

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EARTHLINK, LLC

Plaintiff,

-against-

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

Motion Sequence No. 004

Hon. Andrea Masley

AFFIRMATION OF H. GREGORY BAKER

H. Gregory Baker affirms pursuant to CPLR § 2106(a) that the following is true:

1. I am a partner at Patterson Belknap Webb & Tyler LLP (“Patterson Belknap”) and am counsel for Charter Communications Operating, LLC (“Charter”) in the above-captioned action. I am fully familiar with the facts and circumstances herein. I submit this affirmation in Opposition to Plaintiff’s Motion for Order to Show Cause for Spoliation Sanctions.

2. Attached as **Exhibit A** is a true and correct copy of EarthLink’s preservation notice to Charter dated July 27, 2020 (“EarthLink’s Preservation Notice”).

3. Attached as **Exhibit B** is a true and correct copy Charter’s litigation hold notification, first issued on August 7, 2020, and subsequently reissued on December 1, 2020.

4. Attached as **Exhibit C** is EarthLink’s responses and objections to Charter’s First Set of Interrogatories dated June 24, 2022.

5. Attached as **Exhibit D** is a true and correct copy of correspondence to Shaila Diwan dated June 24, 2022, “confirm[ing] that a legal hold was implemented shortly after the receipt of the letter from Mr. Dykhouse,” that “Charter’s document collection and review is

ongoing,” and that if Charter learns “that any documents, including audio files, were deleted or lost, [it] will update EarthLink accordingly, just as [Charter] expect[s] EarthLink to inform Charter if any of its own documents have been deleted or lost.”

6. Attached as **Exhibit E** is a true and correct copy of correspondence to Shaila Diwan dated July 7, 2022, stating that “Charter does not agree to produce documents and communications concerning Service Subscribers beyond the sixteen that EarthLink has thus far identified” and reiterating “that collecting documents and communications related to the remaining Service Subscribers would be a substantial and unjustified burden on Charter.”

7. Attached as **Exhibit F** is a true and correct copy of correspondence to Alexander M. Noble dated July 19, 2022, explaining that Charter “vehemently rejects [the] assertion that it has not been candid about the call recordings. The truth is precisely the opposite: Charter never confirmed that the call recordings were preserved, and given the size of the organization—which comprises more than 93,000 employees—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.”

8. During discovery, on or around July 20, 2022, Charter’s counsel learned for the first time that although the call recordings had not been preserved, approximately two-thirds of all inbound calls, including calls with EarthLink subscribers, are automatically machine-transcribed and these transcripts had likely been retained.

9. Attached as **Exhibit G** is a true and correct copy of correspondence to Shaila Diwan and Damian Marshall dated July 28, 2022, explaining that Charter was “just in the process of drafting a letter informing you that Charter recently identified transcripts of a

significant percentage of customer calls dating back to March 2020" when EarthLink filed the Order to Show Cause.

Dated: August 29, 2022
New York, New York



H. Gregory Baker