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October 14, 2022

VIA NYSCEF

Justice Andrea Masley
New York State Supreme Court
Commercial Division, Part 48
60 Centre Street
New York, NY 10007

Re: *EarthLink LLC v. Charter Communications Operating, LLC*,
Index No. 654332/2020

Dear Justice Masley:

We are counsel for Plaintiff EarthLink, LLC (“EarthLink”). We write in response to the Court’s request at the September 29, 2022 hearing (“Hearing”) for EarthLink to provide copies of certain customer call transcripts produced by Charter that were referenced in EarthLink’s reply papers (“Reply”) in support of its application for spoliation sanctions (“Spoliation Motion”).

On September 26, 2022, EarthLink filed its Reply in support of the Spoliation Motion, including the undersigned’s Affirmation of Alexander Noble ([NYSCEF 225](#) (“Noble Reply Affirmation”)). The Noble Reply Affirmation identified 13 transcripts, produced by Charter, that EarthLink cited in its Reply as appearing to support EarthLink’s contention that Charter was improperly targeting EarthLink customers. *Id.* ¶ 19. As stated in the Noble Reply Affirmation, these 13 transcripts were among the full set of transcripts in the Transcript Excel File that EarthLink provided to the Court on a USB device on September 22, 2022. *Id.* ¶ 19 n.1.

During the Hearing, the Court requested copies of these 13 Charter transcripts. See [NYSCEF 240](#) (Hr’g Tr. at 34:02-06; 45:02-05).¹ Accordingly, EarthLink has enclosed PDF versions of these 13 transcripts as attachments to this letter, with highlighting of portions demonstrating Charter improperly targeting or making misrepresentations to EarthLink customers. In accordance with the Court’s order to show cause entered on September 24, 2022

¹ On the record, the Court inadvertently referred to the 13 transcripts at issue as the “14 transcripts.” [NYSCEF 240](#) at 34:02-06. For the avoidance of doubt, EarthLink referenced 13 transcripts in paragraph 19 of the Noble Reply Affirmation and has enclosed those 13 transcripts herewith.

authorizing the temporary sealed treatment of Charter's transcript documents, including these 13 transcripts, ([NYSCEF 223](#)), EarthLink has filed these documents under temporary seal herewith.

Because the PDFs of the call transcripts produced by Charter do not include metadata on the face of the document, EarthLink has provided a cover sheet for each of the attached transcripts identifying certain fields of their associated metadata, including the date on which each call occurred and additional details about the customer's services with Charter.

Additionally, EarthLink seeks to clarify how these 13 particular transcripts were identified. During the Hearing, Charter's counsel suggested that these transcripts were identified in EarthLink's sampling review of 500 Charter transcripts. *See* [NYSCEF 240](#) at 21:08-15; *see also* [NYSCEF 225](#) ¶¶ 11-12 (Noble Reply Affirmation describing EarthLink sampling review of 500 randomly-selected Charter transcripts for transcription issues). This is incorrect. EarthLink's sampling review did not include reviewing for evidence of Charter misconduct. Rather, after attempts to conduct more traditional searches and reviews of Charter's production were thwarted by the significant volume of transcription errors, EarthLink conducted a random sample review focused on identifying and quantifying the pervasiveness of transcription errors in the transcripts. *Id.* ¶¶ 15-16. The 13 transcripts at issue were merely examples of certain transcripts evidencing Charter misconduct that EarthLink discovered over the course of its attempts to conduct a broader review of Charter's transcript production.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Alex Noble', with a horizontal line extending from the end of the signature.

Alexander Noble