documents with Bates numbers, in the belief that the FTC staff attorneys would see  
6 what was there and be satisfied.

7           20. Unsatisfied, the FTC filed the aforementioned enforcement action,  
8 supported by sworn declarations that misstated the amount of document production  
9 given by XCAST. XCAST provided sworn declarations to the contrary that all  
10 relevant and available documents were produced.

11           21. The court handling the enforcement action ruled that XCAST was not  
12 in compliance, disregarding the sworn declarations of XCAST in favor of sworn  
13 declarations by the FTC staff. The Court gave XCAST a deadline to be in  
14 compliance.

15           22. XCAST still had nothing else to produce, so in order to prove that it was  
16 already in compliance, XCAST had all documents previously made available to the  
17 FTC staff Bates stamped and loaded to a website hosted by an e-discovery vendor.  
18 A handful of previously unavailable documents were included in the Bates stamped  
19 production, due to an inspection of XCAST'S headquarters in Los Angeles (which  
20 was previously not available due to Covid restrictions).

21           23. After initially threatening to move for contempt, the FTC staff attorney  
22 in charge of the matter indicated in writing that he considered the matter closed in  
23 July of 2022.

24           24. The transmittal letter that came with the FTC's draft Complaint in  
25 December of 2022 incorrectly stated that XCAST was aware that it was under  
26 investigation. The charges levied against XCAST in the draft Complaint were the  
27 first time that XCAST had become aware that any of its activities were alleged to be  
28 in violation of any FTC rules or regulations. Even during the CID proceedings, the

1 FTC did not accuse XCAST of violating any FTC rules or regulations. XCAST was  
2 only accused of not providing information requested under the CID, which was not  
3 true, and none of the documents produced laid a foundation for the present  
4 complaint.

5 25. The Bates stamped documents provided by XCAST was a substantial  
6 overlap with what XCAST had previously made available to the FTC; with numbers  
7 and a hosted site, the FTC could no longer allege that documents were not produced.

8 26. The entire CID experience was expensive in terms of legal fees and  
9 costs and caused key personnel in the company to stop doing important daily  
10 functions like marketing, network maintenance, and billing/collecting, in order to  
11 search for things that did not exist.

12 **ALLEGATIONS IN THE DRAFT COMPLAINT NOW INCORPORATED**  
13 **INTO THE PRESENT COMPLAINT**

14 27. The draft and present complaint shift dramatically away from the CID,  
15 to accuse XCAST of violating the Telemarketing and Consumer Fraud and Abuse  
16 Prevention Act (“Telemarketing Act”), 15 U.S.C. § 6105, enforceable under Section  
17 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC’s Telemarketing Sales Rule  
18 (“TSR”), 16 C.F.R. Pt. 310.

19 28. None of the accusations in the draft Complaint, which are completely  
20 unfounded, have anything to do with the documents and information produced in  
21 good faith to the FTC through the CID process.

22 29. The draft complaint makes the following outlandish claim: “[t]his case  
23 involves billions of illegal robocalls delivered to American consumers using  
24 wholesale Session Initiation Protocol (SIP) termination (outbound calling) provided  
25 by Defendant XCAST Labs, Inc.”

26 30. This statement is a reckless accusation and based on a naïve  
27 understanding of the traffic that flows through a software switch provided by  
28 XCAST. XCAST’S switch represents a small, single cog in the gigantic gear that is

1 the telecommunications network. Many small cogs lie between a caller and a called  
2 party without knowing, based on privacy laws and other federal regulations, the  
3 information contained in the call.

4 31. Reckless accusations against XCAST and similarly situated  
5 intermediate carriers seem intended to put intermediate carriers like XCAST out of  
6 business. Sall intermediate carriers cannot be responsible for the content of every  
7 communication that passes through their part of call delivery. Putting intermediate  
8 carriers out of business, after the breakup of the AT&T, and passage of the  
9 Telecommunications Act of 1996, both events intended to make telecommunications  
10 more competitive, will make telecommunications less competitive.

11 32. On information and belief, the FTC is being misguided into believing  
12 that the duration of a call determines whether the call is an illegal or legal call.  
13 However, in assessing robocall mitigation techniques, XCAST, as a common  
14 carrier, is bound by regulations set forth by the FCC. The FCC, in turn, has never  
15 issued an order or ruling that common carriers should screen calls based on call  
16 duration.

17 33. On information and belief, the FTC has been led to believe that short  
18 duration calls are illegal robocalls. However, many if not most short duration calls  
19 are perfectly legal prerecorded calls.

20 34. On information and belief, the FTC in fact knows who is originating  
21 illegal calls or messages. The FTC knows where the scammers are located and they  
22 know that most are located outside the USA. XCAST and its customers are not  
23 making illegal robocalls.

24 35. Rather than going after the actual scammers and fraudsters, the FTC is  
25 now attempting to make intermediate carriers like XCAST responsible for the  
26 actions of scammers merely because a scamming call may have passed through an  
27 XCAST switch.

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1           36. Between the caller to the called party, an illegal robocall could pass  
2 through multiple hops, or switches, operated by multiple intermediate carriers,  
3 before the call reaches the called party. None of these intermediate switch  
4 companies is permitted by law to listen to or see these messages. There is no way of  
5 knowing exactly what is in a message or call unless the called party listens to it.  
6 Telecom companies therefore use robocall mitigation technology to block what  
7 would be considered a suspicious call.

8           37. XCAST has developed proprietary robocall screening tools, as have  
9 several other major carriers and smaller intermediate carriers. None of these  
10 techniques are based on call duration because there is no legitimate correlation  
11 between call length and call legality.

12           38. XCAST is aware of a single vendor who is marketing a call-duration-  
13 type mitigation software tool. On information and belief, this vendor offers the  
14 product to intermediate carriers, and if they do not agree to buy the product, the  
15 vendor turns in misleading data to the FTC which then uses that data to construct  
16 crippling accusations and proposed remedies that will put most of these intermediate  
17 carriers, including XCAST, out of business.

18           39. XCAST was in fact approached by this vendor, and declined to  
19 purchase the software tool, mainly because in the view of XCAST'S technical staff  
20 and business leaders, the software was not a legitimate solution to the problem.

21           40. On information and belief, not long after XCAST declined to purchase  
22 the software tool, the FTC began building an ill-advised case against XCAST based  
23 on FTC laws and regulations designed to prevent and sanction fraud. These laws  
24 were not designed to sanction telecom companies from passing calls through their  
25 switches.

26           41. The FTC alleged in its draft Complaint that XCAST has "assisted its  
27 customers in making [suspicious and therefore presumed to be illegal] calls to  
28 consumers." An allegation that XCAST "assisted" implies that XCAST had

1 knowledge of the content of a call, not just knowledge that a call was made.  
2 Carriers like XCAST assist the transport messages, and by law they do not read  
3 them, nor do they ever assist in creating a message.

4 42. The FTC, through this complaint, seeks to impose a “should have  
5 known” standard on carriers who transport call traffic. Whether a carrier should  
6 have known about a call being illegal would depend on what regulations the FCC  
7 imposes on the carrier, and what the carrier knows from experience.

8 43. The FTC is not tasked by Congress with the power to regulate  
9 communications traffic; they can only enforce mandated policies of greater  
10 competition and less fraud.

11 44. Ultimately, the only way to tell if a robocall is illegal is to monitor  
12 content that is delivered; this is already being done when a consumer makes a  
13 complaint to the appropriate authorities. Techniques based on suspicious  
14 indicators can only be mandated by the FCC.

15 45. On information and belief, the FTC based claims in the draft and  
16 present complaints on two things: (1) call records that XCAST voluntarily provided  
17 to the FTC based on the FTC’s purported investigation of phone numbers associated  
18 with one previous customer of XCAST whose relationship had been terminated by  
19 XCAST a year prior to the filing of this complaint; and (2) a Canadian carrier with  
20 whom XCAST ended its relationship after the FCC identified the carrier as not  
21 abiding by all regulations established by the FCC (whose guidance XCAST is bound  
22 to follow as a regulated carrier)

23 46. The FCC has regulatory authority over common carriers like XCAST.  
24 The FCC has provided certain rules and regulations to control illegal robocalling.  
25 Congress passed the Telephone Abuse Criminal Enforcement and Deterrence Act,  
26 known as the “TRACED ACT,” to give the FCC new tools to fight unwanted, and  
27 often illegal, robocalls.

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1           47.    According to the FCC website, robocalls are the top consumer  
2 complaint reported to the FCC annually.

3           48.    Although XCAST is not a voice service provider, the TRACED ACT  
4 implements Caller ID authentication which allows voice service providers to verify  
5 that the caller ID information transmitted with a particular call matches the caller’s  
6 real number, which in turn helps to determine whether the call should be blocked or  
7 labeled.

8           49.    According to the FCC’s website “widespread deployment of caller ID  
9 authentication will reduce the effectiveness of illegal spoofed caller ID, allow law  
10 enforcement to identify bad actors more easily, and better enable phone companies  
11 to block illegal calls before those calls reach consumers.”

12           50.    The TRACED Act required the FCC to mandate the STIR/SHAKEN call  
13 identification framework. STIR/SHAKEN is what enables phone companies to  
14 verify that the caller ID information transmitted with a call matches the caller’s real  
15 phone number.

16           51.    The FCC adopted a Report and Order on March 31, 2020 mandating  
17 that originating and terminating phone companies implement STIR/SHAKEN in the  
18 IP (internet protocol) portions of their networks by June 30, 2021.

19           52.    The FCC adopted the Second Report and Order on September 29, 2020,  
20 that further implemented STIR/SHAKEN and protected consumers against  
21 malicious caller ID spoofing. STIR/SHAKEN was required by the largest voice  
22 service providers to be implemented by June 30, 2021.

23           53.    The purpose of the TRACED Act, and STIR/SHAKEN protocols, was  
24 to protect consumers against unwanted robocalls. A robocall cannot be labeled  
25 “illegal” unless the content of the message is known. Carriers do not know, and  
26 cannot find out without law enforcement or intelligence service subpoenas, the  
27 content of the message.

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1           54. Before the TRACED Act was passed, XCAST had voluntarily provided  
2 records to the Industry Traceback Group (“ITG”) which is a part of the lobbying  
3 group US TELECOM. Some of those records were of the calls mentioned in  
4 paragraph 41 above. XCAST provided those records at the ITG’s request to assist  
5 in bona fide efforts to reduce illegal robocalling.

6           55. The TRACED ACT directs all carriers and voice providers who  
7 comprise the category of “telecommunications” to abide by the jurisdictional  
8 authority of the FCC and comply with the FCC’s directives on how the TRACED  
9 ACT was to be implemented.

10           56. The FTC is expressly denied authority over common carriers. In *FTC*  
11 *v. AT&T Mobility LLC*, 15-16585 (9<sup>th</sup> Cir. 2018) “common carrier” was defined as  
12 “any person engaged as a common carrier for hire, in interstate or foreign  
13 communication by wire or radio or interstate or foreign radio transmission of  
14 energy.” Following creation of the internet, the term “telecommunications carrier”  
15 was added to the Communications Act through the Telecommunications Act of  
16 1996.

17           57. In the Telecommunications Act of 1996, a “telecommunications  
18 carrier” is “treated as a common carrier...only to the extent that it is engaged in  
19 providing telecommunication services.”

20           58. XCAST is identified by both the FCC and the State of California as an  
21 interconnected voice provider and its activity in this context is clearly “acting as a  
22 common carrier.”

23           59. Carriers and voice providers do not have the duty or the ability to have  
24 insight into the content of a call so would not know whether or not they were “pre-  
25 recorded” messages; in any event, prerecorded messages are not *per se* illegal.

26           60. Carriers and voice providers have no responsibility to access the Do  
27 Not Call (“DNC”) Registry because that responsibility falls on the “calling party.”  
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1           61. Carriers and voice providers would not necessarily know the identity of  
2 a seller because, in the case of XCAST, XCAST’s customer would not likely know  
3 who the seller or caller is. However, as soon as the FCC introduced its “Know Your  
4 Customer” rules, XCAST immediately entered into partnerships with multiple  
5 commercial vendors to assist in building its individual customer profiles to expand  
6 customer vetting beyond just credit checking.

7           62. Much of what Plaintiff complains involves a time period (January 2018  
8 through February 2021) that precedes the implementation of the TRACED Act. The  
9 reason for passing the TRACED Act was to provide all carriers and voice providers  
10 consistent and legal tools to police their networks to prevent fraud.

11           63. Were this not the case, there would have been no reason to enact the  
12 TRACED Act. Until the first implementation of STIR/SHAKEN in July 2021, no  
13 carrier or voice provider possessed such tools. Prior to that time, not even all the  
14 largest carriers were able to perform such policing and some requested a delay in  
15 STIR/SHAKEN when they realized some of their legacy equipment could not be  
16 modernized fast enough to adapt to the required changes.

17           64. Even though smaller carriers like XCAST were given an extra year to  
18 be STIR/SHAKEN compliant, XCAST was fully compliant with STIR/SHAKEN  
19 by July 2021.

20           65. The FCC, with regulatory authority over carriers, invited nominations  
21 for a consortium to conduct tracebacks. The lobbying group US TELECOM was  
22 selected to use their Industry Traceback Group (“ITG”) to be responsible for tracing  
23 back the origin of suspected illegal calls.

24           66. Carriers regulated by the FCC have the ability to access call records,  
25 but are also under legal and ethical obligations not to violate consumer privacy  
26 rights and federal privacy laws. The FCC has issued rules regarding the obligations  
27 of carriers to keep call records confidential and to respect and maintain the privacy  
28 of those using the telecommunications network.

1           67. Section 222 of the 1996 Telecommunications Act restricts  
2 telecommunication carriers from sharing customer proprietary network information  
3 without customer approval except in certain exceptions specified by law. Section  
4 222 also spells out the interplay between the FCC and the FTC when it comes to  
5 protecting privacy: “(because) common carriers subject to the Communications Act  
6 *are exempt from the FTC’s Section 5 authority* (emphasis added), the  
7 responsibility falls to the Commission (FCC) to oversee their privacy practices  
8 consistent with the Communications Act.” 47 C.F.R. § 24.

9           68. Despite XCAST’S concerns about privacy and confidentiality, XCAST  
10 participated in the ITG’s efforts to build a database of suspicious calls, primarily  
11 because the FCC encouraged all to participate. In January 2020, XCAST was asked  
12 to join the ITG’s steering committee thanks to XCAST’S extensive work in building  
13 the database.

14           69. On December 29, 2020, the FCC issued an order guiding carriers and  
15 voice providers how to respond to the TRACED Act. The guidelines required  
16 carriers and voice providers to better police their networks but gave no guidelines on  
17 how to accomplish this. The FCC did not require carriers and voice providers to  
18 include “do not call” or DNC screening. To this day, DNC screening is an  
19 obligation only to the calling party.

20           70. XCAST has never been cited in an FCC report to Congress for making  
21 or facilitating unlawful robocalls and/or spoofed calls. The FCC has never  
22 mentioned XCAST in any reports to the Committee on Energy and Commerce of  
23 the House. The ITG has never mentioned XCAST in a report to any Congressional  
24 oversight committees.

25           71. The FCC must issue “best practices” to deal with any new material  
26 burdens or legal or practical barriers to the call authentication framework. The FCC  
27 has not endorsed a robocall mitigation practice that includes call duration as a factor.  
28

1           72.    The FCC has not initiated any rule making proceedings that uses call  
2 duration as a factor in determining whether to block a call.

3           73.    XCAST is not a broadband provider. The FTC mistakenly believes it  
4 is, and mistakenly believes that XCAST can originate a call from a telemarketer or  
5 company which originated the call. A call must first be sent through a broadband  
6 provider. The FTC, failing to understand the nature of XCAST’S technology and  
7 business operations, has argued that XCAST is a broadband provider and therefore  
8 not a carrier, but an “information services provider.”

9           74.    While it is true that illegal robocalls have proliferated throughout the  
10 vast worldwide telecommunications networks, STIR/SHAKEN procedures to help  
11 identify illegal robocalls were not implemented until July 2021. Even after  
12 implementing STIR/SHAKEN, illegal robocalls are still passing through the  
13 attestation standards established under the STIR/SHAKEN. XCAST has done all it  
14 can and all it is required to do and more, to mitigate robocalls as a carrier.

15           75.    In the draft complaint, the FTC called attention to two XCAST  
16 customers: (i) Dialcom aka Gudelor (a California based telecommunications  
17 provider) and (ii) RSCom LTD (a Canadian based telecommunications provider).  
18 These two customers were mentioned in the CID. XCAST assumed that these two  
19 customers were the subject of the FTC’s investigation. The FTC staff attorneys  
20 never indicated that XCAST was a target.

21           76.    For whatever objections the FTC had to Dialcom and RSCom, XCAST  
22 could not have identified their activities as being problematic until the effective date  
23 of the TRACED Act and implementation of STIR/SHAKEN. The DNC list was not  
24 an effective tool for identifying bad calls, and it was not required by the FCC for  
25 carriers.

26           77.    At the times complained of by the FTC, the entire US economy was in  
27 a crisis mode due to the pandemic. XCAST customers, including resellers and  
28 associated small businesses were failing due to the government mandated

1 lockdowns. In any event, it was XCAST'S resellers and independent agents who  
2 had direct knowledge of the customers.

3  
4 **COUNTERCLAIM I (Declaratory Judgment)**

5 78. XCAST incorporates by reference each and every allegation set forth in  
6 paragraphs 1-78 above.

7  
8 79. Pursuant to the Declaratory Judgments Act, 28 U.S.C. §§ 2201(a) and  
9 2202, XCAST requests that this court enter a judgment construing the provisions of  
10 the FTC Act and declaring and clarifying the rights and obligations of the parties  
11 under the FTC Act as they effect Plaintiff's services and operations, more  
12 specifically identified below.

13  
14 80. There is in fact a live case or controversy between the parties. This is a  
15 situation that is ongoing, but even if temporarily stopped is capable of repetition, but  
16 evading review.

17  
18 81. Plaintiff and Defendant have fundamental disagreements regarding the  
19 existence, interpretation and application of several provisions of the FTC Act.  
20 Declarations from this court would resolve this controversy and provide the parties  
21 with certainty regarding their legal rights and obligations related to the same.

22  
23 82. Plaintiffs thus asks that the court declare the following:

24  
25 i. That the FTC has not statutory authority over XCAST to impose fines,  
26 injunctions, or other relief for merely having an unknown message pass through its  
27 switch;  
28

1           ii. Section 13(b) of the FTC Act, 15 U.S.C. §53(b) only authorizes the FTC to  
2 seek injunctive relief if and when the target is “is violating, or is about to violate,  
3 any provision of law enforced by the Federal Trade Commission” and does not  
4 authorize the FTC to seek injunctive relief for past conduct that has ceased absent  
5 evidence that it is likely to recur. XCAST is engaged in no ongoing or imminent  
6 violations of any rule or law of the FTC or the FCC  
7

8           iii. XCAST’S actions complained of in this complaint violate no rules, laws  
9 or regulations related to robocalling;  
10

11           iv. the FTC has violated XCAST’S constitutional right guaranteed by the 5th  
12 Amendment to due process of the law, by exceeding its statutory authority in  
13 seeking to impose telecommunication standards on a telecommunications company,  
14 and by abusively filing this action without notice and without a hearing before a  
15 regulatory body of either the FTC or the FCC, the latter being the only legitimate  
16 authority to impose fines and mandate procedures on XCAST;  
17  
18

19           v. The Plaintiff lacks standing to bring this action.  
20  
21  
22  
23  
24  
25  
26  
27  
28

