

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

ALEXANDER NOBLE, an attorney duly admitted to practice law in the State of New York, affirms under the penalties of perjury that:

1. I am a lawyer with the firm of King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036, counsel for Plaintiff EarthLink, LLC (“Plaintiff” or “EarthLink”).
2. I submit this affirmation in support of EarthLink’s Reply Brief in Support of Its Motion for Spoliation Sanctions (the “Motion”) against Defendant Charter Communications Operating, LLC (“Defendant” or “Charter”).
3. Attached hereto as **Exhibit 1** is a PDF containing a true and correct copy of the text of the transcript Charter produced as CHARTER00373100. Exhibit 1 is a call transcript produced by Charter dated April 17, 2020.
4. Attached hereto as **Exhibit 2** is a PDF containing a true and correct copy of the text of the transcript Charter produced as CHARTER00344525. Exhibit 2 is one of numerous examples of the speaker labels (“[redacted]” or “[redacted]”) in the transcripts reviewed being

inaccurate, with some transcripts combining agent and customer dialogue under a single, inaccurate label.

5. Attached hereto as **Exhibit 3** is a PDF containing a true and correct copy of the text of the transcript Charter produced as CHARTER00319588. Exhibit 3 is an example of the speaker labels and time-stamps in the transcripts disappearing entirely, leaving undifferentiated, indecipherable blocks of text.

6. Attached hereto as **Exhibit 4** is a PDF containing a true and correct copy of the text of the transcript Charter produced as CHARTER00206451. Exhibit 4 is a call transcript produced by Charter dated October 8, 2020.

7. Attached hereto as **Exhibit 5** is a PDF containing a true and correct copy of the text of the transcript Charter produced as CHARTER00223474. Exhibit 5 is a call transcript produced by Charter dated January 11, 2020.

8. Attached hereto as **Exhibit 6**, **Exhibit 7**, and **Exhibit 8** are PDFs containing true and correct copies of the text of three transcripts Charter produced as CHARTER00286098, CHARTER00286912, and CHARTER00326921, respectively. Exhibits 6, 7, and 8 show that, 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. Exhibits 6, 7, and 8 are an example of the same caller being transferred to different Charter employees over the course of a single call that is captured across multiple, separate transcripts, with each transcript covering only a portion of the call.

9. Attached hereto as **Exhibit 9** is a PDF containing a true and correct copy of the text of the transcript Charter produced as CHARTER00373100. Exhibit 9 is one of numerous

examples of transcripts that include only some segments of a customer's call but not the entire call.

10. Attached hereto as **Exhibit 10** is a PDF containing a true and correct copy of the text of the transcript Charter produced as CHARTER00199932. Exhibit 10 is one of many examples of transcripts that appear to transcribe a call solely between two Charter employees.

11. I have led a team of attorneys reviewing various of the documents and purported transcripts that Charter has produced in this litigation.

12. Our team reviewed a sample of 500 randomly identified transcripts from the set of transcripts Charter produced.

13. Charter's production was loaded onto the Relativity document review platform. Relativity's random sample generator was applied to the set of transcripts dated March 29, 2020 through October 31, 2020 (consistent with the date range identified in Charter's opposition brief) to create a list of 500 randomly-selected transcripts from Charter's production.

14. Under the direction of me and my colleagues, a team of attorneys conducted a review of that random sample of 500 transcripts.

15. The team identified any transcripts with references to EarthLink, any transcripts that contained one or more sentences of unintelligible text, and any transcripts that appear to be only segments of the customer's full call. That final category includes transcripts where the text indicates that the caller had been transferred to or spoken with a different customer agent prior to when the transcript began, or was being transferred to speak to a different agent when the transcript ended.

16. The results of that review were:

- Roughly 35% of transcripts include entire sentences of unintelligible text;

- Only about 30% of transcripts refer to EarthLink; and
- 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.

17. Based on our review of Charter's transcripts, we have identified at least 33 different ways the word "EarthLink" was mis-transcribed in the transcripts. Specifically, we have identified the word "EarthLink" being mis-transcribed as the following words:

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

18. The metadata associated with the transcripts Charter produced, which metadata included customer identification numbers, shows that the transcripts represent calls from the following number of unique customers, as broken down by month from December 2019 through October 2020:

Month	Unique Customer Numbers Identified in Transcript Metadata
November 2019	2,365
December 2019	4,955
January 2020	3,656
February 2020	255
March 2020	5,258
April 2020	5,450
May 2020	5,757
June 2020	7,805

July 2020	6,208
August 2020	5,882
September 2020	5,537
October 2020	8,857

19. Based on our review of Charter's production of purported transcripts of its customer service calls with EarthLink customers, which review is ongoing, numerous transcripts appear to support EarthLink's position in this litigation. For example, the following transcripts all appear to support EarthLink's contention that Charter was improperly targeting EarthLink customers: CHARTER00223474, CHARTER00196865, CHARTER00195046, CHARTER00280446, CHARTER00282110, CHARTER00389563, CHARTER00190573, CHARTER00380696, CHARTER00230582, CHARTER00304675, CHARTER00185677, CHARTER00347536, CHARTER00210617.¹

20. Our review of the transcripts Charter produced is ongoing, and the examples identified in this Affirmation represent only fraction of the transcripts that may relate to the issues described above or EarthLink's claims and defenses.

Dated: September 26, 2022
New York, New York

Submitted by,

/s/ Alexander Noble
Alexander Noble
KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2227
anoble@kslaw.com

¹ These transcripts are 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.