SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

EARTHLINK, LLC, Plaintiff, v. CHARTER COMMUNICATIONS OPERATING, LLC, Defendant.	Index No. 654332/2020 Motion Sequence No. 004 Hon. Andrea Masley

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE FOR SPOLIATION SANCTIONS

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Defendant Charter Communications Operating, LLC ("Charter") submits this memorandum of law in opposition to the Order to Show Cause for Spoliation Sanctions ("OSC") by EarthLink, LLC ("EarthLink").

PRELIMINARY STATEMENT

The OSC should be denied for two principal reasons. First, EarthLink has suffered no prejudice because Charter has produced better evidence of the very call recordings that EarthLink claims were spoliated. Charter has, at a significant expense, now produced transcripts of approximately two-thirds of the calls between EarthLink service subscribers and Charter's customer service centers. Under applicable law, the extreme sanction of spoliation is not warranted where, as here, a party (EarthLink) is able to obtain the missing information through alternative sources. Second, even if Charter had somehow been able to preserve the recordings—which, as demonstrated below, would not have been feasible—the recordings would have provided very little value to EarthLink, as phone recordings are not text-searchable and they would have comprised over *16 million hours* of phone calls that would have literally taken hundreds of years to listen to.

The record also shows that, if EarthLink actually wanted Charter to preserve the handful of recordings that are relevant to its claims, it could have simply provided Charter the information necessary for Charter to preserve them. It did not. EarthLink claims that its pre-suit investigation revealed that Charter had defamed EarthLink in its communications with *specific* customers. But in the pre-suit preservation notice that EarthLink sent Charter in July 2020, it did not specify which customer calls to preserve. If EarthLink had provided such information, Charter could have acted to preserve the few recordings at issue

EarthLink also engages in a smear campaign against Charter and its counsel. It contends that Charter's hold notice was inadequate and its counsel misled EarthLink and this Court.

Charter's response to these baseless accusations should not be construed as dignifying them. The bottom line is that, upon receipt of the preservation notice from EarthLink, Charter promptly issued a hold notice that—under any measure of reasonableness—was appropriate. That is so because Charter was not obligated to preserve, and could not have preserved without undue burden, customer service calls. To do so, Charter would have needed to set up a new network architecture and an entirely new data storage facility. While EarthLink is correct that Charter did not inform it of the existence of the transcripts until July 28, 2022, that was not because of any grand scheme on Charter's part to hide the ball. The reality is that Charter has offices throughout the country, and despite its counsel's diligent efforts, it was not able to uncover the existence of the transcripts until July 2022. Importantly, when it did so, it immediately informed EarthLink. That much is undisputed. At the end of the day, EarthLink has not been prejudiced, and its smear campaign against Charter and its counsel is highly inappropriate.

BACKGROUND

I. The Charter-EarthLink Partnership Required Each Party to Service EarthLink Service Subscribers

The Charter-EarthLink contractual relationship resulted from a regulatory compromise struck in 2000 in connection with the merger of Time Warner Inc. ("Time Warner") and America Online, Inc. To obtain regulatory approval for the merger, Time Warner was required to sell its Internet service to competing Internet service providers, such as EarthLink, for resale to consumers. (Amended Complaint, Doc. 15 ¶¶ 25–30.) Accordingly, Time Warner and EarthLink entered into the High-Speed Service Agreement ("HSSA"), pursuant to which Time Warner sold EarthLink high-speed data service, which EarthLink then branded as its product and sold to consumers. (*Id.* ¶¶ 29–30.) As a result of Charter's acquisition of Time Warner in 2016, the HSSA was assigned to Charter, which, on October 31, 2017, elected its right to terminate the HSSA upon

EarthLink's acquisition by another company, Windstream. (*Id.* ¶ 43.) However, under the terms of the HSSA, the Charter-EarthLink partnership continued through a three-year transition period until October 31, 2020. (*Id.* ¶ 43.)

During this wind down period, Charter and EarthLink were both required to provide customer service to EarthLink service subscribers (who were, in effect, receiving Charter's Internet). (*Id.* ¶ 11.) Specifically, Charter handled calls related to its system facilities, installation services, and its own billing, and EarthLink handled calls related to EarthLink software, web and email support, and its own billing. (*See* Doc. 85 § 7.1.)

II. Charter Receives a Staggering Volume of Customer Calls

Even though Charter gave notice of termination to EarthLink on October 31, 2017, Charter was required to continue servicing existing EarthLink subscribers until October 31, 2020. (Amended Complaint, Doc. 15 ¶ 51.) At this time, there were more than 40,000 EarthLink subscribers who received their high-speed internet through Charter. (*Id.* ¶¶ 51, 64.) Therefore, for three years, tens of thousands of EarthLink service subscribers, along with more than 30 million Charter subscribers, called into Charter customer call centers for questions on billing, technical, and other issues. (*Id.* ¶ 49.)

In 2020, Charter call centers received, on average, more than 20 million calls per month. (Affirmation of David Hosein ("Hosein Aff.") ¶ 6.) The average call lasted approximately seven to eight minutes, which translates to approximately *160 million minutes* per month. (*Id.*) Just a single day's worth of recordings requires *10,000 gigabytes* of storage. (*Id.* ¶ 7.)

III. EarthLink Sends Charter a Broad Preservation Notice Without Specifying Customer-Specific Information

As the HSSA approached its termination, EarthLink—now owned by a private equity firm—placed significant pressure on Charter to continue the parties' relationship, which had been

highly lucrative for EarthLink. Charter rebuffed EarthLink's repeated requests. Accordingly, on July 17, 2020, EarthLink sent Charter a preservation notice, notifying Charter that EarthLink was investigating potential claims against Charter concerning alleged breaches of the HSSA. (*See* Doc. 142.[1]) EarthLink's notice stated that Charter should preserve all documents and communications relating to the parties' relationship, including "*all* currently existing recordings of Spectrum's sales and service calls with EarthLink Service Subscribers." (*Id*. (emphasis added).)

Importantly, at the time it sent the preservation notice, EarthLink admittedly knew the identity of the sixteen specific EarthLink subscribers who allegedly received misleading statements from Charter customer service representatives. But the preservation notice failed to specify any information, such as customer account numbers or dates and times of the allegedly defamatory phone calls, that would have permitted Charter to preserve the specific recordings. (*Id*.) In fact, two years passed before EarthLink actually disclosed the identities of the allegedly aggrieved customers, and then only in response to Charter's interrogatories. (Ex. C at 9–12.[2])

IV. Charter Implements a Reasonable Hold Notice

On August 7, 2020, Charter issued a reasonably tailored litigation hold notice, instructing that documents relating to the litigation be preserved including documents related to communications between Charter and EarthLink customers, marketing and advertising of

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[1] EarthLink now takes the position that Charter should have anticipated litigation based on a routine business email sent in August 2019. (*See* Doc. 157 at 3, 11.) But the email, on its face or between the lines, did not threaten or otherwise reasonably alert Charter of potential claims by EarthLink. Moreover, the fact that EarthLink later followed up with a preservation notice on July 17, 2020, confirms that it also understood that its prior correspondence did *not* trigger the duty to preserve. Otherwise, there would be no need to send a preservation notice.

[2] References to "Ex_" are to exhibits annexed to the accompanying affirmation of H. Gregory Baker ("Baker Aff."), dated Aug. 29, 2022.

EarthLink high-speed services, and transitioning of EarthLink customers to EarthLink. (Ex. B.) The hold notice was periodically reissued. (*Id.*)

Because of the high volume of calls and the size of those recordings, Charter's standard procedure is to override audio recordings after a period of 120 days. (Hosein Aff. ¶ 7.) The litigation hold did not affect this override.[3] That is so because, to store millions of additional recordings, Charter would have needed to build an entirely new storage system. (*Id.* ¶ 8.) This process would have taken months. (*Id.*)

EarthLink now claims that it is only seeking calls with EarthLink subscribers and thus the burden of preserving the recordings would have been minimal. Not true. The burdens associated just with identifying recordings of calls that had already occurred in the prior 120 days from the time Charter received EarthLink's preservation notice would have been unduly burdensome. Under Charter's call recording management system, recordings of calls from EarthLink subscribers are not identified as such or segregated from calls with Charter subscribers (because EarthLink subscribers were in effect receiving Charter's Internet). (*Id.* ¶ 9.) In fact, it is not always apparent to Charter customer service representatives that they were speaking to an EarthLink subscriber. In order to identify and preserve the recordings with EarthLink subscribers, Charter

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[3] EarthLink claims that Charter "did not disclose its destruction of evidence." (Doc. 157 at 15.) To the contrary, Charter has been forthright about the existence of the call recordings. At no point did Charter mislead EarthLink into thinking that the recordings were preserved. (*See* Ex. D ("confirm[ing] that a legal hold was implemented shortly after the receipt of the [preservation notice]," that Charter's document review is ongoing, and that if Charter learns "that any documents, including audio files, were deleted or lost, [it] will update EarthLink accordingly"); Ex. E at 2 (objecting to EarthLink's request for production and reiterating "that collecting documents and communications related to the remaining Service Subscribers would be a substantial and unjustified burden on Charter"). Given the size of the organization (more than 90,000 employees serving tens of millions of customers) and the complexities of its servers and data storage, Charter had to verify that it no longer had the customer recordings before confirming that fact to EarthLink. (Baker Aff. ¶¶ 7–9.)

would have needed to *manually* search the database of recordings for the tens of thousands of EarthLink subscribers *one by one*. (*Id.* ¶ 10.) With millions of calls in that database, that process would have taken thousands of hours.

V. Charter Produces Transcripts for an Overwhelming Majority of Calls

Beginning in March of 2020, for training purposes, Charter began systematically transcribing and storing approximately two-thirds of all customer service calls, including calls with EarthLink subscribers, on a random basis.[4] Under the process, every day, approximately two-thirds of all recordings from the call centers were randomly selected and transmitted to a third-party vendor for transcription. (Affirmation of David Heath Smith ("Smith Aff.") ¶¶ 2–6.) This selection represents roughly 54,500 hours of recordings per day. (*Id.* ¶ 4.) *All* of these transcripts have been preserved. (*Id.* ¶ 6.) Furthermore, these transcripts can be easily identified by customer and downloaded such that they become text-searchable. (*Id.* ¶ 7.)

Charter has now produced approximately *104,000* transcripts of calls between Charter customer representatives and EarthLink service subscribers covering the relevant time period. If, as EarthLink claims, Charter engaged in a widespread campaign to disparage EarthLink and steal its customers, that evidence should be readily apparent from the 104,000 transcripts that have been produced.

EarthLink complains that Charter did not inform EarthLink of the transcripts for several months. But the reality is that Charter's counsel also did not know about the transcripts. Charter is a company of more than 90,000 employees and its processes, including the audio recording and transcription processes, are organized in dozens of separate workstreams. Consequently, Charter's

[4] Prior to March 2020, Charter did not have a process in place to transmit and retain all of the transcriptions. (*See* Smith Aff. ¶ 6.) Accordingly, Charter has produced a smaller number of transcripts from this period.

counsel did not learn until around July 20, 2022, that although the call recordings had not been preserved, approximately two-thirds of all inbound calls, including calls with EarthLink subscribers, were automatically transcribed and these transcripts had likely been retained. (Baker Aff. ¶¶ 8–9.) Shortly thereafter, Charter was able to confirm both the existence of the call transcripts, and its counsel was in the process of drafting a letter to notify EarthLink's counsel of this development. (Ex. G.) But EarthLink jumped the gun and filed the OSC.

Upon receipt of the OSC Charter immediately wrote to EarthLink explaining that it had located the relevant transcripts, and that their existence vitiated the need for any action by the Court. (*Id*.) Charter explained that it was in the process of segregating the Charter customer transcripts from the EarthLink customer transcripts, "which is a laborious task, given that there were 40,000 plus EarthLink customers from March 2020 to October 2020." (*Id*.) Charter also explained that the transcripts, which have now been produced to EarthLink, are the best evidence of what was said on customer calls. Unlike the recordings, the transcripts are text-searchable and it is possible to segregate the EarthLink customers from Charter customers. (Smith Aff. ¶ 7.) Indeed, even if Charter had produced every single recording, the recordings would *not* have been text-searchable and they would have been so voluminous as to be essentially useless. To put the call volume in perspective, the average call lasted roughly 8 minutes. At the conservative rate of 20 million calls per month, EarthLink's motion concerns more than *1,800 years'* of call recordings. It would have taken 1,000 attorneys reviewing 10 hours of recordings per day more than 1,500 days to listen to these recordings. Nonetheless, EarthLink proceeded with its application even when informed of these facts.

ARGUMENT

I. Charter's Obligation to Preserve was Triggered on July 27, 2020

A party moving for spoliation sanctions has the heavy burden of showing that the party who controls the evidence "possessed an obligation to preserve it at the time of its destruction[.]" *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015) (citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)) (internal quotation marks omitted). The preservation requirement arises only "when a party 'reasonably anticipates litigation.'" *Mastr Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Secs. Inc.*, 295 F.R.D. 77, 82 (S.D.N.Y. 2013) (quoting *Orbit One Commc's, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010)).

EarthLink takes the remarkable position that Charter's duty to preserve was triggered in August 2019 by a routine business email. (*See* Doc. 157 at 3, 11.) Specifically, EarthLink points to an email from an EarthLink executive to a Charter executive, noting "[w]e have been getting customer calls/emails that are very concerning. It appears [Charter] is trying to get customers to end their relationship with EarthLink. I can share more when we talk." (Doc. 140.) But in the email, the Earthlink executive did not threaten or otherwise indicate that EarthLink was asserting a claim. To the contrary, the executive indicated a desire by EarthLink to amicably resolve the issue through a meeting of the type that the parties held on a routine basis. (*Id.* ("I wanted to get some time on your calendar to discuss our partnership. There are a few items that make sense for us to discuss and figure out.").) Thus, the email is a far cry from the type of action that could reasonably put Charter on notice of a litigation. It would betray common sense to require a business to foresee litigation and preserve documents in response to this type of a communication from a business partner.

In reality, the earliest that Charter's preservation obligation was triggered was July 27, 2020, when Charter received EarthLink's preservation notice. *See, e.g*, *Karsch v. Blink Health Ltd.*, No. 17-CV-3880, 2019 WL 2708125, at *18 (S.D.N.Y. June 20, 2019) (duty to preserve began when plaintiff sent a "demand letter . . . threatening litigation"); *Ottoson v. SMBC Leasing & Fin., Inc.*, 268 F. Supp. 3d 570, 581 (S.D.N.Y. 2017) (obligation to preserve was triggered when plaintiff's counsel "sent a demand letter to Defendants threatening litigation"). If EarthLink truly believed that its prior correspondence triggered an obligation to preserve on Charter's part, there would have been no need for it to send the preservation notice.

Since Charter's standard business practice was to retain recordings for 120 days, the earliest recordings available as of July 27, 2020, were from March 29, 2020. (Hosein Aff. ¶ 7.) Any recordings prior to March 29, 2020 would already have been overridden. (*Id*.) Thus, the only recordings at issue in this motion are the recordings from the time period after March 29, 2020. And certainly, there are no relevant recordings from after October 31, 2020, because that is when the HSSA ceased to be effective. As demonstrated, Charter has produced transcripts covering two-thirds of *all* calls with EarthLink subscribers from the post-March 29, 2020 time period.

II. Charter Was Not Obligated to Preserve More than 140 Million Audio Recordings

A party moving for spoliation sanctions must show "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 that claim or defense." *Pegasus Aviation I, Inc*, 26 N.Y.3d at 547 (citing *Zubulake*, 220 F.R.D. at 220) (internal quotation marks omitted). Relevance may be established by (1) a showing that the party responsible for the evidence's destruction acted with a sufficiently culpable state of mind or (2) extrinsic evidence showing that the missing evidence would have been favorable to the moving party. *Id.*

Importantly, even when a duty to preserve arises, a party is not required to preserve every shred of paper and every email. *See Zubulake,* 220 F.R.D. at 217. That is so because reasonableness is the hallmark of e-discovery. Thus, even where the duty to preserve documents would have otherwise been triggered, courts have refused to find a duty to preserve or issue sanctions where preservation would be unreasonable or impracticable. *See Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004), *order clarified*, No. 00 CIV. 5141, 2005 WL 1514284 (S.D.N.Y. June 24, 2005) (holding that preservation of ephemeral data would require "heroic efforts far beyond those consistent with [a party's] regular course of business"); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316, 2006 WL 3851151, at *2 (S.D.N.Y. Dec. 22, 2006) (holding company had no additional duty to install equipment to preserve chat room messages); *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, No. 13 CIV. 816, 2015 WL 5769943, at *8 (S.D.N.Y. Oct. 2, 2015) (there was no obligation to preserve where, among other considerations, the "demand for preservation was breathtakingly broad"). "[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy *unique*, relevant evidence that might be *useful* to an adversary." *Williams v. N.Y.C. Transit Auth.*, No. 10 CV 0882, 2011 WL 5024280, at *3 (E.D.N.Y. Oct. 19, 2011) (quoting *Zubulake*, 220 F.R.D. at 217 (emphases added)).

John Wiley is instructive on the issue. There, the plaintiffs, a group of textbook publishers, sued the defendant, a bookseller, for sales of allegedly "pirated" textbooks. *John Wiley & Sons, Inc.*, 2015 WL 5769943, at *1. After the plaintiffs learned the defendant was selling pirated textbooks, they sent a cease-and-desist letter and demanded that the defendant preserve its entire inventory of potentially-infringing textbooks. *Id.* at *3. The court found that even though the letter demanded retention of "all" books, "defendants could not have been expected to preserve

indefinitely every single textbook in their inventory." *Id.* at *8. Further, the court found that the letter did not "impose an obligation even as to any counterfeit books," because they had "minimal evidentiary value." *Id*.

EarthLink's position here is more absurd than that advanced by the plaintiff in *John Wiley*. Abiding by EarthLink's preservation demand would have required Charter to preserve more than *140 million* recordings amounting to more than one billion minutes. (*See* Hosein Aff. ¶ 6.) Further, to identify which recordings were associated with EarthLink subscribers, Charter would have been obligated to: (i) undertake a manual process to identify which of the individual 60 million recordings from the prior 120 days related to an EarthLink subscriber; and (ii) for incoming calls, after they were recorded, search the recordings on a monthly basis to figure out which related to one of the more than 40,000 EarthLink subscribers—a process which would have taken thousands of hours. (*Id.* ¶¶ 9–10.)

Further, just to store these recordings, Charter would have needed to upgrade its storage and recording database—an arduous process that would have taken months and cost millions of dollars. (*Id.* ¶ 8.) Without a new storage system, preserving the recordings would have placed Charter's recording storage system and related operations at risk. (*Id*.) Under any measure of reasonableness, these efforts are unreasonable and thus not required. *See Convolve, Inc.*, 223 F.R.D. at 177 (preservation does not require "heroic efforts far beyond those consistent with . . . regular course of business").

And that says nothing about the burdens that Charter would have incurred to produce the recordings (if they had been retained) in a manner that complied with federal law prohibiting cable operators such as Charter from disclosing personally identifiable information ("PII") related to a consumer. Specifically, under the Cable Act, "a cable operator shall not disclose personally

identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned . . . ." 42 U.S.C. § 551(c)(1). To produce the recordings *with* the PII, Charter would have needed to notify more than 40,000 customers—a task that is highly burdensome and time-consuming—and provide them with an opportunity to object to the disclosure. To produce the recordings *without* the PII, Charter would have needed to hire hundreds of lawyers who would have had to listen to years of recordings and override the PII with white noise. That is both impractical and unduly burdensome.

And if Charter had produced the recordings to EarthLink, they would have been so voluminous as to be worthless for EarthLink. EarthLink would have needed to review more than *1,800 years* of recordings. Therefore, EarthLink's position cannot be correct, where the transcripts produced to EarthLink contain the same information as the recordings. This is particularly true given that EarthLink had information (i.e., the identity of the sixteen customers) that would have considerably eased Charter's preservation burden. But EarthLink failed to provide that information in its preservation notice to Charter.

III. EarthLink Fails to Demonstrate that Charter Acted With a Culpable State of Mind

To prove spoliation, the moving party must demonstrate that the evidence was "destroyed with a culpable state of mind." *Zubulake,* 220 F.R.D. at 220 (internal quotation marks omitted). Contrary to EarthLink's claims, Charter's preservation efforts did not constitute willful or even negligent spoliation of evidence. Upon receipt of EarthLink's preservation notice, Charter took all necessary, reasonable steps to issue a litigation hold and preserve all relevant emails and other ESI. (Ex A; Ex. B; *see* supra 4–5.) With the exception of these recordings, EarthLink has not identified any deficiencies in Charter's preservation efforts.

IV. Earthlink Has Not Suffered Prejudice

"In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness." *Duluc v. AC & L Food Corp.*, 119 A.D.3d 450, 451–52 (1st Dep't 2014). A party seeking sanctions has the burden of establishing prejudice as a result of the improper disposal of evidence. *See, e.g.*, *Kirschen v. Marino*, 16 A.D.3d 555, 556 (2d Dep't 2005) ("The gravamen of this burden is a showing of prejudice."); *Richard Green (Fine Paintings)*, 262 F.R.D. 284, 291 (S.D.N.Y. 2009) (sanctions should be tailored according to the "prejudice suffered by the party seeking sanctions" and "the severity of the sanctions imposed should be congruent with the destroyer's degree of culpability"). To establish prejudice, it "is not enough" that "the destroyed evidence would have been responsive to a document request." *Field Day, LLC v. Cnty. of Suffolk*, No. 04-2202, 2010 WL 1286622, at *14 (E.D.N.Y. Mar. 25, 2010). Critically, "where the missing information has been obtained from other sources, courts have been reluctant to find that the moving party has suffered prejudice." *Distefano v. L. Offs. of Barbara H. Katsos, PC*, No. CV-112893, 2017 WL 1968278, at *25 (E.D.N.Y. May 11, 2017); *see also Field Day, LLC*, 2010 WL 1286622, at *14 ("[I]t is unclear that Plaintiffs suffered any prejudice as destroyed documents apparently have been otherwise obtained."). In "determining the appropriate sanction, a court should strive to impose the least harsh sanction which would serve as an adequate remedy." *Quraishi v. Port Auth. of N.Y. & N.J.*, No. 13 CIV. 2706, 2015 WL 3815011, at *8 (S.D.N.Y. June 18, 2015). Spoliation sanctions are not warranted where, as here, the movant does not demonstrate prejudice. *Thomas v. City of N.Y.*, 9 A.D.3d 277, 278 (1st Dep't 2004) (no sanctions where "[p]laintiff fail[ed] to show that the unavailability of the [evidence] will substantially hinder his ability to prove [his case]").

Contrary to EarthLink's claim that the call recordings "are the ***only*** contemporaneous records of what was said by whom to whom on the calls" (Doc. 157 at 16.), the transcripts that Charter produced provide are *better* evidence because, unlike the recordings, they are text-searchable. EarthLink cannot credibly claim that the recordings are the only contemporaneous records before it has even reviewed Charter's document production. EarthLink alleges that Charter engaged in a widespread campaign to disparage EarthLink and steal its customers. Even if one-hundred percent of the recordings that EarthLink seeks are no longer available, the 104,000 randomly-selected transcripts provide EarthLink with the means to make its arguments. Since EarthLink has not been deprived of the means to prove its case, no spoliation sanctions are justified. *See Favish v. Tepler*, 741 N.Y.S.2d 910, 911 (2d Cir. 2002) (The "record does not demonstrate that the loss of the [evidence] will fatally compromise the defense . . . or leave the defendants without the means to defend the action.").

Rather than address the facts of this case, EarthLink argues that the Court should impose spoliation sanctions based on a purported "pattern" of alleged spoliation by Charter in other cases. (Doc. 157, at 18-20.) None of the cases that EarthLink relied upon bear any resemblance to the circumstances of this case. *In re Windstream Holdings, Inc*., 627 B.R. 32, 41 (S.D.N.Y. Bankr. 2021), involved allegations of terminations of connectivity services to certain customers in violation of an automatic stay in a bankruptcy proceeding. It had nothing to do with records deletion or allegations of spoliation of evidence. *Goff v. Roy James Holden, Jr.*, No. CC-20-01579-E (Dallas Cty. Ct. June 7, 2022), involved a criminal murder investigation and partial deletion of unique video footage for a specifically-identified 24-hour period, not an open-ended demand to preserve millions of call recordings indefinitely. (*See* Doc. 155 at 1.) And *Warner Records Inc. v. Charter Communications, Inc*. contradicts EarthLink's position because the *Warner Records*

court declined to impose any spoliation sanction. 2022 WL 1567142, at *4 (D. Colo. May 18, 2022) ("Judge Hegarty expressly stated that he did not view these recommendations as a sanction for spoliation… I agree."). To the contrary, the court found "no convincing evidence of wrongful intent" and that it was "not surprising" that certain emails were inadvertently deleted "given the enormity of the documentation potentially relevant to this and to similar cases." (*Id.* at *5.) In this case, Charter has produced transcripts of the recordings that Earthlink complains have been deleted. EarthLink's claims of prejudice ring hollow in light of Charter's production, which EarthLink did not wait to review before it rushed to file its baseless motion.

CONCLUSION

For the foregoing reasons, Charter respectfully requests that the Court deny EarthLink's motion for order to show cause for spoliation sanctions.

Dated: New York, New York
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CERTIFICATION OF RULE 17 COMPLIANCE

I certify that this brief contains 4,608 words, as measured by the word count of the word-processing software (Microsoft Word) used to prepare the document.

Dated: New York, New York
August 29, 2022

/s/ Devon Hercher
Devon Hercher