

1 WO

2

3

4

5

6

7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

8

9

10

11

12 Equal Employment)
Opportunity Commission,)

13)
14) Petitioner,)

No. CIV 09-0209 PHX RCB

15) vs.)

O R D E R

16) Bashas', Inc.)

17) Respondent.)

18

Introduction¹

19

20

21

22

23

24

25

26

Since at least since May 2006, petitioner, the Equal Employment Opportunity Commission ("EEOC"), has been attempting to obtain, *inter alia*, pay scale information from respondent, Bashas', Inc. The EEOC has been seeking that information as part of its ongoing investigation into whether Bashas' has engaged in discrimination against its Hispanic

27

28

¹ Assuming familiarity with the parallel action of Parra v. Bashas', Inc., No. Civ 02-0591 ("Parra"), as well as the prior proceedings herein, and especially E.E.O.C. v. Bashas', Inc., 2009 WL 1783437 (D. Ariz. June 18, 2009) ("E.E.O.C. I"), there is no need to repeat that entire history herein.

1 employees on the basis of national origin with respect to
2 wages and promotions. To date, the EEOC has filed a
3 Commissioner's Charge ("Charge") of discrimination against
4 Bashas', as well as serving Bashas' with four administrative
5 subpoenas, and two Requests for Information ("RFI"). The May
6 28, 2008, subpoena is the subject of the EEOC's pending
7 "Order to Show Cause why an Administrative Subpoena Should
8 not be Enforced" (doc. 1).

9 On September 21, 2009, this court heard oral argument as
10 to that OSC and as to Bashas' related "Motion for Leave to
11 Conduct Limited Discovery" (doc. 10). After carefully
12 considering all of the submissions, including exhibits
13 admitted during that hearing, the testimony of the witnesses,
14 Gregg Tucek, Bashas' in-house counsel, and Kristy L. Nied,
15 Bashas' Director of Communications, and argument of counsel,
16 the court rules as follows.

17 **Summary of Arguments**

18 In seeking to have the court enforce the May 28th
19 subpoena, the EEOC first asserts that because Bashas' did not
20 timely file a petition to revoke or modify that subpoena,
21 Bashas' has not exhausted its administrative remedies. The
22 EEOC thus reasons that, except for constitutional challenges,
23 Bashas' has waived all objections to enforcement of that
24 subpoena. Even if Bashas' is not deemed to have waived its
25 objections, the EEOC asserts that Bashas' has "no valid
26 defenses" for not complying with that subpoena. Memo. (doc.
27 2) at 6:15-16. Thus, the court should enter an order
28 directing Bashas' to respond to the May 28, 2008 subpoena.

1 Bashas' retorts that it has "preserved its right to
2 challenge this subpoena" by, *inter alia*, providing detailed
3 objections by June 13, 2008 -- the production date specified
4 on the subpoena. Resp. (Doc. 25) at 5 (emphasis omitted).
5 Turning to the merits, Bashas' asserts that this subpoena was
6 not issued for a legitimate purpose, and hence the court
7 should not enforce it. Bashas' seeks leave to conduct
8 limited discovery to substantiate that argument.

9 Additionally, Bashas' asserts that the court should not
10 enforce the subpoena because the Charge does not provide it
11 with adequate notice as to the nature of the allegations.
12 Although it recognizes the broad definition of relevancy in
13 this context, Bashas' implicitly argues that the court should
14 deny enforcement of the May 28th subpoena because the
15 information which the EEOC is seeking therein is "completely
16 irrelevant." Resp. (doc. 25) at 12 (emphasis omitted).
17 Alternatively, if the court does enforce the subpoena,
18 Bashas' "requests that the Court narrow [the] overbroad
19 requests" therein and enter a confidentiality order "to
20 prevent improper disclosure of Bashas' confidential employee
21 information." Id. at 16:16-17.

22 The court will first address the EEOC's waiver argument.
23 The court will proceed in this way because if it finds that
24 Bashas' has waived its objections to the subpoena, such a
25 waiver would include Bashas' objection on abuse of process
26 grounds. Thus, a finding of waiver here would render moot
27 Bashas' discovery motion. Only if the court is convinced
28 that Bashas' has not waived its right to challenge the

1 subpoena on abuse of process grounds, will it consider
2 whether to allow Bashas' to proceed with limited discovery.

3 Discussion

4 I. Waiver²

5 Factual Background

6 The challenged subpoena directed Bashas' to mail to the
7 EEOC "on June 13, 2008 at 4:00 o'clock[,]" compact disks
8 containing a vast range of employee data, such as
9 compensation details, ethnicity and union eligibility.
10 Manget Aff. (doc. 2-2) at 3, ¶ 14; and attach. 7 thereto at
11 39. Nowhere on the face of that subpoena is there any
12 mention of the five day time frame, discussed below, for
13

14 ² As outlined in E.E.O.C. I, slightly more than eight weeks after this
15 court denied the Parra plaintiffs' motion for reconsideration on the issue of
16 certifying a class as to the pay claim, on May 26, 2006, the EEOC served an
17 administrative subpoena upon Bashas'. One of the bases for Bashas' objection to
18 that subpoena was that the EEOC had closed the individual charges in Parra more
19 than four years prior to the issuance of that subpoena. E.E.O.C. I, 2009 WL
20 1783437, at *2. The EEOC did not respond to any of Bashas' objections; nor did it
21 move to enforce that May 2006 subpoena. Id. Seemingly, the EEOC's response was
22 to "re-open[]" the charges as to the eight individuals who had filed EEOC charges
23 against Bashas' in 2002, including plaintiffs Parra and Estrada." Id. (citations
24 omitted); see also Mot. (doc. 10), exh. E thereto. Bashas' objected to that re-
25 opening as well, but again, the EEOC never responded or moved to enforce the May
26 2006 subpoena. Quincy Decl'n (doc. 10-3) at 17, ¶ 8:8-9.

27 Partially based upon the foregoing, it appears to the court that Bashas' is
28 raising the specter that the EEOC may not have the power to issue a subpoena once
a charging party, such as Jose Parra, institutes litigation based upon that charge.
Fairly recently, however, in E.E.O.C. v. Fed. Express Corp., 558 F.2d 842 (9th Cir.
2009), petition for cert. filed, 77 U.S.L.W. 3680 (Jun 01, 2009) (No. 08-1500), the
Ninth Circuit held that the EEOC "retains its authority to issue an administrative
subpoena against an employer even after the charging party has been issued a right-
to-sue notice and instituted a private action based upon that charge. Id. at 854.
Federal Express thus forecloses Bashas' suggestion that because the EEOC closed the
Parra charges and then "re-opened" them, the EEOC lacks the authority to issue an
administrative subpoena such as the one at issue herein. Of course, in Federal
Express the Ninth Circuit expressly left open the issue "whether the EEOC [later]
may be barred from bringing a subsequent lawsuit based upon the [original]
charge[.]" Id. Declining to address that issue, the Federal Express Court found
that it was "simply irrelevant to whether the EEOC could issue an administrative
subpoena based upon that charge[]" in the first place. Id. In light of the
foregoing, the court finds that the EEOC had the authority to issue the May 28,
2008 subpoena, despite having previously closed and then re-opened the charges as
to some of the Parra plaintiffs.

1 filing a petition to revoke or modify that subpoena. The
2 only legal authority which that subpoena references is Title
3 VII, 42 U.S.C. § 2000e-9. The May 28th subpoena indicates
4 that it is being "issued pursuant" to that statute. Id.,
5 attach. 7 thereto at 39. "That subpoena was served upon
6 Bashas' by certified mail the next day, May 29, 2008."
7 E.E.O.C. I, 2009 WL 1783437, at *3 (citations and footnote
8 omitted).

9 On the directed production date - June 13th - nearly eight
10 months prior to the filing of this action, Bashas' "asserted
11 its objections to the subpoena, citing relevant authorities,
12 and reiterat[ing] its prior objections and concerns to this
13 request for information." Mot. (doc. 10), exh. F thereto at
14 19, ¶ 16:6-7. Those objections took the form of a letter to
15 Chester V. Bailey, EEOC Phoenix District Director, and
16 Charles J. Rahill, the EEOC investigator to whom the
17 subpoenaed documents were to be produced. Doc. 25-3 at 103.

18 For almost eight months the EEOC did nothing. The EEOC
19 never contacted Bashas', for example, to inform Bashas' that
20 because it had not timely filed a petition to revoke or
21 modify the May 28th subpoena, it failed to exhaust its
22 administrative remedies. Similarly, the EEOC never advised
23 Bashas' that failing to exhaust, from the EEOC's standpoint,
24 would constitute a waiver of any objections Bashas' may have
25 to the subpoena. Nor, in the following months, did the EEOC
26 ever respond to any of the objections detailed in Bashas'
27 June 13, 2008 letter. Instead, on February 2, 2009, the same
28 day this court denied post-April 2004 pay data discovery in

1 Parra, the EEOC filed the pending OSC to enforce the May 28,
2 2008, subpoena.

3 **Analysis**

4 The EEOC is taking the position, as noted at the outset,
5 that because Bashas' has not exhausted its administrative
6 remedies, it has "waived *all* objections to enforcement of
7 th[at] subpoena." OSC Memo. (doc. 2) at 5 (emphasis added).
8 Implicit in that broad assertion is that by failing to
9 exhaust its administrative remedies, Bashas' has waived its
10 right to object to the subpoena on abuse of process grounds;
11 concomitantly Bashas' is not entitled to conduct limited
12 discovery on that issue.

13 To support its waiver argument, the EEOC relies upon 29
14 U.S.C. § 161, which states in relevant part:

15 ***Within five days after the service of a***
16 ***subpena*** [sic] on any person requiring the
17 production of any evidence in his possession
18 or under his control, such person ***may***
19 ***petition*** the Board ***to revoke***, and the Board
20 shall revoke, such subpoena [sic] if in its
21 opinion the ***evidence*** whose production is
required does ***not relate*** to any matter
under investigation, or any matter in
question in such proceedings, ***or*** if in
its opinion such ***subpena*** [sic] ***does not***
describe with sufficient particularity
the evidence whose production is required.

22 29 U.S.C. § 161 (1) (emphasis added). The EEOC further relies
23 upon 29 C.F.R. § 1601.16(b)(1), which states in relevant part:

24 Any person served with a subpoena who intends
25 not to comply ***shall petition*** the issuing
26 Director or petition the General Counsel,
27 if the subpoena is issued by a Commissioner,
28 ***to seek its revocation or modification.***
Petitions must be mailed to the Director
or General Counsel, as appropriate, ***within***

1 **five days** (excluding Saturdays, Sundays and
2 Federal legal holidays) **after service** of
3 the subpoena.

4 29 C.F.R. § 1601(b)(1) (emphasis added). Disregarding the
5 inconsistency between the permissive statutory language and
6 the mandatory language of the regulation, the EEOC contends
7 that Bashas' failure to petition to revoke or modify the
8 subpoena within five days of service (*i.e.*, June 5, 2008),
9 precludes Bashas' from challenging that subpoena except on
10 constitutional grounds.

11 Bashas' counters by accurately pointing out that the
12 regulation's mandatory language is at odds with the statute's
13 permissive language. Based upon that distinction, Bashas'
14 asserts that "*many* courts have held that the exhaustion
15 requirements of th[at] regulation [29 C.F.R. § 1601.16(b)(1)]
16 are not binding on respondents." Resp. (doc. 25) at 6
17 (emphasis added). Due to the paucity of relevant case law,
18 this is an overstatement.

19 Nonetheless, to support that broad assertion, Bashas'
20 cites to, but does not discuss, E.E.O.C. v. Lutheran Social
21 Services, 186 F.3d 959 (D.C.Cir. 1999). There, the D.C.
22 Circuit held that an employer who did not file a section
23 1601.16(b)(1) petition did not waive its right to object to an
24 EEOC subpoena on attorney-client and work doctrine privilege
25 grounds. E.E.O.C. v. WinCo Foods, Inc., 2006 U.S. Dist. LEXIS
26 74521 (E.D.Cal. 2006), however, and not Lutheran Services, is
27 the cornerstone of Bashas' argument that despite not filing a
28 section 1601.16(b)(1) petition, it has not waived its right to
 object to the May 28th subpoena.

1 Bashas' was not alone in giving relatively short shrift
2 to Lutheran Social Services. Narrowly focusing on the nature
3 of the employer's objections in Lutheran Services, the EEOC
4 contends that Lutheran is inapplicable here. Although the
5 parties did not deem Lutheran Services worthy of any
6 meaningful discussion or analysis, the court does. Lutheran
7 Services warrants fairly close examination because: (1) it is
8 the seminal wavier case; (2) the WinCo court adopted that
9 reasoning; and (3) Lutheran Services and WinCo are strikingly
10 similar to the present case.

11 Additionally, Lutheran Services is noteworthy because
12 that Court held that compliance with 29 C.F.R. § 1601.16(b)(1)
13 is not a jurisdictional prerequisite, as the EEOC conceded
14 therein. Lutheran Services, 186 F.3d at 962. The WinCo
15 court,³ as does this court, found Lutheran Services persuasive
16 on that point. Compliance with that regulation is not
17 jurisdictional, the D.C. Circuit explained, because
18 "[e]xhaustion is a jurisdictional prerequisite . . . [o]nly
19 when Congress states in clear, unequivocal terms that the
20 judiciary is barred from hearing an action until the
21 administrative agency has come to a decision." Id. (internal
22 quotation marks and citation omitted). Title VII lacks those
23 "clear, unequivocal terms," as the Lutheran Services Court
24 explained. Title VII, which "confers on the EEOC the same
25 subpoena authority the National Labor Relations Act gives to
26 the National Labor Relations Board[,]" provides "only that

27
28 ³ WinCo is the only case within the Ninth Circuit of which the court is aware addressing the issue of whether section 1601.16(b)(1) is jurisdictional.

1 parties 'may petition the [Commission] to revoke' a subpoena
2 on the basis of relevance and particularity; nowhere does [29
3 U.S.C. § 161(1)] even imply, much less expressly state, that
4 courts lack jurisdiction to hear objections not presented to
5 the [EEOC]." Id. at 962 and 963 (citations omitted) (emphasis
6 added). Therefore, despite the mandatory language of the
7 regulation, nothing in the governing authorizing statute
8 unequivocally states that exhaustion is a jurisdictional
9 prerequisite. Thus, in accordance with Lutheran Services and
10 WinCo, this court finds that Bashas' failure to comply with 29
11 C.F.R. § 1601.16(b)(1) does not deprive this court of
12 jurisdiction to consider Bashas' objections.

13 Although the Lutheran Services Court held that section
14 1601.16(b)(1) did not deprive the court of jurisdiction to
15 consider the employer's objections to the EEOC's subpoena, it
16 did recognize the discretionary nature of exhaustion
17 thereunder. In other words, "courts may exercise their
18 authority to hear issues not presented to the agency if the
19 circumstances surrounding noncompliance with agency procedures
20 are sufficiently compelling." Id. at 963 (internal quotation
21 marks and citations omitted). This means that "the
22 exhaustion requirement continues to apply *as a matter of*
23 *judicial discretion*[,]" as opposed to a mandatory
24 jurisdictional doctrine, "in cases not governed by the APA
25 [Administrative Procedure Act]." Lutheran Services, 186 F.3d
26 at 963 (quoting Darby v. Cisneros, 509 U.S. 137, 153-54, 113
27 S.Ct. 2539, 125 L.Ed.2d 113 (1993)) (emphasis added by
28 Lutheran Services Court). Simply put: "Where Congress

1 specifically mandates, exhaustion is required. But where
2 Congress has not clearly required exhaustion, sound judicial
3 discretion governs." McCarthy v. Madigan, 503 U.S. 140, 144,
4 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992).

5 Invoking those well-settled principles, the Lutheran
6 Services Court held that the "mandatory language" of section
7 1601.16(b)(1) "creates a strong presumption that issues
8 parties fail to present to the agency will not be heard in
9 court." Lutheran Services, 186 F.3d at 964 (citation
10 omitted). At the same time, though, the D.C. Circuit found
11 that there was "no categorical bar prevent[ing] [it] from
12 considering whether the facts surrounding Lutheran's failure
13 to file a section 1601.16(b)(1) petition constitutes
14 circumstances sufficiently extraordinary to defeat this
15 presumption[.]" Id.

16 For three reasons, the Lutheran Services Court excused the
17 employer's failure to file a § 1601.16(b)(1) petition
18 objecting to the EEOC's subpoena. First, the form subpoena at
19 issue therein did not "stat[e] that a subpoena recipient has
20 five days to object or even point[] the recipient to section
21 1601.16(b)(1)[.]" Id. That subpoena stated "only that it 'is
22 issued pursuant [to] (Title VII) 42 U.S.C. § 2000e-9.'" Id.
23 The Court persuasively reasoned that "[n]othing on the face of
24 the subpoena or in the statutes to which it referred would
25 have led [Lutheran] . . . to believe that [it] *must* petition
26 the EEOC within five days, particularly given that Lutheran's
27 objection rested not on relevance or particularity, but on the
28 attorney-client and work product privileges." Id. (citation

1 omitted). Relevancy and lack of particularity are the two
2 grounds which 29 C.F.R. § 1601.16(b)(1) identifies as bases
3 for filing a petition to revoke.

4 The second reason for excusing timely filing of a
5 § 1601.16(b)(1) petition in Lutheran Services was that the
6 EEOC investigator "seem[ed] to have been unaware" of
7 Lutheran's "obligation" under that regulation. Id. at 965.
8 That seeming unawareness arose from the fact that the EEOC
9 investigator "never said, 'Sorry, you're too late. 29 C.F.R.
10 § 1601.16(b)(1) requires your client to have filed a petition
11 with the District Director within five days of receiving the
12 subpoena.]" Id. Instead, according to Lutheran's counsel,
13 the investigator took a more conciliatory approach,
14 "agree[ing] to 'keep [the lawyer] posted on the EEOC's
15 decision and to contact [the lawyer] before taking further
16 action.'" Id. (citation omitted). It was "[n]ot until the
17 EEOC filed th[at] enforcement action [that] . . . [the EEOC]
18 mention[ed] section 1601.16(b)(1)." Id.

19 The Lutheran Services Court also found it significant that
20 Lutheran had "repeatedly claimed the [subpoenaed] document to
21 be privileged." Id. 186 F.3d at 965 (citation omitted). Not
22 only that, "the EEOC official with whom the regulation
23 required Lutheran to file its petition, . . . , was aware of
24 the nature of Lutheran's objections." Id.

25 Importantly, the Court in Lutheran Services further
26 explained that its holding "would do little if any damage to
27 the integrity of the Commission's section 1601.16(b)(1)
28 procedures." 186 F.3d at 965. The Court recited the well-

1 settled tenet that "[t]he basic purpose of the exhaustion
2 doctrine is to allow an administrative agency to perform
3 functions within its special competence." Id. (internal
4 quotation marks and citations omitted). "No such benefit
5 would flow from requiring exhaustion[,] " the Lutheran Services
6 Court found, because "the EEOC has no expertise with respect
7 to the attorney-client and work product privileges." Id.
8 Such expertise "resides in the federal courts." Id. (citation
9 omitted). Consequently, the Court noted that "even if
10 Lutheran had filed a section 1601.16(b)(1) petition, [it]
11 would not defer to the EEOC's disposition of Lutheran's
12 privilege claims." Id. (citations omitted). Declining to
13 defer to agency expertise made Lutheran Services "quite
14 different from the more typical situation where a subpoena
15 recipient's objections rest on relevancy or particularity, the
16 two factors listed in 29 U.S.C. § 161." Id.

17 Bolstering the Court's holding in Lutheran Services was
18 the "important role" that the attorney-client and work product
19 privileges "play . . . in Title VII's enforcement scheme[,] "
20 along with the fact that "rejecting the [EEOC's] waiver claim
21 w[ould] not deny it access to any sources of possible evidence
22 of discrimination." Id. at 966. "[U]nder th[os]e combined
23 circumstances," the D.C. Circuit found that it would be "both
24 unfair and unwise to penalize Lutheran for failing to file a
25 section 1601.16(b)(1) petition." Id. at 966-967.
26 Accordingly, it did not deem "Lutheran's failure to file a
27 section 1601.16(b)(1) petition as a waiver of its privilege
28 claim." Id. at 965.

1 As in Lutheran Services, the issue here is "whether the
2 facts surrounding [Bashas'] failure to file a section
3 1601.16(b)(1) petition constitute circumstances sufficiently
4 extraordinary to defeat" the presumption that the court should
5 not consider issues which Bashas' did not present to the EEOC.
6 See id. Stated differently, the court must consider whether
7 "the circumstances surrounding [Bashas'] noncompliance with
8 [EEOC] procedures are sufficiently compelling[]" so that, in
9 the exercise of its discretion, the court may consider those
10 issues. See id. at 963 (internal quotation marks and
11 citations omitted). The remarkable similarities, set forth
12 below, between Lutheran Services and the present case,
13 persuade this court that Bashas' has preserved its right to
14 challenge the May 28, 2008 subpoena, regardless of its failure
15 to file a § 1601.16(b)(1) petition.

16 Significantly, the Lutheran Services subpoena, which is an
17 appendix to that decision, is identical to the subpoena which
18 the EEOC issued to Bashas'. And, just like the Lutheran
19 Services subpoena, the subpoena to Bashas' merely stated that
20 it was issued "pursuant . . . (Title VII) 42 U.S.C. 2000e-
21 9[.]" Manget Aff. (doc. 2-2), attach. 7 thereto at 39. There
22 is nothing on its face which would have led Bashas' to believe
23 that it had only five days to petition to revoke or modify
24 that subpoena.

25 Evidently the EEOC is attempting to distinguish Lutheran
26 Services on the basis that although the challenged subpoena
27 did not mention the five day rule, Bashas' was "aware of [its]
28 *ability* to petition to revoke or modify the subpoena because

1 [she] had previously attempted to do so on behalf of [Bashas']
2 in Jose Parra's charge." Reply (doc. 28) at 4, n. 3 (citation
3 omitted)(emphasis added). The flaw with that reasoning is
4 that Bashas' awareness of its *ability* to file a petition is
5 fundamentally different than its awareness of the *time frame*
6 in which to do so.

7 Bashas' May 25, 2006 petition to revoke the EEOC's May 11,
8 2006 subpoena, to which the EEOC points, shows Bashas'
9 awareness of its ability to petition to revoke; but, that
10 petition does not show Bashas' awareness of the five day time
11 frame. Apparently Bashas' received the May 11th subpoena on
12 May 15th, but its petition to revoke is dated May 25th, and
13 evidently faxed to the EEOC that same date. Doc. 25-3 at 75-
14 76; and 78. Bashas' petition to revoke thus was not mailed
15 within five days after service of the May 11th subpoena, as
16 section 1601.16(b)(1) mandates. Perhaps that is because, like
17 the other EEOC subpoenas before this court, the May 11th
18 subpoena did not specify the five day time frame, or the
19 statutory or regulatory basis for that requirement.

20 Interestingly, Bashas' concluded its May 25, 2006 petition
21 by requesting to be "advise[d]" if the EEOC "believe[d] [that]
22 for some reason . . . [Bashas'] . . . overlooked a relevant
23 fact or *legal authority*[" Id. at 82 (emphasis added).
24 Despite that explicit request, the EEOC never advised Bashas'
25 that that petition was not timely. In fact, the EEOC did not
26 directly respond to that petition, and it never filed an
27 action to enforce the May 11, 2006 subpoena. Thus, the court
28 disagrees with the EEOC's suggestion that the timing of

1 Bashas' prior petition to revoke supports a finding that
2 Bashas' was aware of the five day rule. Obviously the court
3 also does not agree that Bashas' awareness of its ability to
4 file such a petition is an adequate basis for distinguishing
5 Lutheran Services.

6 In addition to serving subpoenas which did not notify the
7 recipients of the five day rule, Lutheran Services and the
8 present case are alike in that seemingly the EEOC
9 investigators in both were unaware of the recipients' section
10 1601.16(b)(1) obligations. As in Lutheran Services, the EEOC
11 never informed Bashas' that its June 13, 2008 response was too
12 late. Moreover, as just explained, here, the EEOC also never
13 advised Bashas' of its failure to comply with the five day
14 rule even when in May 2006 Bashas' filed a petition to revoke
15 pursuant to section 1601.16(b)(1).

16 The EEOC's failure to mention section 1601.16(b)(1)
17 becomes even more problematic given that between May 2006 and
18 May 2008, the EEOC served Bashas' with four subpoenas,
19 including the one at issue herein. None of those subpoenas
20 advised Bashas' of the five day time frame, or the
21 consequences of failing to comply therewith. In fact, as to
22 Bashas' response to the two July 27, 2007 subpoenas,
23 completely disregarding the timing issue, the EEOC addressed
24 the merits in some detail, finding that response "inadequate."
25 Id., attach. 5 thereto at 30.

26 The bottom line here, which the EEOC cannot refute, is
27 that Bashas' timely responded to the only deadline in the
28 subpoena - June 13, 2008. At any point in the process, it

1 would not have been difficult for the EEOC to have advised
2 Bashas' of the section 1601.16(b)(1)'s requirements, but it
3 did not. Intentional or not, the effect of the EEOC's silence
4 was to lead Bashas' into a false sense of security as to the
5 necessity of timely filing a petition to revoke or modify.
6 The court will not countenance such behavior. After all, at
7 least since 1999, when the D.C. Circuit wisely suggested a
8 simple addition to the EEOC's form subpoena,⁴ the EEOC has been
9 well aware of the risks inherent in continuing to use a
10 subpoena which does not notify the recipient of section
11 1601.16(b)(1)'s time frame.

12 Moreover, as in Lutheran Services, in this case the EEOC
13 did not mention the five day time frame until the February 2,
14 2009, filing of its application for an OSC. Even then, the
15 supporting affidavit only avers that Bashas' "has not filed a
16 Petition to Revoke or Modify the Subpoena, and the five-day
17 period for filing such a petition with respect to a Title VII
18 subpoena has expired." Id. at 4, ¶ 18. In making that
19 averment, EEOC Enforcement Manager Manget does not cite to any

20 _____

21 ⁴ In Lutheran Services, the Court pointedly observed:

22 [I]f the [EEOC] wishes to ensure (regardless
23 of the actions of its General Counsel) that
24 it has an opportunity to review all subpoena
25 enforcement issues before they get to court,
26 it can easily do so by adding to the face of the
27 subpoena, which already contains a "Notice to
28 Person Subpoenaed," something like the following:

If you have any objections to this subpoena,
you must include them in a petition filed with
the issuing official pursuant to 29 C.F.R.
§ 1601.16(b)(1). Petitions must be mailed
within five days of receiving this subpoena.
Failure to follow these regulations may result
in loss of any ability to raise such objections in court.

Lutheran Services, 186 F.3d at 966-67 (citation omitted).

1 statute or regulation.

2 Finally, as earlier alluded to, like Lutheran Services,
3 Bashas' has repeatedly and continually made its objections
4 known to the EEOC. Those objections included not only
5 relevancy and overbreadth, but abuse of process. In fact, at
6 least as early as May 25, 2006, Bashas' informed the EEOC of
7 its abuse of process argument.⁵ That response, as well as
8 Bashas' June 13, 2008, response to the challenged subpoena
9 were both addressed, among others, to Chester V. Bailey who
10 issued the May 28, 2008 subpoena. Thus, although Bashas' did
11 not timely file a petition to modify or revoke in accordance
12 with § 1601.16(b)(1), its response to the challenged subpoena,
13 which is dated June 13, 2008 - the production date directed in
14 the subpoena - put Mr. Bailey, the "issuing Director," on
15 notice of Bashas' objections, which surely is the underlying
16 intent of that regulation. Indeed, during the hearing the
17 EEOC agreed with the court's observation that as a practical
18 matter it has known of Bashas' objections for months prior to
19 the filing of this action. It thus strikes the court that
20 this is a classic example of the sporting maxim, "No harm, no
21 foul."

22 WinCo upon which Bashas' predominately relies to refute
23 Bashas' waiver argument provides further support for the
24 court's conclusion that Bashas' has not waived its right to
25 object to the EEOC subpoena at issue herein. Applying the
26 Lutheran Services analysis, the court excused WinCo from
27 filing its objections within five days of service of an EEOC
28

⁵ See Doc. 25-3 at 81-82.

1 subpoena. The essential facts of WinCo are practically
2 identical to those here, as well as to those in Lutheran
3 Services. In all three cases, the EEOC subpoena did not
4 notify the recipient of the five day rule. Nor did the EEOC
5 notify any of those recipients, after they served their
6 objections, that there was "any compliance issue or failure to
7 exhaust." See WinCo, 2006 U.S. Dist. LEXIS 75421, at *12
8 (internal quotation marks and citations omitted). WinCo, as
9 did Bashas' also "consistently objected, . . . , to EEOC's
10 information requests and WinCo's formal written objections to
11 the challenged subpoena[.]" Id. Further, the subpoena
12 recipients served responses "to the subpoenas on the date for
13 which production was demanded, long before the filing of
14 th[o]s[e] enforcement action[s]." See id.

15 Given that the WinCo facts were "analogous" to those in
16 Lutheran Services, and that "the balance of factors weigh[ed]
17 strongly in WinCo's favor[,]" the court found WinCo did not
18 waive its objections to the challenged EEOC subpoena. Id.
19 Furthermore, the WinCo court convincingly distinguished the
20 line of cases to which the EEOC cites in its memorandum on the
21 basis that none of them⁶ "involved defendants who lodged
22 objections prior to the EEOC's filing of an enforcement
23 action[;]" and none "examine[d] the inconsistencies between 29
24 C.F.R. § 1601.16(b) and its authorizing statute, 29 U.S.C. §
25 161." Id. at *13 (citations omitted).

26

27

28 ⁶ See E.E.O.C.v. Cuzzens of Georgia, 608 F.2d 1062 (5th Cir. 1979);
E.E.O.C. v. City of Milwaukee, 919 F.Supp.1247 (E.D.Wis. 1996); E.E.O.C. v. County
of Hennepin, 623 F.Supp. 29 (D.Minn. 1985); and E.E.O.C. v. Roadway Express, 569
F.Supp. 1526 (N.D.Ind. 1983)).

1 In any event, what is perhaps most significant about WinCo
2 is that court adopted the Lutheran Services reasoning despite
3 the fact that WinCo did not object on privilege grounds.
4 Indeed, the WinCo court was presented with the "more typical
5 situation" of objections based upon, *inter alia*, relevancy and
6 lack of particularity - the two factors which 29 U.S.C. § 161
7 identifies as grounds for petitioning for revocation of an
8 EEOC subpoena. Thus, the WinCo court did not take into
9 account the basic purpose of exhaustion - deference to agency
10 expertise, which was a critical underpinning of the Court's
11 reasoning in Lutheran Services.

12 Tellingly, in its reply the EEOC did not mention WinCo at
13 all. Instead, the EEOC attempts to distinguish Lutheran
14 Services and another case to which Bashas' cites, E.E.O.C. v.
15 Guess?, Inc., 176 F.Supp.2d 416, 422 (E.D.Pa. 2001), based on
16 the nature of the objections - both involved claims of
17 attorney client and work product privilege. The EEOC
18 stresses, in contrast, that "Bashas' position is that the
19 information subpoenaed is not relevant and is overbroad[.]
20 Reply (doc. 28) at 4. The EEOC thus reasons that those
21 objections are waived because "they are matters in which the
22 EEOC has expertise." Id.

23 WinCo disposes of this argument though. As just stated,
24 the WinCo court applied the Lutheran Services rationale even
25 though WinCo objected to the EEOC subpoena on overbreadth and
26 relevance grounds. Moreover, in addition to overbreadth and
27 relevance, Bashas' is objecting on abuse of process grounds.
28 The significance of this particular objection is that, as with

1 the privilege objections in Lutheran Services, an abuse of
2 process objection is "quite different from the more typical
3 situation where a subpoena recipient's objections rest on
4 relevancy or particularity, the two factors listed in 29
5 U.S.C. § 161." See 186 F.3d at 965. Abuse of process is not
6 among the section 161 factors. Thus, concern over deference
7 to agency expertise is not implicated here, at least as to
8 Bashas' abuse of process objection. Indeed, understandably,
9 it might be difficult for the EEOC to remain wholly objective
10 if confronted with the abuse of process objection.

11 Additionally, it should be noted that in City of
12 Milwaukee, one of the cases to which the EEOC cites, the court
13 addressed the merits of the City's objections to an EEOC
14 subpoena, despite a finding of waiver. That court candidly
15 noted that "one might be tempted to order enforcement . . .
16 without any further discussion or analysis," in light of the
17 waiver. City of Milwaukee, 919 F.Supp. at 1255.
18 "[D]eclin[ing] to succumb to that temptation[,]" the court
19 soundly stated that "the parties and the public are entitled
20 to a more thorough treatment of the issues presented" therein.
21 The same can certainly be said here.

22 For all of these reasons, the court finds that the
23 circumstances surrounding Bashas' failure to timely file a
24 petition to revoke or modify the May 28, 2008 subpoena are
25 "sufficiently extraordinary" to defeat the presumption that
26 Bashas' has waived its right to object because it did not
27 timely file such a petition. The court stresses that it is
28 not adopting a *per se* rule that an abuse of process objection

1 or, for that matter, any objection other than the two set
2 forth in 29 U.S.C. § 161 will automatically suffice to excuse
3 timely filing of a section 1601.16(b)(1) petition. Rather,
4 primarily because of the somewhat unique facts of this case,
5 including this court's extensive familiarity with the
6 background of this action, resulting from the fact that it has
7 presided over the related Parra action for more than seven
8 years, the court finds that Bashas' has not waived its right
9 to object to the May 28, 2008 subpoena, despite failing to
10 file a § 1601.16(b)(1) petition.

11 Before turning to Bashas' discovery motion, it should be
12 noted that in its Reply the EEOC cites to, but does not
13 analyze, E.E.O.C. v. Sunoco, 2009 WL 197555 (E.D.Pa. 2009).
14 Sunoco, on the face of it, might appear to compel a different
15 result here. There, the court found that Sunoco did waive its
16 objections to enforcing an EEOC subpoena where it failed to
17 timely file a petition to revoke or modify. The court in
18 Sunoco found that Lutheran Services was not "controlling"
19 because of the nature of Sunoco's objections. More
20 specifically, Sunoco objected on the "ground that [it] ha[d]
21 not been given fair notice of the existence and nature of any
22 pending charge against it[.]" Id. at *4 (internal quotation
23 marks and citation omitted). The court found that objection
24 to be "the more typical" situation recognized by the Lutheran
25 Court. Id.

26 As in Sunoco, Bashas' is making a lack of notice
27 objection. The EEOC overlooks the fact that, in sharp
28 contrast to the present case, Sunoco did not object to the

1 EEOC's subpoena until 25 days after service. On the other
2 hand, in the present action not only did Bashas' make its
3 objections to the subpoena on the same date as that
4 subpoena directed a response, but, for over a year before,
5 it had made nearly identical objections to substantially
6 similar EEOC Requests and two prior EEOC subpoenas. That
7 critical distinction renders Sunoco inapplicable here.

8 In sum, despite the EEOC's contrary assertion, the
9 court finds that Bashas' did not waive its right to object
10 to the May 28, 2008 subpoena. Therefore, the court will
11 next address Bashas' abuse of process objection, and more
12 particularly, Bashas' motion for leave to conduct limited
13 discovery on that issue.

14 **II. "Motion for Leave to Conduct Limited Discovery"**

15 Primarily because it could not "ignore the broader
16 context in which this particular dispute has arisen, and
17 the timing of this OSC[,] in Parra I this court deemed it
18 necessary to conduct a hearing on Bashas' discovery
19 motion. E.E.O.C. I, 2009 WL 1783437, at *11. Before
20 considering the impact of that hearing on Bashas' motion,
21 the court will reiterate the parties' respective burdens.

22 **A. Administrative Subpoena Enforcement Requirements**

23 The EEOC must satisfy four requirements to establish
24 its entitlement to enforcement of an administrative
25 subpoena by this court. The EEOC must show:

26 [1] that the investigation will be conducted
27 pursuant to a legitimate purpose, [2] that
28 the inquiry may be relevant to the purpose,
[3] that the information sought is not already
within the [agency's] possession, and [4] that

1 the administrative steps required by the
2 [agency's statutes or rules] have been followed.

3 E.E.O.C. I, 2009 WL 1783437, at *6 (quoting, *inter alia*,
4 United States v. Powell, 379 U.S. 48, 57-58, 85 S.Ct. 248,
5 13 L.Ed.2d 112 (1964)). The sole basis for Bashas'
6 discovery motion is that the EEOC is not conducting this
7 particular investigation for a legitimate purpose. Thus,
8 from Bashas' perspective, enforcement of this subpoena
9 would amount to an abuse of this court's process.
10 Likewise, in its response to the OSC (filed after
11 E.E.O.C. I), Bashas' continues to insist that this
12 investigation is not being conducted for a legitimate
13 purpose. Hence, Bashas' maintains that the court also
14 should deny enforcement on abuse of process grounds.
15 Interestingly, the EEOC did not address this issue until
16 the hearing when it responded, in essence, that this
17 investigation is being conducted for a legitimate purpose,
18 *i.e.* to aid in determining whether Bashas' has engaged in
19 discrimination against Hispanics.

20 **B. Bashas' Burden of Proof**

21 Bashas' may be allowed to engage in "[a] limited
22 amount of discovery . . . if, for example, [it] makes a
23 *preliminary and substantial demonstration* of abuse[.]"
24 Id. (quoting Reich v. Montana Sulphur & Chemical Co., 32
25 F.3d 440, 449 (9th Cir. 1994) (internal quotation marks and
26 citations omitted)). This requires Bashas' to "present[]
27 meaningful evidence that the [EEOC] is attempting to abuse
28 its investigative authority.'" Id. (quoting Reich, 32 F.3d

1 at 449 (internal quotation marks and citations omitted)).
2 Agreeing with Bashas', this court has previously found
3 that the "preliminary and substantial demonstration
4 standard does *not* mean actual proof." Id. (internal
5 quotation marks and citation omitted) (emphasis in
6 original). Still, Bashas' "needs to . . . develop facts
7 from which [this] court might *infer a possibility* of some
8 wrongful conduct" by the EEOC. Id. at *7 (internal
9 quotation marks and citation omitted) (emphasis in
10 original). The court has reviewed all of the record proof
11 with an acute awareness that Bashas' has a "relatively
12 heavy" burden to satisfy before even limited discovery
13 will be permitted here. See E.E.O.C. I, 2009 WL 1783437,
14 at *6 (internal quotation marks and citation omitted).

15 **C. Legitimacy of Purpose**

16 As thoroughly discussed in E.E.O.C. I, Bashas' based
17 its claimed need for discovery upon three factors: (1) the
18 timing of the EEOC's investigation and this enforcement
19 action; (2) purported sharing of information between the
20 EEOC and the Parra attorneys and/or the United Food and
21 Commercial Workers' Union ("UFCW"); and (3) the EEOC's
22 alleged "improper ulterior motive" for issuing the Charge
23 and this subpoena. See id. at *7 (internal quotation
24 marks and citations omitted). In its response to the OSC
25 and during the hearing, Bashas' elaborated upon some of
26 those factors.

27 Bashas' views this enforcement action as nothing more
28 than "[a] course of conduct" by the EEOC "intended to

1 harass . . . and to pressure" it with respect to the Parra
2 litigation and UFCW unionization efforts. Resp. (doc. 25)
3 at 11:5-6. To support this view, Bashas' notes that
4 during the past eight years the EEOC has periodically
5 conducted "'investigations'" of Bashas' either through
6 individual charges or this Charge; yet, to date, the EEOC
7 has found no violations. Id. at 9:25-27. In terms of
8 the interplay between this enforcement action and Parra,
9 from Bashas' perspective, those "investigations" and the
10 "various subpoenas" which the EEOC has directed to
11 Bashas', have "not so coincidentally coincided with set
12 backs in the Parra litigation and parallel the UFCW's . .
13 . union campaign against" it. Id. at 10:27-11:1 (citation
14 omitted).

15 Bashas' attempted to cast further doubt on the EEOC's
16 motives in pursuing this enforcement action by noting at
17 the hearing that it recently filed a Chapter 11 Bankruptcy
18 Petition. Bashas' "believes" that a "large part of the
19 reason" the EEOC continues to pursue this action is
20 because it can "evade the bankruptcy court[,] unlike
21 Parra, which as a result of Bashas' bankruptcy, is now
22 subject to a stay. Audio Tr. (Sept. 21, 2009) at 10:04
23 a.m.

24 The EEOC maintains that the Charge and the subpoena at
25 issue are part of its investigative authority to determine
26 whether Bashas' has engaged in discriminatory conduct.
27 This view would be much easier to embrace if it were not
28 for several factors, such as the striking similarity

1 between Parra and this action. The present Charge is
2 "from at least May 2004," whereas at least as to the pay
3 claim, April 2004 is the cut-off date in the Parra action.
4 Manget Aff. (doc. 2-2), attach. 1 thereto. Other than
5 that, this Charge is practically indistinguishable from
6 the allegations in Parra. Also, there is the fact that
7 for some inexplicable reason, the EEOC did not intervene
8 in Parra.

9 Moreover, as highlighted below, the EEOC has not been
10 continuously and actively pursuing this investigation.
11 Ordinarily the EEOC would have the prerogative to decide
12 at what pace and how vigorously to pursue a given
13 investigation, and it would be of little or no consequence
14 to the court. Under the unique circumstances of this
15 case, however, and taking into account the extremely close
16 link between this action and Parra, the court cannot
17 disregard the manner in which the EEOC has conducted this
18 investigation. For months at a time the EEOC allowed this
19 investigation to lay dormant. Then, when the Parra
20 plaintiffs have sustained a setback, seemingly the EEOC
21 has a renewed interest in pursuing this investigation.

22 With the advantage of full briefing on the OSC and the
23 recent hearing, the court finds that Bashas' has made the
24 requisite showing so as to justify limited discovery. The
25 primary basis for this finding is timing - not just the
26 timing of the OSC *vis-a-vis* this court's February, 2, 2009
27 ruling precluding discovery, but the timing of this EEOC
28 investigation more generally. The timing of the EEOC's

1 actions which eventually resulted in the filing of this
2 OSC take on even greater import when viewed in conjunction
3 with the Parra action. Motive, too, is a consideration in
4 this court's finding that Bashas' may proceed with
5 limited discovery. The EEOC's motives for filing this
6 Charge and enforcement action become questionable when,
7 again, they are viewed in the larger context of Parra and
8 the UFCW's unionization efforts aimed at Bashas'.

9 Turning first to the Charge, both its timing and its
10 content raise concerns as to the EEOC's underlying purpose
11 and motive. The Charge is dated May 9, 2007, which, Mr.
12 Tucek testified, was at the "height of the UFCW's campaign
13 against Bashas[.]" Audio Tr. (Sept. 21, 2009) at 10:18:23-
14 10:18:29 a.m. Of equal if not more import is the content
15 of that Charge. Not only does it substantially mirror the
16 Parra allegations, but it seems that its scope was largely
17 attributable to the Parra's April, 2004 time limitation on
18 discovery of Bashas' wage data.

19 During the hearing, the EEOC candidly admitted that it
20 "certainly does not operate totally in a vacuum." Id. at
21 1:57 - 2:00 p.m. As an agency, it is "aware" of other
22 cases that are being litigated. Id. at 2:00:32 p.m.
23 Potentially significant here is the EEOC's indication that
24 it communicates with other plaintiffs' counsel. As the
25 EEOC describes it, it is "in touch with what is going on
26 in the litigation field." Id. at 2:02 p.m. So, "if the
27 Commissioner has an interest in an area" that is "being
28 litigated[,]" the EEOC "will often field questions[.]"

1 Id. 2:02:25-34. Moreover, although the EEOC vehemently
2 denies that it publicly discusses a charge prior to its
3 filing, it readily conceded that the existence of EEOC
4 charges may become known in the community through
5 witnesses, intervening charging parties, or the
6 respondents themselves. See id. at 2:05:42-2:06:00 p.m.
7 Given this undoubtedly realistic depiction of how the EEOC
8 operates, it stands to reason that the EEOC could not
9 assure the court that the temporal scope of discovery in
10 Parra "did not have an effect on the time periods" set
11 forth in the Charge. Id. at 2:00:53-2:01:15 p.m.
12 (emphasis added).

13 Shifting to the OSC, the court remains skeptical,
14 despite the EEOC's repeated assurances, that it is simply
15 coincidental that on February 2, 2009 - "the same day this
16 court denied discovery in Parra as to Bashas' post-April
17 2004 pay policy, the EEOC decided to file an OSC to
18 enforce a subpoena encompassing such pay data, a subpoena
19 which had been served over eight months earlier." See
20 E.E.O.C. I, 2009 WL 1783437, at *7. This skepticism
21 stems, in part, from the EEOC's candid responses to the
22 court's inquiries during the hearing.

23 As the EEOC explained it, the trial attorney
24 responsible for drafting this OSC completed it in October,
25 2008. Audio Tr. (Sept. 21, 2009) at 2:03:14 p.m. After
26 that, the OSC remained in the office of the supervisory
27 trial attorney for a "long time[.]" Id. at 2:03:15-26
28 p.m. Based upon the foregoing, the EEOC insists that the

1 February 2, 2009 filing of this OSC "really" was just a
2 "coincidence[.]" Id. at 2:03:27 p.m.

3 Querying the EEOC, it readily acknowledged the court's
4 concern, but stressed that as an agency it would not delay
5 the filing of a court document. Id. at 2:03:34-37 p.m.
6 The EEOC strongly suggests that the "coincidental" timing
7 of the filing of the OSC came about because of the EEOC's
8 workload priorities. Litigation takes precedence over
9 subpoena enforcement matters, so there is "often a long
10 lapse" between the issuance of a subpoena and its
11 enforcement. Id. at 2:03:43-46 p.m.

12 While the EEOC's explanation is plausible, like the
13 EEOC, this court does not operate in a vacuum. It, too,
14 must take into account "the broader context[.]" See
15 E.E.O.C. I, 2009 WL 1783437, at *11. When the court does
16 that, the fact that, with the exception of a supervisor's
17 review, the OSC was complete in October, 2008, undermines
18 the EEOC's position. If the OSC was essentially complete,
19 it strikes the court as odd that the EEOC would not have
20 filed this action sooner, especially if, as it professes,
21 it has an interest in eradicating workplace
22 discrimination.

23 The delay also cannot be justified based upon the
24 content of the OSC. The OSC itself is three pages of
25 boilerplate language. The supporting affidavit is
26 similarly terse and does not include voluminous exhibits.
27 Lastly, the EEOC's memorandum of law also is rather
28 cursory. Thus, it strains credulity that even with

1 limited institutional resources, this particular OSC could
2 not have been reviewed and filed until eight months after
3 service of the subpoena.

4 Apart from the OSC, the issue of timing continues to
5 be "troublesome" because the EEOC never sought to enforce
6 the three preceding subpoenas. See E.E.O.C. I, 2009 WL
7 1783437, at *8. The first subpoena, in the matter of
8 eight individuals including plaintiffs Parra and Estrada,
9 is dated May 11, 2006, slightly more than eight weeks
10 after this court denied the Parra plaintiffs' motion for
11 reconsideration on the issue of certifying a class as to
12 the pay claim. That timing alone is curious.
13 Furthermore, the EEOC never responded to Bashas' petition
14 to revoke that subpoena. In that petition, among other
15 grounds, Bashas' asserted that the May 2006 subpoena was
16 based upon the improper re-opening of the Parra and
17 Estrada charges. See Doc. 25-3 at 79-81. Instead of
18 responding to that petition, the EEOC "re-opened" the
19 charges of those individuals, which it had closed in 2002
20 after the filing of Parra.

21 Lastly, the court is well aware that the EEOC denies
22 that there is anything improper in its having
23 communication with third-parties. Audio Tr. (Sept. 21,
24 2009) at 2:2:54-2:03:07 p.m. Assuming, as the EEOC
25 assured the court, that it abides by its confidential
26 obligations, in the abstract the court would agree that
27 such communications are not improper. The court is not
28 concerned with some theoretical communication between the

1 EEOC and third-parties, however. Here, the concern arises
2 because on this record the court can "*infer a possibility*
3 of some wrongful conduct" by the EEOC in terms of its
4 outside communications and motives. E.E.O.C. I, 2009 WL
5 1783437, at *7 (internal quotation marks and citation
6 omitted) (emphasis in original). For that reason, among
7 others, limited discovery is needed here. After the
8 completion of discovery, it may be that the court finds
9 that the EEOC has acted with a legitimate purpose in
10 filing this Charge and enforcement action. That
11 determination cannot be made in a factual vacuum, however.

12 To conclude, in E.E.O.C. I this court found that,
13 "*without more, . . . timing was not a sufficient basis for*
14 *allowing . . . discovery.*" Id. at *8 (emphasis added).
15 Now, however, the timing factor tips decidedly in favor of
16 allowing Bashas' to conduct limited discovery. Likewise,
17 the motive factor also augurs in favor of allowing such
18 discovery. That is so because on the record as presently
19 constituted, Bashas' has made "*a preliminary and*
20 *substantial demonstration of abuse[]*" so as to justify
21 limited discovery on the issue of whether the EEOC has
22 filed this Charge and enforcement action for a legitimate
23 purpose. See id. at *6 (internal quotation marks and
24 citation omitted) (emphasis in original). Although not
25 determinative, the court has taken into account, as
26 Bashas' put it, the "reality" under which it is
27 "operating" in that currently it has access to a "limited
28 amount of evidence[.]" Audio Tr. (Sept. 21, 2009) at

1 10:04:23-29 a.m. Bashas' ability to conduct such
2 discovery will be fairly circumscribed, however, as set
3 forth in the next section.

4 **D. Sufficiency of Notice**

5 Before delineating the scope of discovery, the court
6 recognizes that Bashas' also contends that this court
7 lacks jurisdiction to enforce the May 28, 2008 subpoena
8 because the Charge does not provide Bashas' with
9 sufficient notice of the allegations against it. This
10 argument need not detain the court for long.

11 In E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 104 S.Ct.
12 1621, 80 L.Ed.2d 41 (1984), the Court held that an EEOC
13 charge must meet the requirements of 42 U.S.C. § 2000e-
14 5(b), which "is a jurisdictional prerequisite to judicial
15 enforcement of a subpoena issued by the EEOC." Id. at 65
16 (footnote omitted). The court adopted the following
17 standard in the "pattern-and practice" context:⁷

18 *Insofar as he is able*, the Commissioner
19 should identify the groups of persons that
20 he has reason to believe have been
21 discriminated against, the categories of
22 employment positions from which they have
23 been excluded, the methods by which the
24 discrimination may have been effected, and
25 the periods of time in which he suspects
26 the discrimination to have been practiced.

23 Id. at 73 (emphasis added). Especially given the
24 prefatory phrase, "[i]nsofar as he is able," that standard

26 ⁷ The Charge itself does not allege a "pattern and practice" of
27 discrimination by Bashas', but that is a reasonable construction. And, evidently
28 that is how Bashas' is construing the Charge as it invokes the Shell Oil standard,
which expressly applies to pattern and practice allegations. Moreover, the EEOC
has not disputed that characterization or Bashas' reliance upon that standard.
Accordingly, for now, the court will adopt construction which the EEOC advances and
apply the Shell Oil standard.

1 is fairly lenient by any measure.

2 The Commissioner's Charge against Bashas' satisfies
3 that standard. It identifies "Hispanics" as the "group of
4 persons" the Commissioner "has reason to believe have been
5 discriminated against." See Manget Aff. (doc. 2-2),
6 attach. 1 thereto. The Charge also sets forth the alleged
7 methods of discrimination, *i.e.*, "failing to pay Hispanic
8 employees comparable wages to non-Hispanic employees and
9 failing to promote Hispanics into Management positions."
10 Id. Further, that Charge includes a time frame - "since
11 at least May 2004[.]" Id.

12 The Charge does not, however, as Bashas' emphasizes,
13 "identify the categories of employment positions
14 effected[.]" See id. At this point in the proceeding, the
15 court does not find that that omission renders the Charge
16 jurisdictionally defective, especially given that a charge
17 "is not the equivalent of a complaint initiating a
18 lawsuit." See id. at 68. The function of a charge
19 differs from that of a complaint in an adversary
20 proceeding. A Title VII charge "place[s] the EEOC on
21 notice that someone (either a party claiming to be
22 aggrieved or a Commissioner) believes that an employer has
23 violated the title." Id. The Commissioner's Charge
24 against Bashas' serves that function.

25 Likewise, there is no merit to Bashas' suggestion that
26 the Charge should have "indicat[ed] . . . which of
27 [Bashas'] 41,000 individuals have allegedly been subjected
28 to discrimination." Resp. (doc. 25) at 11:20-21.

1 Imposing a duty on the Commissioner to, among other
2 things, "specify the person discriminated against, . . .
3 would radically limit the ability of the EEOC to
4 investigate allegations of patterns and practices of
5 discrimination." Shell Oil, 466 U.S. at 70. Such a
6 specificity requirement, along with other requirements,
7 "would cut short most of [the EEOC's pattern and practice]
8 investigations[,]" which, as the Shell Oil Court found,
9 "would be manifestly inconsistent with Congress' intent."
10 Based upon the Shell Oil rationale, the court finds that
11 the Charge at issue herein is not jurisdictionally
12 defective because it does not specify the individuals
13 alleged to have been the subject of discrimination by
14 Bashas'. In short, the court is convinced that this
15 Charge meets the Shell Oil standard. Consequently, there
16 is no merit to Bashas' assertion that this court does not
17 have jurisdiction to enforce the May 28th subpoena because
18 the Charge does not provide it with adequate notice of the
19 allegations against it.

20 **E. Relevancy**

21 Lastly, Bashas' contends that the subpoena "seeks
22 information that is completely irrelevant to the
23 allegations of the Charge." Resp. (doc. 25) at 12:11-12
24 (emphasis omitted). Bashas' does not explicitly seek
25 denial of enforcement on that basis, although its response
26 could be so construed. The court therefore is compelled
27 to at least comment upon that assertion.

28

1 Most recently in Federal Express, the Ninth Circuit
2 reiterated, “[C]ourts must enforce administrative
3 subpoenas unless the evidence sought by the subpoena is
4 plainly incompetent or irrelevant to any lawful purpose of
5 the agency.” Federal Express, 558 F.3d at 854 (internal
6 quotation marks and citations omitted). Relevancy in
7 this context “is determined in terms of the investigation
8 rather than in terms of evidentiary relevance.” Id.
9 (citation omitted). “Moreover, the relevancy requirement
10 is ‘not especially constraining.’ Id. (quoting Shell Oil,
11 466 U.S. at 68) “The term ‘relevant’ is ‘generously
12 construed’ to ‘afford[] the Commission access to
13 *virtually any material that might cast light on the*
14 *allegations* against the employer.” Id. (quoting Shell
15 Oil, 466 U.S. at 68-69).

16 Given the expansive definition of relevancy in this
17 context, at least at this juncture, the court is unable to
18 find that the May 28, 2008 subpoena should not be enforced
19 because it is seeking information which, assuredly, is not
20 relevant to its investigation. Again, at least for the
21 moment, the court is satisfied that the subpoenaed
22 information, while perhaps “not necessarily relevant in an
23 evidentiary sense[,] . . . will help the EEOC craft
24 additional information requests that may produce evidence
25 of discriminatory treatment.” See id.

26 **F. Scope of Discovery**

27 Having found that Bashas’ is entitled to conduct
28 limited discovery, the court will further define the scope

1 of that discovery. Bashas' expressly sought leave to
2 serve written discovery requests upon the following:

3 [T]he EEOC, the named plaintiffs and plaintiffs'
4 counsel in the *Parra* action, including the Impact
5 Fund and Davis, Cowell & Bowe, as well as Jocelyn
6 Larkin, of the Impact Fund, and Elizabeth A.
Lawrence, of Davis, Cowell & Bowell [sic]
individually [firm] ... individually, and the
UFCW[.]”

7 Mot. (doc. 10) at 11:12-15. Bashas' shall be allowed to
8 serve written discovery requests upon the foregoing
9 entities and individuals, but the court is limiting the
10 scope of those requests. Bashas' seeks to obtain
11 “documents pertaining to any communications, information
12 or documents provided between the EEOC and these third
13 parties relating to this Commissioner's Charge or any
14 other charges currently under investigation by the EEOC.”
15 Id. at 11:15-18 (emphasis added). The documents which
16 Bashas' is seeking shall be limited to the Commissioner's
17 Charge dated May 9, 2007, which is the basis for the
18 EEOC's investigation and the issuance of the subpoena
19 which forms the basis for this enforcement action.
20 Bashas' shall not be allowed to obtain documents
21 pertaining to “any other charges currently under
22 investigation by the EEOC.” See id.

23 Bashas' also “seek[s] any documents relating to the
24 *Parra* litigation, which may or may not be subject to the
25 *Parra* court's confidentiality order, provided to the EEOC
26 by the *Parra* plaintiffs or their counsel.” Id. at 11:18-
27 20. The court will allow this discovery. It will not,
28 however, allow depositions without leave of court.

1 Bashas' anticipates completing this discovery within
2 six weeks. Given that Bashas' is seeking discovery
3 against multiple non-parties, the court will establish a
4 limitation on the time frame for service of discovery.
5 More specifically, Bashas' shall have twenty-five (25)
6 days from the date of entry of this order in which to
7 serve its written discovery requests. Response to those
8 requests shall be in accordance with the Federal Rules of
9 Civil Procedure and all other applicable legal authority.
10 Accordingly, Bashas' has six weeks from the date of entry
11 of this order in which to complete the discovery which the
12 court is permitting.

13 **Conclusion**

14 For the reasons set forth herein, the court hereby
15 ORDERS that:

16 (1) the "Application for an Order to Show Cause why an
17 Administrative Subpoena Should not be Enforced" (doc. 1)
18 filed by petitioner, the Equal Employment Opportunity
19 Commission, is DENIED without prejudice; and

20 IT IS FURTHER ORDERED that:

21 (2) the "Motion for Leave to Conduct Limited
22 Discovery" (doc. 10) by respondent, Bashas', Inc. is
23 GRANTED. Bashas' shall proceed with such discovery within

24 / / /

25


26

27

28

1 the parameters set forth herein, including the six week
2 time frame, which commences on the entry date of this
3 order.

4 DATED this 30th day of September, 2009.

5
6 
7 _____
8 Robert C. Broomfield
9 Senior United States District Judge
10
11
12
13
14
15
16

17 Copies to counsel of record
18
19
20
21
22
23
24
25
26
27
28