SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

Motion Sequence No. 004

Judge Andrea Masley

ORAL ARGUMENT REQUESTED

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR SPOLIATION SANCTIONS AGAINST DEFENDANT CHARTER

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Plaintiff EarthLink, LLC respectfully submits this Memorandum of Law in support of spoliation sanctions against Defendant Charter Communications Operating LLC.

PRELIMINARY STATEMENT

The central factual issue in this case is whether Charter used its call center communications with EarthLink Service Subscribers to spread false information about EarthLink and switch Service Subscribers from EarthLink to Charter internet service. Amended Complaint, Doc. 15 ¶¶ 12, 56. The best and ***only*** contemporaneous evidence of that alleged conduct is the calls themselves, which Charter records. However, nearly two years into this litigation—after months of discovery letter writing and conferrals concerning Charter's assertion of undue burden associated with production of these call recordings—Charter has informed EarthLink that it destroyed this evidence and continued to do so even after the filing of the Complaint and service of discovery requests in this action.

To be clear, (a) Charter records these calls, (b) Charter had ample notice of EarthLink's claims and the relevance of these calls to EarthLink's claims, (c) call recordings existed after Charter was on notice of the claims (including after service of EarthLink's Complaint and discovery requests), but (d) Charter nonetheless destroyed this evidence without informing either EarthLink or the Court. This is textbook spoliation and Charter should be sanctioned for its conduct and the prejudice caused to EarthLink.

Charter revealed that it destroyed the call recordings during a telephonic meet and confer conference on July 13, 2022. Charter stated that there are no recordings of calls between Charter and the Service Subscribers because the recordings were not saved as part of this litigation and, according to Charter, to do so would not have been practical or feasible. After repeated efforts by EarthLink to confer concerning Charter's retention and investigation of these matters, Charter has remained silent and EarthLink has no option but to raise this issue with the Court.

Charter's destruction of evidence was executed with a culpable state of mind and resulted in exceptional prejudice to EarthLink. Moreover, it appears that this type of conduct is commonplace at Charter as it has been recently sanctioned in multiple, separate matters, for similar conduct relating to the failure to suspend automated functions. *See infra* at Section III(A). To deter Charter from this conduct and address the prejudice to EarthLink, the Court should grant an adverse inference against Charter, preclude it from offering certain evidence and argument on summary judgment or at trial, and award EarthLink its costs and fees associated with Charter's destruction of evidence.

FACTUAL BACKGROUND

A. Charter Had Ample Notice of EarthLink's Claims and the Central Relevance of the Calls

EarthLink provided notice of its claims and the central relevance of the calls to Charter numerous times starting in August 2019 and continuing up and until the filing of the original complaint and service of document requests in September 2020. All during this time, Charter possessed recordings of calls with Service Subscribers but never took steps to preserve them and, in fact, destroyed the call recordings without informing EarthLink or the Court.

August 12, 2019 Email

In mid-2019, Charter stopped providing EarthLink granular customer level reporting of the revenue generated from the Service Subscribers. Doc. 15 ¶ 55. This hindered EarthLink's ability to monitor how many Service Subscribers were cancelling and why. *Id.* Around this time, EarthLink began receiving reports from Service Subscribers that Charter customer service representatives were making false and misleading statements on customer service calls to convince them to switch to Charter's branded internet service, Spectrum. Doc. 15 ¶¶ 56-58.

On August 12, 2019, EarthLink emailed Charter's management stating that EarthLink had discovered "very concerning" evidence that "Spectrum is trying to get customers to end their relationship with EarthLink." *See* Affirmation of Alexander Noble (Noble Aff.") (Doc. 139) Ex. 1 (Doc. 140).[1] On August 20, 2019, Charter responded that it was "certainly interested in hearing more about the customer complaints" referenced in EarthLink's email. *Id.*

In August 2019, recordings of calls with Service Subscribers existed and were in Charter's possession. However, Charter did not take any steps to preserve the recordings and allowed the calls to be deleted 120 days after they were recorded.

June 25, 2020 Email

In 2020, EarthLink surveyed Service Subscribers who had cancelled their EarthLink service. The respondents reported hearing misleading statements from Charter customer service representatives. *See* Ex. 2 (Doc. 141). On June 25, 2020, EarthLink detailed these findings in an email to Charter executive Michael Locke. *See id*. EarthLink gave seven examples of misconduct by Charter representatives and stated that this "evidence that Spectrum is making knowingly false statements about EarthLink" demonstrated that "Spectrum has been churning these customers for their own benefit" in violation of the HSSA. *Id.* Mr. Locke acknowledged receipt of this email and represented that he "will socialize accordingly" at Charter. *Id.*

In June 2020, recordings of calls with Service Subscribers existed and were in Charter's possession. However, Charter did not take any steps to preserve the recordings and allowed them to be deleted 120 days after they were recorded.

[1] Exhibits cited herein as "Ex." are attached to the Affirmation of Alexander Noble herewith.

July 27, 2020 Document Preservation Notice

On July 27, 2020, EarthLink's outside counsel sent Charter's General Counsel a Document Preservation Notice (the "Preservation Notice"). Ex. 3 (Doc. 142). The Preservation Notice states that EarthLink is investigating claims it may have against Charter and, *inter alia*, that "recordings of Spectrum's sales and service calls with EarthLink Service Subscribers" are at issue and must be preserved. *Id.* at 2. This Preservation Notice alone, and certainly coupled with the August 12, 2019 email and the June 25, 2020 email, provided sufficient notice to Charter of the likelihood of litigation and the obligation to preserve recordings of the calls.

In July 2020, recordings of calls with Service Subscribers existed and were in Charter's possession. Charter did not take any steps to preserve the recordings and allowed the recordings to be deleted 120 days after they were recorded.

August 10, 2020 Communications between Counsel

On August 10, 2020, Charter's Associate General Counsel, Cody Harrison, contacted EarthLink's outside counsel, acknowledged receipt of the Notice, and requested a telephone call to discuss preservation of the relevant materials. Ex. 4 (Doc. 143). On or about August 10, 2020, Mr. Marshall had a telephone call with Mr. Harrison, in which Mr. Harrison asked for guidance beyond the Preservation Notice as to the scope of EarthLink's claims. *See* Affirmation of Damien Marshall (Doc. 156) at ¶¶ 3-4. Mr. Marshall responded that the Preservation Notice was comprehensive as to EarthLink's potential claims and Charter should take all steps necessary to fulfill its preservation obligation. *Id*.

In August 2020, recordings of calls with Service Subscribers existed and were in Charter's possession. Charter did not take any steps to preserve the recordings and allowed the recordings to be deleted 120 days after they were recorded.

September 9, 2020 Complaint

On September 9, 2020, EarthLink commenced this action by filing its original Complaint specifically alleging that "Charter has secretly been using its call centers to target EarthLink's Service Subscribers and affirmatively mislead them about EarthLink and its service." Doc. 1 ¶ 32. The Complaint included detailed allegations of misconduct by Charter during its customer service calls with EarthLink's Service Subscribers. *Id.* at ¶¶ 36-40.

In September 2020, recordings of calls with Service Subscribers existed and were in Charter's possession. However, Charter did not take any steps to preserve the recordings and allowed the recordings to be deleted 120 days after they were recorded.

September 15, 2020 Discovery Requests

On September 15, 2020, EarthLink served its first document requests on Charter.[2] *See* Ex. 5 (Doc. 144). EarthLink's Request No. 8 specifically requested, "[a]ll documents relating to communications between Call Center employees and Service Subscribers, including all recordings or transcriptions of those communications." *Id.*

In September 2020, recordings of calls with Service Subscribers existed and were in Charter's possession. However, Charter did not take any steps to preserve the recordings and allowed the recordings to be deleted 120 days after they were recorded.

Taking all of the above, there can be no reasonable argument that Charter did not have notice of EarthLink's claims and the relevance of the call recordings to those claims.

[2] EarthLink amended these requests following the Court's April 7, 2022 Order (Doc. 68) and served them on April 8, 2022 as the First Set of Document Requests to Defendant.

B. Charter Made Representations Implying that the Audio Recordings Exist

Charter made repeated representations to the Court from October 2020 through September 2021, that the types of calls detailed in EarthLink's Complaint were outliers and liability could not be premised on a few "stray" comments. For example, in Charter's October 23, 2020 brief in support of its Motion to Dismiss, Charter characterized the customer service calls detailed in the Complaint as "***stray comments by [Charter] call center agents***," and argued that "[t]he prohibition on direct targeted marketing in the [HSSA] addresses formal marketing campaigns, not ***stray comments by unidentified call center representatives on 'routine service calls***.'" *See* Doc. 7 at 7, 17 (emphases added). Charter has made similar representations in nearly all of its filings and arguments before the Court in this matter.[3] By signing these filings, Charter's counsel certified pursuant to 22 NYCRR § 130.1-1a(b) that these representations were "to the best of [counsel's] knowledge, information and belief, formed after an inquiry reasonable under the circumstances," and "not frivolous as defined in section 130-1.1(c)." Pursuant to Section 130-1.1(c)(2)-(3), "conduct is frivolous if … it asserts material factual statements that are false" or it is "undertaken primarily to delay or prolong the resolution of the litigation."

C. Charter Did Not Disclose its Destruction of the Audio Recordings in its Responses to Earthlink's Discovery Requests

EarthLink's Discovery Requests specifically requested audio recordings of the calls and information from those calls. Ex. 6 (Doc. 145) (Interrogatories Nos. 13, 14); Ex. 7 (Doc. 146) (EarthLink First Document Requests No. 8).

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[3] *See* April 26, 2021 Charter Memorandum of Law (Doc. 56) at 6–8, 11–13, 15–19; July 1, 2021 Charter Reply Memorandum (Doc. 61) at 5–9, 11; September 17, 2021 Oral Argument Tr. (Doc. 65) at 3:10-11, 3:16-21; 5:12-18, 6:01-04; 6:05-11; May 13, 2022 Charter Answer and Counterclaims (Doc. 73) ¶¶ 4, 29, 30.

On June 24, 2022, Charter responded to the Discovery Requests refusing to produce the recordings or information regarding the recordings. Doc. 145, Doc. 146. The responses did not disclose that Charter had destroyed the recordings. Indeed, rather than disclose that recordings could not be produced because they had been destroyed, Charter objected to production on burden grounds, asserting that the volume of recordings was too great to collect, search, and produce. For example, Charter's response to EarthLink's request for documents concerning the calls, including recordings and transcriptions of the calls stated:

> Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request on the grounds that it is overbroad, unduly burdensome and not reasonably tailored to lead to the discovery of admissible evidence, and disproportionate to the needs of the case insofar as it seeks "[a]ll documents relating to communications between Call Center employees and Service Subscribers," regardless of whether such communications relate to any issues in this case. Charter further objects to the Request to the extent that it seeks transcriptions that have not been created and do not currently exist. Charter further objects to the Request on the grounds that it is duplicative of Requests Nos. 1, 2, 4 and 5.
>
> For the foregoing reasons, Charter will not produce documents and communications responsive to this Request. Charter adds that during the period requested, from January 1, 2017 to present, Charter's call centers received hundreds of millions of calls from subscribers, including both EarthLink and non-EarthLink subscribers.

Doc. 146 at 8-9.

In addition, Charter submitted ***verified*** interrogatory responses refusing to provide information related to the recordings on the grounds that the volume of calls presented too much burden (rather than disclosing that Charter had destroyed the recordings) stating:

> Charter is unable to respond to this Interrogatory on the grounds that a response is neither practical nor feasible. Charter employs or works with third-party contractors to staff its call centers. Depending on the nature of their issues, EarthLink Service Subscribers may have been routed to Charter's Inbound Sales and Retention ("IBS&R") group, or to its Customer Service representatives. IBS&R had 6,883 employees as of year-end 2019, and 7,892 employees as of year-end 2020. In addition, there were 18,674 customer service agents as of year-end 2019 and 20,044 customer service agents as of year-end 2020. During the period of January 1, 2019

> to January 1, 2021, those call centers fielded an average of around 20 million calls per month. Accordingly, Charter cannot respond to this Interrogatory.

Doc. 145 at 14.

Notably, Charter's response to Document Requests No. 8 (which requests both recordings and transcripts of the calls) expressly states that call transcripts "have not been created and do not currently exist," but made no such disclosure with respect to the recordings. Doc. 146 at 8-9. Given the statement regarding transcripts, it is reasonable to question whether Charter did not disclose that the call recordings had been destroyed in order to resist production of the recordings on the false basis of burden, hoping that the spoliation would not be revealed.

D. Charter Did Not Disclose Its Destruction of the Recordings in its Responses to EarthLink's Requests to Confer on the Matter

On June 23, 2022, EarthLink's counsel sent Charter's counsel a copy of the July 27, 2020 Preservation Notice, requesting that Charter "confirm that no materials relating to the allegations and issues in this case have been deleted or lost, including any audio files or recordings." Ex. 8 (Doc. 147) at 1-2.

On June 24, 2022, Charter "confirm[ed] that a legal hold was implemented shortly after the receipt of the letter," further stating that "***[i]f we learn that any documents, including audio files, were deleted or lost, we will update EarthLink accordingly***." Ex. 9 (Doc. 148) at 1-2 (emphasis added).

On June 29, 2022, EarthLink responded to Charter stating: "Charter has confirmed it has not deleted these calls and these calls are easily searchable for metadata as well as search terms," and requesting that Charter, "please detail how many calls from Service Subscribers Charter has during the time period of this interrogatory." Ex. 10 (Doc. 149) at 6.

Charter responded on July 7, 2022, stating that Charter had not confirmed that "it ha[d] not deleted these calls," Ex. 11 (Doc. 150) at 10, and objecting to the production of any information

regarding any Service Subscribers (other than the sixteen specifically identified by EarthLink) stating:

> At this time, Charter does not agree to produce documents and communications concerning Service Subscribers beyond the sixteen that EarthLink has thus far identified. Charter reiterates its position that collecting documents and communications related to the remaining Service Subscribers would be a substantial and unjustified burden on Charter.

Id. at 2. Again, given the chance to state that the recordings had been destroyed, Charter did not disclose that fact.

E. Charter Admitted Destruction of the Recordings

On July 13, 2022, counsel for Charter and EarthLink met and conferred on, among other things, EarthLink's requests for recordings of Charter's customer service calls with Service Subscribers. During the conference, Charter's counsel admitted that "there are no recordings between Charter and the Service Subscribers" because call recordings are automatically deleted after 120 days and "the recordings were not saved as part of this litigation." Noble Affirmation (Doc. XXX) ¶ 18; Ex. 13 (Doc. 152) at 3-4. Charter confirmed that has not preserved any recordings of its calls with the Service Subscribers from the year 2020 and before. *Id.* Charter stated that "Charter's customer recording preservation system automatically overwrites phone calls every 120 days," "after which time calls are automatically overwritten so as to make room to store recordings of subsequent calls." Doc. 152 at 3, 3 n.1.

On July 15, EarthLink asked Charter's counsel for further information detailing its earliest knowledge of the decision to keep auto-deletion polices active for the call recordings, any analysis of the decision and Charter's document hold, and preservation efforts. Ex. 14 (Doc. 153) at 3. On July 25, 2022, EarthLink again requested this information from Charter. Ex. 15 (Doc. 154) at 1-2. As of the time of this application, Charter has yet to provide a response. Charter continues to resist discovery on numerous issues (the subject of a separate, forthcoming motion), including the

collection and/or review of documents of the in-house Charter attorneys tied to the Preservation Notice and call recording destruction. *Id.* at 3.

ARGUMENT

II. CHARTER'S DESTRUCTION OF THE CALL RECORDINGS WARRANTS SPOLIATION SANCTIONS

"A party that seeks sanctions for spoliation of evidence must show (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, (2) that the evidence was destroyed with a 'culpable state of mind,' and (3) 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support the claim or defense.'" *Dantzig v. Orix Am Holdings, LLC*, 653368/2016, N.Y. Slip Op. 33030(U), at *16-17 (Sup. Ct., N.Y. Cty. Oct. 9, 2019) (Masley, J.); *accord RCSUS Inc.*, 2022 WL 831908, at *9-10; *Siras Partners LLC*, 2018 WL 1363411, at *4. Each of those elements is met here.

A. Charter Had Control over the Recordings and Was Obligated to Preserve Them at the Time of Destruction

1. Charter Does not Dispute its Control over the Audio Records, their Existence or their Deletion

Charter acknowledges that it made recordings of its calls with the Service Subscribers and subsequently deleted them. Noble Aff. ¶ 18; Doc. 153 at 1-2; Doc. 152 at 3-4. Charter has never objected that it lacked possession, custody or control over the recordings, nor could it. To the contrary, Charter's July 19 letter states that, during the relevant time period, Charter received and recorded millions of customer service calls, including from EarthLink customers, but they were overwritten at 120 days after the call, pursuant to "Charter's standard and longstanding practice." Doc. 152 at 3.

2. Charter Was Obligated to Preserve the Recordings at the Time of Their Destruction

A party is obligated to preserve documents when it has a "reasonable anticipation of litigation." *See VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 43 (1st Dep't 2012). "A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." *Id.* The receipt of a written document preservation notice is sufficient to trigger a duty of preservation. *See Dantzig*, N.Y. Slip Op. 33030(U),, at *17-18. Once the duty to preserve attaches, the party should issue a litigation hold and "suspend its routine document retention/destruction policy." *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). A party that reasonably anticipates litigation must preserve all documents that "it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Id.* at 217.

EarthLink first raised EarthLink's concerns regarding the calls on August 12, 2019. Doc. 140. Since then, EarthLink has repeatedly provided notice to Charter regarding the likelihood of litigation and the importance of the calls, including:

- EarthLink's June 25, 2020 email to Charter detailing specific misstatements on customer service calls that constituted a breach of the HSSA. Doc. 141;
- EarthLink's July 27, 2020 Preservation Notice sent to Charter's General Counsel specifically demanding preservation of the call recordings. Doc. 142;
- EarthLink's September 9, 2020 Complaint detailing EarthLink's claims and the central relevance of the calls. Doc. 1 ¶¶ 12, 36;
- EarthLink's September 2020 Requests for Production of Documents which specifically requested production of recordings of calls between Charter and the Service Subscribers. Doc. 144 at 8 (Document Request No. 8).

Charter cannot reasonably contest that it was on notice of the likelihood of litigation and the importance of the calls to the litigation. Indeed, even after this litigation commenced and document requests seeking production of the recordings were served, Charter failed to suspend the auto-deletion of the recordings. EarthLink's Complaint included detailed allegations related to Charter's misrepresentations made on the audio recordings, further demonstrating the centrality of the calls to the litigation. EarthLink's September 2020 Document Requests specifically requested the call recordings. Charter cannot deny it was on notice of the need to preserve these recordings.

B. Charter Destroyed the Audio Recordings with a Culpable State of Mind

"Spoliation sanctions ... are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense." *915 Broadway Assocs. LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 2012 WL 593075, at *6 (Sup. Ct., N.Y. Cty. 2012). Thus, "[a] culpable state of mind' ... includes ordinary negligence." *Id.*

Here, the intentionality of Charter's conduct is apparent. Charter was on notice of the need to retain the audio recordings but allowed the recordings to be destroyed by failing to suspend auto-delete functions. This included ongoing destruction ***during*** this litigation that was not disclosed to EarthLink or the Court for years thereafter. New York law is clear that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy." *VOOM*, 93 A.D.3d at 41.

Indeed, Charter's failure to suspend automatic-deletion functions constitutes willful spoliation of evidence. The *VOOM* case is instructive. There, the First Department affirmed the trial court's application of an adverse inference sanction where the trial court found the defendant's failure to halt auto-deletion of electronic data up to four months after commencement of the action constituted bad faith. *Id.*; *see also Mendez v. La Guacatala, Inc.*, 95 A.D.3d 1084, 1085 (2d Dep't

2012) (automatic 30-day over-writing of tapes after receipt of notice deemed willful or negligent spoliation and appropriate remedy would be negative inference as to destroyed tape); *Apple Inc. v. Samsung Elec. Co*., 881 F. Supp. 2d 1132, 1149 (N.D. Cal. 2012) (failure to turn off an email auto-delete function alone constituted willful spoliation); *Facebook, Inc. v. OnlineNIC Inc.*, 2022 WL 2289067, at *9 (N.D. Cal. Mar. 28, 2022) (spoliation of evidence qualifies as willful when the party has "some notice that the documents were potentially relevant to the litigation before they were destroyed."); *WeRide Corp. v. Kun Huang*, 2020 WL 1967209, at *10 (N.D. Cal. Apr. 24, 2020) (finding willfulness where defendant "left in place the autodelete setting on its email server … and maintained a policy of … wiping the computers of former employees").[4]

At a bare minimum, Charter's conduct was negligent. *Mendez*, 95 A.D.3d at 1085; *Strong v. City of New York*, 112 A.D.3d 15, 22 (1st Dep't 2013) (Negligent erasure or over-writing of audiotapes is sufficient for spoliation sanctions where the spoliator was "on notice that the [audiotapes] might be needed for future litigation."); *see also 915 Broadway Assocs. LLC*, 2012 WL 593075, at *10.

Under either standard, the requested sanctions are appropriately tailored and proportional to Charter's conduct regardless of its level of culpability. *See infra* Section II(B).

1. Charter's claimed burden of preserving the evidence does not excuse destruction of the audio recordings

Charter has not provided a justification for its destruction of evidence.[5] EarthLink can only presume Charter's objection to collecting and producing the calls due to burden in its

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[4] The Court may properly consider these federal authorities in applying New York common law spoliation standards because First Department law "adopt[s] the federal standard for spoliation in the context of electronic documents." *See Estee Lauder Inc. v. One Beacon Ins. Group, LLC*, 2013 WL 1703243, at *8 (Sup. Ct., N.Y. Cty. Apr. 12, 2013) (citing *VOOM*, 93 A.D.3d at 36).

[5] Charter has recently claimed in a letter (but not in its objections) that EarthLink is responsible for Charter's spoliation because EarthLink failed to identify its 50,000 subscribers within the hold

discovery responses is intended to justify failing to ***preserve*** this information. This argument fails for at least three reasons.

First, it is well-established that the purported burden of preserving data does not absolve a party from its preservation duties. *See Pippins v. KPMG LLP*, 279 F.R.D. 245, 255–56 (S.D.N.Y. 2012) (holding party receiving litigation hold was required to preserve hard drives regardless of burden until it reached agreement over sampling methodology or abandoned litigation position requiring data). Far from operating as a defense to its failure to preserve the call recordings, the volume of the recordings destroyed highlights the severity of Charter's conduct—Charter's spoliation significantly undermines EarthLink's ability to prove the numerosity of the Service Subscribers affected by Charter's misinformation campaign. Doc. 152 at 4.

Second, if a party claims that preservation of certain evidence would be unduly burdensome, that party "***still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.***" *See Sines v. Kessler*, 2021 WL 1208924, at *8 (W.D. Va. Mar. 30, 2021) (emphasis added). Any party who believes they "cannot fulfill this duty to preserve" must "give the opposing party notice of access to the evidence or of the possible destruction of the evidence." *Maldonado v. Hapag-Lloyd Ships, Ltd.*, 2015 WL 1966335, at *2 (E.D.N.Y. May 1, 2015). Here, Charter did not notify EarthLink that it planned to destroy the call recordings at any point prior to Charter's destruction of evidence. Thus, Charter's after-the-fact excuses for spoliation cannot absolve it.

Third, EarthLink has never demanded that Charter preserve every audio recording of every customer service call in its possession—EarthLink reasonably demanded that Charter preserve its

notice. Doc. 152 at 4. This argument is meritless and clearly contrived *ex-post*, long after deletion. Charter always had this information and was free to request it if it did not have it.

communications with the Service Subscribers. For this reason, Charter's dramatic claims that it received "140 million calls" within a seven-month period in 2020 miss the mark—Charter was not asked to preserve this volume of calls. Doc. 152 at 3.

2. Charter's lack of candor suggests a culpable state of mind.

Charter did not disclose its destruction of evidence up and until July 13, 2022, nearly two years after the initiation of this litigation. In fact, both Charter's formal responses to discovery requests and its correspondence with counsel did not disclose the destruction of the recordings.

First, Charter's responses to EarthLink's Discovery Requests, including verified responses to Interrogatories, objected to the production of the recordings on the basis or burden, giving the impression that the volume of call recordings was so great that it presented an undue burden on Charter to search for and produce the recordings. *See supra* at Section C. Indeed, Charter's discovery responses readily disclosed that transcripts of the calls "do not currently exist," but made no such disclosure with regard to the call recordings. Doc. 146 at 8-9. Moreover, Charter's ***verified*** interrogatory responses failed to disclose that these audio recordings had been destroyed years earlier and gave no indication that Charter had an automatic over-writing policy for the audio recordings, despite it being "Charter's standard and longstanding practice." Doc. 152 at 3.

Second, Charter did not disclose the destruction of the audio recordings after multiple direct questions on the matter from EarthLink's counsel and repeated follow-up requests during discovery in this action. *Supra* at Section D.

The Court can infer a culpable state of mind from this lack of candor. *See Harry Weiss, Inc. v. Moskowitz*, 106 A.D.3d 668, 669 (1st Dep't 2013) (holding that the spoliator's failure to "disclose to defendants that it had discarded the [spoliated] computer for almost two years" "evince[d] a higher degree of culpability than mere negligence.").

C. The Destroyed Audio Recordings Were Relevant Evidence

The relevance of the calls to this litigation is indisputable. EarthLink's primary claim is that Charter used its calls with EarthLink Service Subscribers to spread misinformation about EarthLink and convince the Service Subscribers to switch their internet service to Charter. Charter asserts that the allegations in EarthLink's Complaint reflect "stray" comments and do not have the numerosity to establish Charter's liability. Accordingly, both the actual statements made on the calls and the number of calls containing misrepresentations has been put directly at issue by Charter. Moreover, although a presumption of relevance is not necessary here given the obvious relevance of the calls, "[t]he relevance of the evidence will be inferred where it is 'destroyed either intentionally or as the result of gross negligence.'" *915 Broadway Assocs. LLC*, 2012 WL 593075, at *6 (quoting *Ahroner v. Israel Disc. Bank of N.Y.*, 79 A.D.3d 481, 482 (1st Dep't 2010)); *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D.3d 607, 609 (1st Dep't 2016).

In addition to being relevant, the call recordings are unique in that they are the ***only*** contemporaneous records of what was said by whom to whom on the calls. Charter cannot avoid sanctions by pointing to the availability of other potential evidence that EarthLink may use to support its claims—particularly self-serving evidence created by Charter's representatives after-the-fact. Other potential evidence faces evidentiary hurdles or is otherwise less trustworthy than the calls themselves.[6] As this Court recognized in *Siras Partners LLC*, a party's preservation of

[6] While EarthLink has evidence of Charter's misconduct from EarthLink's own calls with its Service Subscribers and EarthLink's Customer Notes, Charter will likely raise evidentiary objections and numerosity challenges thereto. Charter should be precluded from raising any such objections and numerosity challenges to EarthLink's evidence, including on any motion for summary judgment. *See Mangione v. Jacobs*, 37 Misc. 3d 711, 730 (Sup. Ct., Queens Cty. 2012) (collecting cases precluding a spoliating party from moving for summary judgment on grounds impacted by spoliation of evidence); *Gilchrist v. City of New York*, 104 A.D.3d 425, 426 (1st Dep't 2013) (same). Similarly, Charter will likely attempt to admit objectionable and self-serving evidence, such as its representatives' Customer Notes. *See* Noble Affirmation ¶ 19. Charter's

one form of relevant communications does not excuse their failure to preserve all other relevant communications. 2018 WL 1363411, at *5 (rejecting spoliating party's argument that its production of "25,000 pages of emails" mitigated failure to preserve relevant WeChat instant messages, holding that ***all communications via any form of media*** should have been preserved.") (emphasis added).

Finally, the Court should find that the call recordings would have supported EarthLink's claims, especially when the other available evidence supports such a finding. For example, although Charter provided customer service to the Service Subscribers regarding their internet services, EarthLink maintained its own call center to support separate products for the Service Subscribers, such as email. Recordings of EarthLink's call center calls capture a subset of Service Subscribers complaining about their experience with Charter's call centers—particularly Charter's misrepresentations and efforts to convince them to switch internet service providers. EarthLink preserved these call recordings and will produce calls responsive to Charter's document requests in accordance with the Court's scheduling order. These records support an inference that the recordings of Charter's calls would contain supportive evidence as well. *See VOOM,* 93 A.D.3d at 46-47 (handful of recovered "snapshot" emails evidencing relevant conduct was sufficient to infer spoliated emails would have also contained relevant evidence).

III. THE COURT SHOULD IMPOSE SANCTIONS ON CHARTER FOR ITS DESTRUCTION OF EVIDENCE AND NONDISCLOSURE OF THE SAME

The Court has broad discretion to fashion an appropriate spoliation remedy. *See* CPLR 3126; *Ortega v. City of New York,* 9 N.Y.3d 69, 76 (2007); *Utica Mut. Ins. Co. v. Berkoski Oil*

Customer Notes are no substitute for the audio recordings: they are Charter's self-serving, unilateral characterizations of their customer interactions, in which Charter's employees have no reason to record their own improper conduct, let alone record verbatim their misrepresentations about EarthLink. To the extent Charter argues this evidence is exculpatory, it must be precluded given Charter's spoliation. *See infra* at Section II(B).

Co., 58 A.D.3d 717, 718 (2d Dep't 2009). "In deciding whether to impose sanctions, courts look at the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness." *RCSUS Inc.*, 2022 WL 831908, at *9-10. Possible sanctions include employing an adverse inference, precluding proof favorable to the spoliator, and requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence. *See, e.g.*, *Ortega*, 9 N.Y.3d at 76 (collecting cases). The egregiousness of the behavior, as well as the need for deterrence are also factors to consider in fashioning relief. *Crocker C. v. Anne R.*, 58 Misc. 3d 1221(A), 2018 N.Y. Slip Op. 50182(U), at *18 (Sup. Ct. N.Y. Cty. 2018) (discussing the "punitive and deterrent purpose underlying the spoliation doctrine"); *accord West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 780 (2d Cir. 1999) ("trifold aims" of spoliation sanctions are: "(1) deterring future spoliation of evidence; (2) protecting the [injured party's] interests; and (3) remedying the prejudice [the injured party] suffered as a result of [spoliator's] actions.").

A. Charter's Pattern of Conduct Supports the Need for Significant Sanctions

Charter's conduct is egregious and any sanction should be severe enough to deter similar conduct in the future. *Crocker C. v. Anne R.*, 2018 N.Y. Slip Op. 50182(U) at *18 (discussing the "punitive and deterrent purpose underlying the spoliation doctrine"); *accord West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 780 (2d Cir. 1999) (spoliation sanctions serve "trifold aims of: (1) deterring future spoliation of evidence; (2) protecting the [injured party's] interests; and (3) remedying the prejudice [the injured party] suffered as a result of [spoliator's] actions.").

Charter has a history of inappropriately failing to suspend automatic records deletion policies and other automated functions during the course of litigation and has received sanctions for this conduct ranging from findings of contempt to precluding Charter from presenting impacted evidence and arguments. For example:

- Charter was previously found in contempt in its bankruptcy adversary dispute with Windstream, in part due to Charter's failure to suspend automatic-cancellation policies. *See In re Windstream Holdings, Inc.*, 627 B.R. 32, 41 (S.D.N.Y. Bankr. Apr. 8, 2021) (finding Charter violated bankruptcy court's automatic stay order by failing to halt "automatic nonpayment protocols" that resulted in unlawful terminations of services to Windstream's customers).

- On June 6, 2022, Charter was sanctioned by a Texas court for failing to suspend auto-deletion of surveillance video relevant to a negligent supervision action filed against Charter. *See Goff v. Roy James Holden Jr. and Charter Communications, LLC*, No. CC-20-01579-E, Order Granting Plaintiffs' Motion for Spoliation Jury Instructions and Sanctions (Dallas Cty. Ct. June 6, 2022), *writ denied In re Charter Communs.*, No. 05-22-00557-CV, 2022 Tex. App. LEXIS 3959, at *1 (Tex. App. June 9, 2022).[7]

- Charter has recently faced rebuke for failing to preserve documents after receiving litigation holds in prior cases. *See Warner Recs. Inc. v. Charter Commc'ns, Inc.*, 2022 WL 1567142, at *3 (D. Colo. May 18, 2022) (holding that Charter's failure to implement a litigation hold, resulting in deletion of relevant custodial data and documents, precluded Charter from disputing the numerosity of copyright notices in infringement action).

The recent *Goff* case is particularly on point. There, despite receiving a preservation notice from plaintiff's counsel, Charter failed to suspend "a retention policy that purges and deletes video surveillance from its system 30-31 days after the footage is recorded" that resulted in deletion of the video. Doc. 155 at ¶¶ 3, 5, 7, 11. The court found that "Charter knew the video would be deleted if not saved, but nonetheless allowed for its destruction," warranting adverse jury instructions that it spoliated the video. *Id.* at 11-12. Further, the court held Charter in contempt for refusing to comply with the court's discovery orders and committing "discovery abuses," warranting additional sanctions. *Id.* at 13. The Court should consider this history in determining an appropriate sanction. *See VOOM*, 93 A.D.3d at 46 (in spoliation cases, courts consider "events

[7] The Dallas County Court's sanctions order against Charter is attached as Ex. 16 (Doc. 155) to the Noble Affirmation.

which did not occur in the case proper but occurred in other cases…; to ignore a pattern of misbehavior ... would be blinking reality").

Charter's history of nondisclosure, years after commencement of the action, also warrants spoliation sanctions. *See Filatava v. Rome Realty Grp. LLC*, 93 A.D.3d 576, 576-575 (1st Dep't 2012) (striking spoliating defendant's answer where court held defendant willfully concealed its destruction of evidence for two years after the commencement of the action); *Moskowitz*, 106 A.D.3d at 669 (sanction precluding party from offering any trial evidence in opposition to other party's defenses and counterclaims where computer was destroyed almost two years into litigation and not revealed despite repeated requests for that information).

Absent a meaningful sanction, Charter will not be deterred from what appears to be a common practice of not suspending automatic delete functions or preserving evidence, despite legal obligations to do so.

B. The Sanctions EarthLink Requests are Tailored to Mitigate the Extreme Prejudice Suffered

The sanctions imposed must be fashioned to adequately mitigate the prejudice EarthLink has suffered. *Crocker C.*, 2018 N.Y. Slip Op. 50182(U) at *18 (Sanctions for spoliation must "place the innocent party in the same position he or she would have been in" absent spoliation). EarthLink proposes the below remedies designed to address these issues and do so expeditiously before additional discovery costs are expended.

The Court Should Grant an Adverse Inference. The Court should grant an adverse inference that Charter failed to prevent the destruction of relevant unique evidence for EarthLink's use in this case and that the destroyed evidence was favorable to EarthLink. *See Apple Inc.,* 881 F. Supp. 2d 1132 at 1146, 1151 (granting adverse inference instruction based on the defendant's failure to halt auto-delete); *Gogos v. Modell's Sporting Goods, Inc*., 87 A.D.3d 248, 251 (1st Dep't

2011) (granting adverse inference and noting that plaintiffs "should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes, particularly in view of the conflicting evidence in this case"); *Barsoum v. N.Y. City. Hous. Auth*., 202 F.R.D. 396, 401 (S.D.N.Y. 2001) (where a plaintiff lost a tape of a meeting between her and defendants, the jury would be allowed to draw an adverse inference against plaintiff regarding the meeting itself); *Dunn v. New Lounge 4324, LLC*, 180 A.D.3d 510, 510 (1st Dep't 2020); *Rokach v. Taback*, 148 A.D.3d 1195, 1196 (2d Dep't 2017); *Rodriguez ex rel. Rodriguez v. City of New York*, 2014 N.Y. Slip Op. 50828(U) at *2 (Sup. Ct., N.Y. Cty. May 29, 2014) (adverse inference charge warranted as spoliation of evidence sanction defendants failed to preserve video footage where defendant was on notice of the probability that the footage would be relevant to future litigation).

The Court Should Preclude Contrary Testimony or Argument by Charter. Charter should be precluded from arguing or offering evidence that the false statements are "stray" or otherwise lack numerosity. *See Warner Recs. Inc.*, 2022 WL 1567142, at *3 (holding that Charter's failure to implement a litigation hold, resulting in deletion of relevant custodial data and documents, precluded Charter from disputing the numerosity of copyright notices in infringement action). Similarly, the Court should overrule any potential objections by Charter to the admission of EarthLink's own evidence of its calls and customer notes.

The Court Should Grant Monetary Sanctions Against Charter. New York courts regularly assess monetary sanctions for costs and fees associated with a party's discovery abuses, including costs of a motion for sanctions. *See, e.g.*, *Knoch v. City of N.Y.*, 970 N.Y.S.2d 270, 271 (2d Dep't 2013). As a result of Charter's willful deletion and lack of disclosure of its deletion of the recordings, EarthLink has been forced to "devote extensive time and resources to trying to obtain the most basic discovery." *Am. Cas Card Corp. v. AT&T Corp.*, 184 F.R.D. 521, 525

(S.D.N.Y. 1999). Charter's destruction of evidence as well as its concealment of this fact and forcing EarthLink to counter misrepresentations at every juncture from multiple motions to dismiss to the court-ordered mediation, has been an undue expense. Moreover, the cost of dealing with the present motion and continuing discovery gamesmanship by Charter concerning these calls must be assessed. *915 Broadway Assocs. LLC*, 2012 WL 593075, at *12 (granting attorney's fees and costs incurred in making successful spoliation motion, noting that "there is ample authority for granting this relief" and collecting cases). Accordingly, Charter should be ordered to pay EarthLink's attorneys' fees and costs associated with this application, future discovery costs to overcome the effect of the spoliation, and all prior time spent defending against Charter's claims as to the "stray" nature of the calls in this litigation, and any time defending against Charter's continuing discovery tactics concerning the calls.

CONCLUSION

For the reasons set forth herein, EarthLink respectfully requests that the Court issue the spoliation sanctions requested against Charter, plus any other and further relief the Court deems just and proper.

Dated: New York, New York
July 28, 2022

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By: */s/ Damien Marshall*

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CERTIFICATION OF RULE 17 COMPLIANCE

I, Damien Marshall, certify that:

1. I am a partner at King & Spalding LLP, counsel for Plaintiff EarthLink, LLC.

2. I submit this Certification in accordance with Rule 202.70 of the Uniform Civil Rules for the Supreme Court of New York, Rule 17 of the Commercial Division, governing the length of papers and word count requirements.

3. In accordance with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), the foregoing Memorandum of Law contains no more than 7,000 words, excluding the parts of the document exempted by Rule 17.

4. To conclude that this Memorandum of Law satisfied the requisite word count, I relied upon the word-processing system used to prepare the document.

Dated: New York, New York
July 28, 2022

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