

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

AFFIRMATION OF ALEXANDER NOBLE

I, Alexander Noble, an attorney admitted to the practice of law before the courts of the State of New York, affirm the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am a Senior Associate in the law firm King & Spalding LLP, counsel for Plaintiff EarthLink, LLC (“EarthLink”). I am fully familiar with the facts and circumstances set forth herein. I submit this affirmation in support of EarthLink’s motion to dismiss defendant’s Counterclaims in this action.

2. Attached hereto as Exhibit 1 is a true and correct copy of Glenn Goad’s August 12, 2019 email to Michael Locke and responses thereto.

3. Attached hereto as Exhibit 2 is a true and correct copy of Michael Toplisek’s June 25, 2020 email to Michael Locke and responses thereto.

4. Attached hereto as Exhibit 3 is a true and correct copy of King & Spalding’s July 27, 2020 email to Charter’s General Counsel attaching a Document Preservation Notice.

5. Attached hereto as Exhibit 4 is a true and correct copy of Charter’s Assistant

General Counsel Cody Harrison's August 10, 2020 email to Damien Marshall requesting a telephone call to discuss the July 27, 2020 Document Preservation Notice.

6. Attached hereto as Exhibit 5 is a true and correct copy of the document requests EarthLink served on Charter on September 15, 2020.

7. Attached hereto as Exhibit 6 is a true and correct copy of Charter's Responses and Objections to EarthLink's First Set of Interrogatories.

8. Attached hereto as Exhibit 7 is a true and correct copy of Charter's Responses and Objections to EarthLink's First Set of Document Requests.

9. Attached hereto as Exhibit 8 is a true and correct copy of King & Spalding's June 23, 2022 letter to Charter's counsel concerning, among other things, Charter's preservation of the audio recordings.

10. Attached hereto as Exhibit 9 is a true and correct copy of Charter's counsel's June 24, 2022 letter responding to King & Spalding's June 23, 2022 letter.

11. Attached hereto as Exhibit 10 is a true and correct copy of King & Spalding's June 29, 2022 letter to Charter's counsel.

12. Attached hereto as Exhibit 11 is a true and correct copy of Charter's counsel's July 7, 2022 letter to King & Spalding.

13. Attached hereto as Exhibit 12 is a true and correct copy of King & Spalding's July 12, 2022 letter to Charter's counsel.

14. Attached hereto as Exhibit 13 is a true and correct copy of Charter's counsel's July 19, 2022 letter to King & Spalding.

15. Attached hereto as Exhibit 14 is a true and correct copy of King & Spalding's July 15, 2022 letter to Charter's counsel.

16. Attached hereto as Exhibit 15 is a true and correct copy of King & Spalding's July 25, 2022 letter to Charter's counsel. As of the time of this application, Charter has yet to provide a response to this letter.

17. Attached hereto as Exhibit 16 is a true and correct copy of the Dallas County Court's June 6, 2022 Order Granting Plaintiffs' Motion for Spoliation Jury Instructions and Sanctions against Charter. *See Goff v. Roy James Holden Jr. and Charter Communications, LLC*, No. CC-20-01579-E, (Dallas Cty. Ct. June 6, 2022), *writ of mandamus denied In re Charter Communs.*, No. 05-22-00557-CV, 2022 Tex. App. LEXIS 3959, at *1 (Tex. App. June 9, 2022).

18. During the July 13, 2022 meet and confer telephone call, in which I participated on behalf of EarthLink, Charter's counsel H. Gregory Baker stated that the EarthLink Service Subscribers calls were routed to Charter call centers, and were recorded for training purposes. Mr. Baker further stated that the calls, as part of Charter's normal practices, were saved for only 120 days, and that "the recordings were not saved as part of this litigation." Mr. Baker stated that, due to the foregoing, "there are no recordings between Charter and the Service Subscribers." Mr. Baker confirmed that "there are no customer calls from 2020 and before."

19. During the July 13 call, Mr. Baker further conveyed to me that Charter had preserved its "Customer Notes," which he explained are notes prepared by Charter representatives reflecting their characterizations of interactions with the Service Subscribers.


20. No prior application for the relief sought herein has been made to the Court.

21. The undersigned affirms that, prior to making this application, EarthLink engaged in good faith efforts to confer with Charter concerning the issues raised herein. On July 13, 2022

during the parties' telephonic met and confer, Charter's counsel revealed that the call recordings requested in EarthLink's discovery demands were destroyed. Due to this definitive statement from Charter about its inability to comply with EarthLink's discovery demands related to these call recordings, there is no other further avenue to pursue.

Dated: New York, New York
July 28, 2022

KING & SPALDING LLP

By: 
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Attorneys for Plaintiff EarthLink, LLC

CERTIFICATE OF LENGTH OF PAPERS
COMPLIANCE

The foregoing affirmation complies with Rule 17 of Section 202.70 of the Uniform Rules for the Supreme Court and County Court because it is less than 7,000 words.

Dated: July 28, 2022
New York, New York

KING & SPALDING LLP

By: 