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 **Oral Argument Requested**

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SPOLIATION SANCTIONS AGAINST DEFENDANT CHARTER

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Plaintiff EarthLink, LLC respectfully submits this reply in support of its motion for spoliation sanctions against Defendant Charter Communications Operating LLC.

PRELIMINARY STATEMENT

Charter's opposition confirms: (1) Charter had a duty to preserve relevant evidence upon receipt of EarthLink's July 27, 2020 hold notice; (2) Charter consciously disregarded EarthLink's pre-suit notice to preserve audio recordings of calls with EarthLink customers and continued deleting calls even after litigation commenced; and (3) the recordings were relevant evidence. This establishes spoliation and mandates sanctions. Charter's counterarguments fail.

First, Charter's admission that it ***intentionally*** destroyed the recordings confirms that Charter acted with the requisite state of mind.

Second, contrary to Charter's suggestion that the burdens of preserving the recordings justify its decision to delete them, the law is clear that a party cannot ***unilaterally*** destroy relevant evidence based on burden without providing the other side with advance notice and the opportunity to inspect or preserve the evidence. In any event, Charter's burden allegations are overstated. EarthLink never demanded that Charter retain "140 million" recordings. Rather, this motion involves roughly 130,000 EarthLink calls (based on Charter's estimates) that Charter chose to destroy.

Third, Charter's late-produced sample of "transcripts" of the audio recordings fails to cure the significant prejudice to EarthLink caused by the destruction of the recordings. Indeed, there are no audio recordings of any calls, there are no "transcripts" of the recordings for at least 43,000 calls (roughly one-third of the estimated calls), and the transcripts that were produced are riddled with errors rendering them largely unusable.

ARGUMENT

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

EarthLink's opening brief, Dkt. 157, demonstrates that EarthLink has met all three elements to establish spoliation: (1) Charter had control over the recordings and an obligation to preserve them at the time of destruction; (2) Charter destroyed the recordings with a culpable state of mind, and (3) the recordings were relevant to and could support EarthLink's claims. *See 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). Charter's opposition brief fails to undermine this showing.

A. Charter Was Obligated to Preserve the Call Recordings.

Charter admits it recorded its calls with EarthLink customers. Dkt. 183 ¶ 4. Charter was required to preserve those audio recordings once it reasonably anticipated litigation. *See VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 43 (1st Dep't 2012); Dkt. 2.[1] At that point, Charter was required to "suspend its routine document retention/destruction policy." *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). "While a litigant is under no duty to keep or retain every document in its possession[,] it ***is*** under a duty to preserve what 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 (cleaned up; emphasis added).

[1] Charter argues it had no duty to preserve prior to receiving EarthLink's July 27, 2020 document preservation demand. Dkt. 174, at 8–9. Assuming that were correct, Charter nonetheless destroyed all call recordings from March 29, 2020 through May 12, 2020 after receiving EarthLink's preservation demand. *See id.* at 9. And Charter destroyed all call recordings from May 13, 2020 through October 31, 2020 ***after EarthLink served Charter with the complaint in this litigation***. *See* Dkt. 2 (service on September 10, 2020); Dkt. 183 ¶ 7 (calls saved 120 days prior to deletion).

While Charter makes assertions about the burden of identifying and preserving the audio recordings,[2] the cases uniformly hold that claimed burdens do not absolve a party from its preservation duties. *See* Dkt. 157, at 14 (citing *Pippins v. KPMG LLP*, 279 F.R.D. 245, 255–56 (S.D.N.Y. 2012) (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)); *Weissman v. TD Bank, N.A.*, No. 403206/2010, 2013 WL 7085415, at *2, *6 (N.Y. Sup. Ct. Dec. 18, 2013) (granting adverse inference where defendant deleted full day video recording but asserted "the full day video was difficult and expensive to isolate and maintain"); *see also Sines v. Kessler*, 2021 WL 1208924, at *8 (W.D. Va. Mar. 30, 2021).

In response, Charter relies on a series of inapposite cases. For example, in *Convolve, Inc. v. Compaq Computer Corp.*, the data allegedly "lost" were "ephemeral" wave forms that were never "retained, even briefly," and appeared fleetingly on a screen while engineers tuned a device. 223 F.R.D. 162, 176–77 (S.D.N.Y. 2004). Likewise, in *Louis Vuitton Malletier v. Dooney &*

[2] Charter's burden arguments are misplaced.

First, Earthlink never requested Charter preserve "140 million audio recordings." *Contra* Dkt. 174, at 9. By Charter's own estimate, the EarthLink customer calls totaled about 130,000 recordings. *See infra* n.6. Charter argues that it could not isolate those recordings because the "recordings are not text searchable." Dkt. 174, at 1. But the webpage of ***Charter's vendor*** reports that it is able to search un-transcribed audio recordings (and regularly does so for litigation). Dkt. 184, at 3 (vendor is NICE); https://tinyurl.com/NICEOffersPhoneticSearches (NICE offers phonetic searching, separate from transcription). Additionally, while Charter asserts it would have to manually search for each EarthLink customer call, Charter's affirmations do not address the logical e-discovery solution of running a "script" (a computer programming code) with EarthLink customer account numbers to collect EarthLink calls. *See* Dkt. 183; Dkt. 184.

Second, Charter argues it ***could*** have preserved this data if EarthLink provided it with more detail on the customers. Dkt. 174, at 1, 4. This argument undermines Charter's position that the EarthLink calls could not have been located and isolated. It also misses the mark because (a) Charter already has EarthLink customer identification information (Dkt. 157, at 2–5) and (b) in any event should have conferred with EarthLink regarding this before unilaterally destroying the recordings (as the cases instruct).

Bourke, Inc., the court declined to impose sanctions where the defendant failed to preserve instant messages because there was no way for the defendant to record and retain them. No. 04-cv-5316, 2006 WL 3851151, at *2 (S.D.N.Y. Dec. 22, 2006). By contrast, in this case, Charter recorded and retained the audio calls—but then deleted them on a rolling basis. Dkt. 174, at 5.[3]

And while Charter suggests that the difficulty of producing the audio recordings justified destroying them, concerns about the burdens of production do not give Charter the unilateral right to destroy evidence; the remedy for asserted production burdens is a motion for protective order. *See* CPLR 3103(a).

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

As EarthLink demonstrated, and Charter admits, Charter knowingly destroyed the audio recordings with a culpable state of mind, including during this litigation. Dkt. 157, at 12–15.

Charter does not seriously contest this point, arguing that it took "reasonable steps" to issue a litigation hold to preserve ***other items***—"emails and other ESI." Dkt. 174, at 12. But Charter admits that, even after reviewing EarthLink's preservation notice referencing the calls, ***Charter issued a hold notice that did not preserve call recordings.*** *Id.* at 5 (asserting that the litigation hold did not prevent the automatic overwriting of audio files "because, to store millions of additional recordings, Charter would have needed to build an entirely new storage system"). This conduct constitutes independent grounds to find gross negligence. *See Voom*, 93 A.D.3d at 45.

[3] Likewise, in *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, the court denied spoliation sanctions where allegedly counterfeit books were destroyed because "the mere existence of a counterfeit book in [booksellers'] inventory would not signal that the book constituted evidence 'relevant' to a future [copyright] litigation," though ***records*** of sales of counterfeits would be relevant. 2015 WL 5769943, at *7 (S.D.N.Y. Oct. 2, 2015) (internal citations omitted). And in *Williams v. New York City Transit Authority*, the court concluded that the defendant ***did*** have an obligation to preserve the records, that the defendant ***did*** act at least negligently, and that the plaintiff could ask the jury to draw an adverse inference. No. 10-cv-0882, 2011 WL 5024280, at *6–9, 11 (E.D.N.Y. Oct. 19, 2011).

Charter's only counterargument is that the destruction of evidence was justified because of burden concerns, but this argument fails because Charter deleted the evidence without first notifying EarthLink or giving EarthLink the opportunity to inspect or preserve the evidence. *See Baliotis v. McNeil*, 870 F. Supp. 1285, 1290–91 (M.D. Pa. 1994) ("At a minimum, … an opportunity for inspection should be afforded a potentially responsible party before relevant evidence is destroyed."); *Thiele v. Oddy's Auto & Marine, Inc.*, 906 F. Supp. 158, 162–63 (W.D.N.Y. 1995) (granting spoliation sanctions in favor of a party denied the opportunity to inspect evidence before destruction).

Moreover, it appears that potential solutions to minimize collection and preservation burdens were available. ***First***, the metadata associated with the transcripts Charter produced shows that Charter [redacted]. *See* Dkt. 191 ¶ 4; Dkt. 192 & spreadsheet filed with Court via USB referenced therein (column "[redacted]" with EarthLink listed in each cell for EarthLink customers). ***Second***, as to the alleged burden of retention, the total relevant call volume to be preserved was approximately 130,000 calls (based on Charter's own estimates)—far less than Charter's assertion of 140 million. The parties could have downloaded and stored this narrow universe of calls without substantial burden. Finally, and as noted above, the law requires that EarthLink be provided with the opportunity to preserve evidence before Charter destroyed it.

C. The Destroyed Call Recordings Were Relevant Evidence.

According to Charter, it intentionally omitted the recordings from its litigation hold and allowed the recordings to be destroyed. Dkt. 174, at 5. That alone establishes the relevance of the documents. *See Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (N.Y. 2015) ("Where the evidence is determined to have been intentionally or wil[l]fully destroyed, the relevancy of the destroyed documents is presumed.").

Even if the destruction was merely negligent and relevance were not presumed, the calls were relevant to EarthLink's claims—a point that Charter does not contest. EarthLink's claims are based in large part on the statements made by Charter's agents in customer service calls with EarthLink customers and the actual audio recordings of those calls are plainly relevant. Dkt. 15, at 22–27. This is sufficient to establish spoliation even if the deletion were merely negligent. *See Pegasus Aviation*, 26 N.Y.3d at 547–48 (for negligent destruction, moving party "must establish that the destroyed documents were relevant to the party's claim or defense");[4] *see also SM v. Plainedge Union Free Sch. Dist.*, 162 A.D.3d 814, 818–19 (2nd Dep't 2018) (where defendant preserved portion of footage covering entirety of accident, but permitted destruction of footage preceding the accident, conduct was negligent, destroyed footage preceding accident was relevant to negligent supervision claim, and court granted adverse inference).

II. THE COURT SHOULD SANCTION CHARTER.

A. Charter's Belated Production of a Sample of Transcripts Does Not Remedy EarthLink's Prejudice.

Under New York evidentiary law, "the spoliation of an original document will prevent that spoliator from proving the contents of the destroyed document by secondary evidence." *People v. Betts*, 272 A.D. 737 (1st Dep't 1947); *see also Abildgaard v. Van Den Brulle*, 45 Misc. 3d 1214(A), 999 N.Y.S.2d 796 (Civ. Ct. 2014) (explaining that, even where a court does not strike a spoliator's pleadings, the court "may, at the very least, preclude that party from offering evidence as to the

[4] Charter ignores its burden regarding culpability and seeks to shift the burden of establishing relevance to EarthLink. Moreover, it wrongly asserts that *Pegasus Aviation* holds, where evidence is negligently destroyed, the moving party must present "extrinsic evidence showing that the missing evidence would have been favorable to the moving party." Dkt. 174, at 9. *Pegasus Aviation* includes no such holding. Regardless, EarthLink meets this burden as it has produced hundreds of customer calls evidencing Charter's misconduct and of the fraction of legible transcripts available in Charter's production, targeted searches have shown many transcripts that support EarthLink's case. Dkt. 225 ¶ 19. Thus, under any standard, the deleted calls were relevant.

destroyed product or document," and imposing that sanction even without finding bad faith), *aff'd*, 29 N.Y.S.3d 846 (N.Y. App. Term. 2015). Accordingly, under the best evidence rule, Charter should not be permitted to use the transcriptions of the audio recordings to prove the contents of either the calls (or the audio recordings of the calls). Charter cannot claim the non-contemporaneously created "transcripts" are sufficient secondary evidence of the contents of call recordings where Charter provides no excuse for its destruction of the recordings (or even its failure to provide EarthLink the opportunity to inspect prior to destruction). Even if Charter offered an excuse, Charter cannot meet its "heavy burden of establishing" the transcripts are a "reliable and accurate portrayal[]" of the recordings to permit their use. *See Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639, 643–47, 644 (1994). Charter does not attempt to meet this burden because it cannot—the transcripts are facially inaccurate and unreliable.

1. The "Transcriptions" Are Not Reliable or Accurate Enough To Prove the Contents of the Call Recordings.

First, the produced transcripts do not cure EarthLink's prejudice from the destruction of approximately 43,000 audio recordings for which no transcripts exist.

Charter states that it has produced transcripts of "approximately two-thirds of the calls between EarthLink service subscribers and Charter's customer service centers" from March 29, 2020 through October 31, 2020. *Id.* Accordingly, Charter lacks transcripts for approximately one-third of the calls. Dkt. 174, at 1, 5. Specifically, Charter states it produced 86,400 transcripts of calls from March through October 2020. Dkt. 184 ¶ 6; *id.* ¶ 8 & n.2.[5] Taking Charter at its word and extrapolating from the 86,400 transcripts produced for that period suggests that there were

[5] Charter says it identified 104,000 total transcripts from November 2019 through October 31, 2020. Dkt. 184 ¶ 6. Only 17,600 transcripts were from calls prior to March 2020, when Charter's current transcription software came online. *Id.* ¶ 8 & n.2.

approximately 130,000 total calls with EarthLink subscribers—thus approximately 43,200 call recordings were deleted for which no transcript exists. Having destroyed the audio recordings and having no transcripts for approximately 43,000 calls, Charter cannot contend that its production provides "better" evidence than the destroyed recordings would have provided. *Id.* at 1, 14.

Second, the transcripts are replete with inaccuracies and errors rendering many indecipherable and inadequate replacements for the recordings Charter destroyed.

The following excerpt from an April 17, 2020 call transcript is emblematic of these defects:

Dkt. 226, at CHARTER00373100.

This is not an isolated example, throughout the entire production:

- Words are mis-transcribed at a high rate—the word "EarthLink" was mis-transcribed as at least 33 different phrases, ranging from "[redacted]" and "[redacted]" to "[redacted]" and "[redacted]." Dkt. 225 ¶ 17.
- Speaker labels ("[redacted]" and "[redacted]") are frequently inaccurate, and some transcripts even combine agent and customer dialogue under a single, inaccurate label. Dkt. 225 ¶ 4; Dkt. 227, at CHARTER00344525–26.
- Speaker labels and time-stamps disappear entirely, leaving undifferentiated, indecipherable blocks of text. Dkt. 225 ¶ 5; Dkt. 228, at CHARTER00319588–91.

To further illustrate this, EarthLink reviewed a sample of 500 produced transcripts for the purposes of this reply and found the following:

- Roughly 35% of transcripts include entire sentences of unintelligible text.
- Only about 30% of transcripts refer to EarthLink, suggesting that the errors in the transcripts are so pervasive that the transcripts mis-transcribe—or simply miss—a significant number of references to EarthLink.
- About 25% of transcripts appear to be only portions of a customer's call, with segments of the call entirely missing from the full set of transcripts produced or produced separately.

Dkt. 225 ¶ 16. The Court need only look at the contents of the USB drive provided (*see* Dkt. 192) to confirm these issues.

Third, the inaccuracies and errors compound the prejudice to EarthLink where ambiguity and error open doors to false interpretations.

For example, the following transcript excerpts indicate that Charter employees were discussing EarthLink "[redacted]" and falsely suggesting customers would [redacted]

[redacted], but the transcripts' indecipherability creates an incomplete record of what was said:

[redacted]

Dkt. 229, at CHARTER00206453 (emphasis added).

[redacted]

Dkt. 230, at CHARTER00223475 (emphasis added).

Given the above, Charter cannot satisfy its "heavy burden" of showing the transcripts are "reliable and accurate portrayals" of the recordings to justify their use. *See Schozer*, 84 N.Y.2d at 644.

2. The Transcripts Make It Impossible to Reliably Assess Whether Charter's Misconduct Was Isolated.

As a defense to this litigation, Charter has asserted that any issues with the customer service calls were isolated instances that do not support EarthLink's claims. The destruction of the call recordings hamstrings EarthLink's ability to rebut this. For example, Charter has not (a) substantiated its estimate that it produced two-thirds of EarthLink customer calls, (b) produced any data regarding the deleted calls, or (c) provided any information about how its automated system selected calls to be transcribed. All of this prevents a reliable assessment of Charter's misconduct on calls (the numerator) and the total number of EarthLink customer calls (the denominator) to rebut Charter's argument that its misconduct on calls were isolated comments.

First, Charter's count of the number of EarthLink customer calls produced is likely overstated.

Charter has not produced transcripts of 104,000 separate in-bound customer calls. Rather, Charter produced a different transcript for each segment of the same call when a customer was transferred to a different Charter agent. Thus, many transcripts are the same caller, dealing with the same issue (*e.g.,* technical/connectivity problems) being transferred to different departments/employees.[6] And, for many transferred customers, the transcripts include only some segments of their call but not the entire call. Dkt. 225 ¶ 9; Dkt. 234, at CHARTER00373100. Thus, rather than producing complete transcripts for some percentage of all EarthLink calls during that period, Charter appears to have produced transcripts of some percentage of all call ***segments*** during that period. It is also appears that many transcripts transcribe internal conversations among

[6] For example, on October 16, 2020, an EarthLink customer made a single, five-minute call during which Charter transferred the customer twice, generating three different transcripts for the same call. Dkt. 225 ¶ 8; Dkt. 231; Dkt. 232; Dkt. 233.

Charter representatives—not EarthLink customers. Dkt. 225 ¶ 10; Dkt. 235, at CHARTER00199932. All of this distorts the number of unique EarthLink customer transcripts Charter has produced. Accordingly, we do not know the total number of call transcripts produced, but we know it is less than 104,000.

Second, the data from the transcripts suggest that they may not be a random sample of all EarthLink customer calls.

Charter admits that not all calls were included in the transcript set, as Charter expressly excluded "enterprise" and "field service" calls from being transcribed. But Charter excluded these calls without specifying what Charter defines to be an "enterprise" call or a "field service" call—and without identifying how many EarthLink accounts or calls were impacted. Moreover, the number of unique EarthLink customers for whom Charter produced transcripts varies wildly by month from March through September 2020, with an unexplained, 37% increase in calls in July 2020 compared to the fairly steady average of calls from March through September 2020. *See* Dkt. 225 ¶ 18. And Charter's production of transcripts from before March 2020 raises questions, with 4,928 unique EarthLink customers in December 2019 but only 255 unique EarthLink callers in February 2020 (a 95% decrease). *See id.*[7]

Third, statements by Charter's witness do not show the transcripts are representative and that two-thirds of EarthLink customer calls were transcribed.

Charter Affirmant David Smith states that "approximately two-thirds of the call recordings" are transmitted to NICE and run through an ASR program. (Dkt. 184, at 3.) He notes

[7] Charter's assertion that transcripts prior to March 2020 "were not always transmitted to Charter or systemically retained," Dkt. 184 ¶ 6 n.2, offer no information about which calls ***were*** preserved then and thus fails to explain why one month has transcripts for nearly 20 times as many customers as another month.

call selection for transmittal is "random" but does not state the selection is representative. As noted above, the program filters out—and does not transcribe—calls from enterprise customers and service calls (both undefined), and Charter assigns no volume to these deleted calls.

Put simply, Charter's destruction of the audio recordings has prejudiced EarthLink, and the late-produced "transcripts" Charter produced fail to cure that prejudice.

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

Because EarthLink established the elements of spoliation and Charter's spoliation has prejudiced EarthLink severely, the Court should impose the sanctions detailed in EarthLink's opening brief. Dkt. 157, at 20–22. We briefly address new matters raised in Charter's Opposition.

Charter argues that, because "EarthLink has not been deprived of the means to prove its case, no spoliation sanctions are justified," citing *Favish v. Tepler*, 294 A.D.2d 396, 397 (2002). But *Favish* held only that ***dismissal of a lawsuit*** was unjustified in that circumstance, and the *Favish* court remanded the case to the trial court "for determination of a less severe sanction." *Id.* at 396. Consistent with *Favish*, EarthLink does not seek to strike Charter's pleadings, but instead seeks the less severe sanctions narrowly tied to the specific prejudice it has suffered, such as an adverse inference and preclusion of evidence on numerosity where the transcripts prevent EarthLink from establishing the true numerator/denominator and allow Charter to use the inaccuracy of the evidence to its benefit. Dkt. 157, at 20–22.[8]

[8] Charter also tries to turn *Warner Records Inc. v. Charter Communications, Inc.* on its head. The court did not find spoliation because the deletion occurred before the party reasonably anticipated litigation, ***but even though the obligation to preserve had not attached***, ***the court precluded Charter from disputing numerosity*** of copyright notices simply because the destroyed evidence was so material to the case. No. 19-cv-00874, 2022 WL 1567142, at *1–3 (D. Colo. May 18, 2022).

CONCLUSION

For the foregoing reasons, EarthLink respectfully requests that the Court sanction Charter, grant an adverse inference, and award any other relief deemed just and proper.

Dated: September 26, 2022
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CERTIFICATE OF LENGTH OF PAPERS COMPLIANCE

The foregoing memorandum of law complies with Rule 17 of Section 202.70 of the Uniform Rules for the Supreme Court and County Court because it is less than 4,200 words, excluding parts of the memorandum of law otherwise exempted.

Dated: September 26, 2022
New York, New York

/s/ Damien Marshall
Damien Marshall