EarthLink, LLC v Charter Communications Operating, LLC

2024 NY Slip Op 30259(U)

January 18, 2024

Supreme Court, New York County

Docket Number: Index No. 654332/2020

Judge: Andrea Masley

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

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EARTHLINK, LLC,

Plaintiff,

- v -

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

INDEX NO. 654332/2020

MOTION DATE _____

MOTION SEQ. NO. 003 004 011

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 129, 130, 131, 166, 378, 379, 426, 427, 444, 445

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 162, 164, 165, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 187, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 240, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 278

were read on this motion to/for SANCTIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 373, 375, 376, 377, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 465, 466, 467[1]

were read on this motion to/for SANCTIONS.

Upon the foregoing documents, it is

This is a breach of contract action between, Earthlink, LLC (EarthLink) and Charter Communications Operating, LLC's (Charter) wherein EarthLink alleges that Charter "secretly used its call centers to target" EarthLink's subscribers and

[1] The court has reviewed and where appropriate considered additional documents filed in NYSCEF but omitted in this autogenerated list of documents read.

"affirmatively mislead them about EarthLink and its service," among other claims. (NYSCEF Doc. No. [NYSCEF] 15, Amended Complaint ¶ 52.) The background of this case is set forth in the court's prior decision and will not be repeated here except to resolve motions 003, 004 and 011. (NYSCEF 68, April 6, 2022 Decision and Order [mot. seq. no. 002).)

In motion 03, plaintiff Earthlink moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss defendant Charter's counterclaims with prejudice.

In motion 04, Earthlink moves pursuant to CPLR 3126 (1) for adverse inferences on summary judgment and/or trial that (a) Charter destroyed its audio recordings of customer service calls with EarthLink's customer in deliberate disregard of EarthLink's request to preserve and Charter's legal obligation to preserve those recordings, and (b) these recordings, had they not been deleted by Charter, would have provided evidence demonstrating Charter's misstatements and improper targeting of EarthLink's customers as alleged in the Amended Complaint in support of Counts I, II, IV, V, VII and VIII; (2) to preclude Charter from offering any evidence contrary to EarthLink's evidence showing Charter's misstatements and improper targeting of EarthLink customers in support of Counts I, II, IV, V, VII and VIII; and (3) to require Charter to pay EarthLink's attorneys' fees and costs associated with this application;

In motion 011, Charter moves pursuant to CPLR 3126 for (a) adverse inferences on summary judgment and/or trial that (1) EarthLink destroyed the email accounts of two employees when EarthLink had a legal obligation to preserve them, and (2) had EarthLink preserved the email accounts, the emails would have supported Charter's defenses in this litigation; (b) monetary sanctions and reimbursement of (1) Charter's

attorneys' fees and costs expended in connection with making this application, (2) costs to pursue information relating to EarthLink's preservation of the emails at issue on this motion, (3) costs of Charter's previous (and now withdrawn)[2] Order to Show Cause for Spoliation Sanctions related to EarthLink's call recordings, and (4) costs associated with any future time spent on litigating these issues.

EarthLink's Spoliation Motion Against Charter (mot. seq. 004)

The issue in this case is whether Charter used its call center communications with EarthLink's customers to spread false information about EarthLink and convince Earthlink customers to switch their internet service from EarthLink to Charter. (NYSCEF 15, Amended Complaint ¶¶ 12, 56.) EarthLink seeks to punish Charter for destroying the recordings of phone calls between Charter's call centers and EarthLink's customers. "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126." (*Delmur, Inc. v School Constr. Auth.,* 174 AD3d 784, 786 [internal quotation marks omitted].)

EarthLink sent a preservation notice to Charter on July 27, 2020 notifying Charter to "preserve information, documents, and electronically stored information potentially relevant" to "breaches of certain provisions of the High-Speed Service Agreement." (NYSCEF 142, Preservation Notice.) EarthLink initiated this action on September 9, 2020 alleging that Charter misinformed Earthlink's Service Subscribers during customer

[2] Charter moved for spoliation sanctions against Earthlink in motion sequence 006, but withdrew that motion on December 7, 2022 when Earthlink produced recordings for 3 million calls from June 2017 to February 2020. (NYSCEF 336, Withdrawal.)

service calls. (NYSCEF 1, Summons and Complaint ¶¶36-40.) Earthlink served its first document demand on September 15, 2020 specifically asking for communications between Charter's Call Center employees and Earthlink's Service Subscribers and designating the relevant period of such calls January 1, 2017 to present.[3] (NYSCEF 144, Earthlink Request 8 read with Instruction 14.) Charter records all customer calls which are stored for 120 days. (NYSCEF 183, David Hosein[4] August 29, 2022 aff ¶7.) Accordingly, as of July 27, 2020, Charter would have had stored calls going back to March 2020, while as of September 9, 2020, the saved call recordings would go back to May, 2020. Charter responded to interrogatories about such calls on June 24, 2022 without mentioning its recording retention policy and objected to production. (NYSCEF 146, Charter's Interrogatory Response at 8-9; NYSCEF 145, Charter's Response to Discovery Requests.)

On July 19, 2022, Charter revealed to EarthLink that it had deleted call recordings. (NYSCEF 152, July 19, 2022 Charter Letter to EarthLink.) To verify whether there were call recordings, Charter searched its servers and data storage for more than 93,000 employees and tens of millions of customers. (NYSCEF 175, H. Gregory Baker, Esq.[5] August 29, 2022 aff ¶¶7-9.) Implicitly, this search took from September 2020 to July 2022.

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[3] Earthlink designates the relevant period as January 1, 2019 to January 1, 2021 in its first set of interrogatories. (NYSCEF 145, Charter's Responses #13 and 14.)

[4] Hosein is Charter's Vice President, Information technology Operations, Customer Care Technology. (NYSCEF 183 Hosein aff ¶1.)

[5] Baker is an attorney for Charter. (NYSCEF 175, Baker aff ¶1.)

On July 20, 2022, Charter's counsel learned that two-thirds of all calls to Charter were in fact "machine-transcribed" and the transcripts were maintained and searchable. (NYSCEF 175, Baker aff ¶8.) The recordings are stored for one day while they are transcribed as the vendor contract limits Charter to one day of storage. (NYSCEF 184, David Heath Smith[6] August 29, 2022 aff ¶4, fn 1.) "54,500 hours of recordings are transcribed each day," which is the maximum number of hours transcribed under Charter's training contract, which is the intended use of these transcripts. [7] (*Id.* ¶¶3-4.) Charter has "identified approximately 104,000 transcripts of call recordings with EarthLink customers that took place between November 2019 and October 31, 2020." (*Id.* ¶8.) Using Charter's production to calculate the number of calls that were not transcribed which might have mentioned EarthLink, EarthLink computes 32,400[8] calls from May to October 2020. (NYSCEF 257, Kenneth Fowler, Esq.[9] October 14, 2022 aff.)

Analysis

"On a motion for spoliation sanctions involving the destruction of electronic evidence, the party seeking sanctions must establish that (1) the party with control over

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[6] Smith is Charter's Senior Director of Customer Intelligence and Insight. (NYSCEF 184, Smith aff ¶1.)

[7] Charter did not have this training process in place prior to March 2020. (NYSCEF 184, Smith aff ¶6, fn 2.) However, as discussed below, Charter's preservation duty did not trigger until May 2020.

[8] EarthLink calculated the missing 1/3 of recordings at 43,200 calls which were not transcribed between March and October 2020 or 5,400 calls per month. (NYSCEF 257, Fowler aff ¶2.) The court uses 32,400 (6x 5,400) as the number of missing calls during the relevant period of May to October 2020.

[9] Fowler is an attorney for EarthLink. (NYSCEF 257, Fowler aff ¶1.)

the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," and (3) the destroyed evidence was "relevant" to the moving party's claim or defense. (*Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 482 [1st Dept 2010].)

As to the **first prong**, an obligation to preserve relevant evidence arises when a party reasonably anticipates litigation. (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012]). Generally, "[a] reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." (*Id.*)

The court's evaluation begins with the relevant period at issue which is the three-year transition period October 31, 2017 to October 31, 2020. (NYSCEF 68, Decision mot. seq. no. 002 at 2.) The court finds that the July 27, 2020 preservation notice was too general to put Charter on notice to preserve customer calls. Likewise, Charter's duty to preserve was not triggered by an August 2019 email from EarthLink to Charter in which the EarthLink writes "we have been getting customer calls/emails that are very concerning. It appears [Charter] is trying to get customers to end their relationships with EarthLink. I can share more when we talk." (NYSCEF 140, EarthLink's August 29, 2019 Email.) This email did not put Charter on notice of potential litigation because at that point, Charter and EarthLink were business partners, albeit breaking up in a three-year transition period; these executives were trying to solve a problem. Charter implemented a litigation hold on August 7, 2020, but such a hold was useless until Charter was notified of the allegations that Charter "secretly used its call centers to

target" EarthLink's subscribers and "affirmatively mislead them about EarthLink and its service." (NYSCEF 15, Amended Compl. ¶ 52; NYSCEF 177, Charter's Litigation Hold.) However, the September 9, 2020 complaint was crystal clear that customer calls were vital. In September 2020, Charter had a duty to preserve the calls recorded between May 2020 and September 2020.

Charter insists that it was impossible to preserve the call recordings because Charter receives more than 20 million calls per month with each call lasting about 7.5 minutes which yields 2.3 million hours of recordings per month. (NYSCEF 183, Hosein aff ¶6.) Each day, Charter uses 10 terabytes or 10,000 gigabytes of memory to save the day's calls. (*Id*. ¶7.) Suspending its document retention protocol of saving call recordings for 120 days would require a new storage architecture which would take months and cost millions to design and implement. (*Id*. ¶8.) Charter opines the number of hours of recorded calls would have been overwhelming: 16 million hours of calls for 7 months.[10] (*Id*. ¶6.) Since call recordings are not searchable, this data would be useless to Earthlink. (*Id*.) Charter did not differentiate between Charter customers and EarthLink customers. (*Id*. ¶9.)

The court rejects Charter's argument and finds that EarthLink has satisfied the first prong. Hosein's statement that Charter could not possibly store so many recordings is undermined by Charter's production of 104,000 transcripts of such preserved calls, albeit for 24 hours. (See NYSCEF 244-256, Sampling of 104,000

[10] It is unclear to the court how Charter arrives at 16 million hours since 8 months x 20 million calls per month is 16 million, but Charter states 7 months. In any case, the period at issue is six months May to October 2020.

transcripts; See also NYSCEF 258, Edward T. Logan, Esq.[11] October 13, 2022 aff.) In September 2020, Charter was required to "suspend its routine document retention/destruction policy." (*Zubulake v UBS Warburg LLC*, 220 FRD 212, 218 [SDNY 2003].) Charter was "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.) Implicit in Charter's excuse is its conscious and unilateral decision not to preserve the phone recordings. Such a burden does not excuse Charter's failure to preserve when Charter also failed to timely notify EarthLink giving it an opportunity to inspect. (*Thiele v Oddy's Auto & Marine, Inc*., 906 F Supp. 158, 162–63 [WDNY 1995] [action dismissed as a spoliation sanction against defendant who was denied the opportunity to inspect evidence before destruction of the alleged defective boat.])

EarthLink challenges Charter's math as exaggerated. Rather, EarthLink opines, Charter needed only to save 129,600 calls or 16,250[12] hours, from March to October 2020. (NYSCEF 257, Fowler aff.) The court rejects this argument because it overlooks that to get to the 129,600 EarthLink related calls, Charter had to search all of its calls. (NYSCEF 183, Hosein ¶10.) It did not distinguish between Charter's callers and EarthLink's callers. (*Id*. ¶5.) Nonetheless, Charter had a duty to preserve the call recordings at least until such time as it sought guidance from the court.

[11] Logan is an attorney for EarthLink. (NYSCEF 258, Logan aff. ¶1.)
[12] 7.5 minutes per call x 130,000 divided by 60 minutes to arrive at hours.

The court also rejects Charter's excuse for failing to preserve calls from May 2020 and October 31, 2020 because EarthLink failed to identify the specific callers that complained to EarthLink or any other identifying information that would have helped Charter's search for those call records such as dates of calls. In response to Charter's interrogatories, EarthLink identified 16 callers two years after Charter's deletion of recordings. (NYSCEF 178, EarthLink June 24, 2022 Responses and Objections to Interrogatories.) Knowing the names of the 16 complaining EarthLink customers in September 2020, would have helped Charter preserve at least the 16 call recordings in this case or even the 16 days of call records if EarthLink had provided the dates of the calls. However, those 16 calls are not equivalent to the 80 million[13] call recordings stored as of September 2020 or even two-thirds of those calls. Charter cannot shift blame to EarthLink with this false equivalency.

With respect to the **second prong**, the court finds that Charter had a culpable state of mind when it destroyed the call recordings or it was grossly negligent.[14] (*See Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607 [1st Dept 2016] [failure to issue a litigation hold and failure to cease deletion of email constitute gross neglect.) Hosein's affidavit establishes that Charter knowingly destroyed the recordings. (NYSCEF 183, Hosein aff.) While not conclusive on culpability, Charter's

[13] 20 million calls per month x 4 months (May to September).

[14] Since the court finds a knowing or grossly negligent destruction of evidence, there is no need to address Charter's argument that 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." (NYSCEF 174, Defendant's Memo of Law [mot. seq. no. 004] at 13.) Moreover, Charter's reliance on *Pegasus* for this proposition is misplaced.

failure to issue a litigation hold for the recordings, is one factor to find Charter's grossly negligent. (See *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 553 [2015].)

Charter's failure to timely notify EarthLink of its recording retention policy, and consequent destruction of recordings, and Charter's deflection in responding to EarthLink's inquiries about the recordings, for years, also demonstrate Charter's culpable state of mind. By not saying a word until years later, Charter robbed EarthLink, and this court, of the opportunity to timely resolve the problem: How could 13.8 million hours of calls be stored and searched. Timely raising the issue with EarthLink and the Court may have yielded a determination that it is impossible to store all the data, as Charter now asserts, consistent with Charter's repeated argument here. Charter had an argument to make -- in September 2020, long before the storage for the purposes of training was known.[15] A litigant is not required to retain everything and, thus, reasonably, many businesses have retention protocols. (*See Zubulake v UBS Warburg LLC*, 220 FRD 212 [SDNY 2003].) A litigant is not required to create storage facilities "on the hypothesis that some of [calls] may contain relevant information." (*Louis Vuitton Malletier v Dooney & Bourke, Inc.*, 04 CIV.5316 RMB MHD, 2006 WL 3851151 [SDNY Dec. 22, 2006].) While the Court agrees that "heroic efforts" inconsistent with regular business practices are not required to preserve potential evidence, Charter's reliance on *Convolve* is misplaced. (*Convolve, Inc. v Compaq Computer Corp.*, 223 FRD 162, 177

[15] At argument, EarthLink raised an issue of fact as to whether technology existed in 2020 which would have allowed storage of all of Charter's call recordings. (NYSCEF 240, tr [mot. seq. no. 004] 28:8-13, 43:8-12.) After argument, EarthLink submitted an affidavit listing various storage options available in 2020. (NYSCEF 258, Logan aff ¶¶4-10.) Of course, Charter was, in fact, storing recordings at the time.

[SDNY 2004], *order clarified*, 00 CIV. 5141 GBDJCF, 2005 WL 1514284 [SDNY June 24, 2005].) The court finds that the call recordings here are more like emails and not ephemeral like "intermediate wave forms displayed on oscilloscope during 'tuning' of computer disk drives." (*Id*. ["To be sure, as part of a litigation hold, a company may be required to cease deleting e-mails, and so disrupt its normal document destruction protocol. But e-mails, at least, normally have some semi-permanent existence. They are transmitted to others, stored in files, and are recoverable as active data until deleted, either deliberately or as a consequence of automatic purging. By contrast, the data at issue here are ephemeral."]

Charter's denial of having a culpable state of mind does not make it so. (NYSCEF 174, Defendant's Memo of Law [mot. seq. no. 004] at 16). As discussed above, the court rejects Charter's excuses for not implementing an immediate litigation hold of the call recordings. (NYSCEF 183, Hosein aff ¶¶7-8.) Implicit in this excuse is that there was a conscious unilateral decision not to preserve the call recordings which is the quintessential culpable state of mind.

Finally, Charter vociferously denies that it misled EarthLink during the discovery process that it overrode the 120-days preservation policy. Charter's discovery responses speak for themselves otherwise. (NYSCEF 148, June 24, 2022, Charter Letter at 1-2 ["confirm that a legal hold was implemented shortly after the receipt of the letter," and "[i]f we learn that any documents, including audio files, were deleted or lost, we will update EarthLink accordingly."]; NYSCEF 150 July 7, 2022 Charter Letter at 10 ["it has not deleted these calls,"].)

As to **third prong**, whether "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," the court is compelled to find the call recordings relevant. (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015].) "The intentional or willful destruction of evidence is sufficient to presume relevance." (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). If the destruction was negligent, then there is no presumption; the moving party must establish relevance. (*Pegasus Aviation*, 26 NY3d at 547–48.) Since this case is all about the statements made by Charter's Call Center employees to EarthLink's subscribers, the call recordings are relevant to this EarthLink claim and would be the most reliable evidence as they were contemporaneous. (NYSCEF 15, Amended Complaint ¶¶22–27.) Charter's insistence that the destroyed evidence was not relevant because Charter had no duty to preserve 140 million audio call recordings[16] is nonsensical as applied to relevance and rejected again for the same reasons discussed above.

The court also rejects Charter's related prejudice arguments. The call recordings are not just responsive to EarthLink's repeated discovery requests, they are relevant to this EarthLink claim. (*Field Day, LLC v Cnty. of Suffolk*, No. 04-2202, 2010 WL 1286622, at *14 [EDNY Mar. 25, 2010].)

Charter's other prejudice argument is that there is no prejudice by the destruction of the call recordings because Charter found the 104,000 transcripts which are better

[16] Twenty million calls per month, x 7 months. However, the relevant period here is six months or 120 million calls.

because they are searchable. According to Charter, if it was engaged in a disparagement campaign against EarthLink, as EarthLink asserts, then it will be apparent form 104,000 transcripts. Charter's argument overlooks that EarthLink's asserts a pervasive scheme to influence EarthLink's subscribers. "[W]here 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. CV112893, 2017 WL 1968278, at *25 [EDNY May 11, 2017].) However, the quality of these transcripts is not good. (NYSCEF 244-256, Sampling of transcripts.) It is impossible to know whether the quality of the recordings would have been better than the quality of the transcripts. "By the very nature of the spoliation, there is no way to know what the spoliated evidence would have revealed." (*Apple Inc. v Samsung Elecs. Co., Ltd.*, 881 F Supp 2d 1132, 1150 [ND Cal 2012].) However, the burden of this unknown falls on the spoliator. Thus, Charter fails to establish that the transcripts are a "reliable and accurate portrayal[]" of the recordings. (*Schozer v William Penn Life Ins. Co. of New York*, 84 NY2d 639, 643–47, 644 [1994].)

Charter repeats that there can be no prejudice because it was impossible to store or search the calls. EarthLink effectively challenges this assertion on various grounds. (NYSCEF 258, Logan aff.; NYSCEF 191, Alexander Noble, Esq.[17] aff ¶¶3-4; NYSCEF 192, Spreadsheet.)

Assuming the calls could be stored and searched, Charter argues that producing all the call recordings during the relevant period would have violated the Cable Act (42 USC 551 [C][1]) which prohibits a cable company from disclosing personally identifiable

[17] Noble is an attorney for EarthLink. (NYSCEF 191, Noble aff ¶1.)

information (PII). Before turning over such call records to EarthLink, Charter asserts its choices would have been to notify the 40,000 EarthLink customers or redact the PII from the calls. (NYSCEF 174, Defendant's Memo of Law [mot. seq. no. 004] at 15-16.) While EarthLink fails to address this additional burden, the court finds that it changes nothing since confidentiality issues like this are resolved in the Commercial Division daily. Moreover, if Charter did the search, then it would need to only contact the EarthLink subscribers identified by the search, not 40,000. Again, the court rejects this prejudice argument because Charter robbed the court of the opportunity to timely address it.

Finally, the court rejects Charter's reliance on *Thomas v City of N.Y.*, 9 AD3d 277, 278 (1st Dept 2004) for the proposition that EarthLink must "show that the unavailability of the [evidence] will substantially hinder his ability to prove [his case]." The burden for proving this defense belongs to Charter. In 2015, the Court of Appeals clearly established a movant's burden in a spoliation matter. (*See Pegasus, infra*.)

Accordingly, the question is what is the correct remedy?

Appropriate Sanctions

Sanctions may include "precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action." (*Ortega v City of New York*, 9 NY3d 69, 76 [2007].) The purposes of spoliation sanctions are to "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have

been in absent the wrongful destruction of evidence by the opposing party." (*West v. Goodyear Tire & Rubber Co.*, 167 F3d 776 , 779 [1999] [citations and internal quotation marks omitted].) A spoliation sanction must "reflect an appropriate balancing under the circumstances." (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016] [internal quotation marks and citation omitted].) Finding the appropriate sanction depends on 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." (*Green v. McClendon*, 262 FRD 284, 288, 292 [SDNY 2009].)

Here, the remedies EarthLink seeks include: (1) an adverse inference that Charter failed to prevent the destruction of relevant evidence for EarthLink's use in this case and that the destroyed evidence was favorable to EarthLink; (2) preclude Charter from arguing or offering evidence that the false statements are "stray" or otherwise lack numerosity; (3) the Court should overrule any potential objections by Charter to the admission of EarthLink's own evidence of its calls and customer notes; and (4) monetary sanctions against Charter.

The court agrees that an adverse inference is appropriate here. "[C]ourts have formulated adverse inference instructions that range in their level of severity." (*Apple Inc. v Samsung Elecs. Co., Ltd.*, 881 F Supp 2d 1132, 1150 [ND Cal 2012].)

For example, in *Arbor*, the court permitted an adverse inference

> "since it will permit the jury to: (1) find that the missing emails and other electronic records would not have supported [spoliator]'s position, and would not have contradicted evidence offered by [nonspoliator], and (2) draw the strongest inference against [spoliator] on the issues of whether [spoliator] would have made the loans regardless of any potential zoning issues, and the measure of [spoliator]'s damages taking into account its assignment of the loans and/or failure to mitigate its damages (PJI 1:77)." (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 610 [1st Dept 2016].)

The least harsh adverse inference instruction "permits (but does not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party." (*Apple Inc. v Samsung Elecs. Co., Ltd.*, 881 F Supp 2d 1132, 1150 [ND Cal 2012].) This is the appropriate procedure here because there is an issue of fact as to whether Charter had storage options and whether EarthLink could have searched the transcripts or if transcribed whether the transcripts would yield the same poor quality of the 104,000 transcripts. Where there is an issue of fact this is the appropriate charge. (*Krin v Lenox Hill Hosp.,* 88 AD3d 597 [1st Dept 2011]*.)*

Under these circumstances, Charter will be precluded from using terms such as "handful" and "stray" to describe the number of calls. (*See Warner Recs. Inc.*, 2022 WL 1567142, at *3 (holding that Charter's failure to implement a litigation hold, resulting in deletion of relevant custodial data and documents, precluded Charter from disputing the numerosity of copyright notices in infringement action].) However, EarthLink's request for the Court to overrule any potential objections by Charter to the admission of EarthLink's own evidence of its calls and customer notes is premature.

EarthLink's request for monetary sanctions against Charter is granted and EarthLink shall submit an affirmation of services for the legal fees and costs incurred as a result of EarthLink's two years of efforts to get the call recordings that no longer existed.

The adverse inference is avaible for summary judgment and trial.

Charter's Motion for spoliation Sanctions Against EarthLink (mot. seq. no. 11)

Charter moves pursuant to CPLR 3126 for spoliation sanctions because EarthLink deleted the mailboxes of two EarthLink employees in November 2019 and March 2020. Charter seeks the following relief: (1) an adverse inference that, if EarthLink had preserved the since-deleted emails, those emails would have been harmful to EarthLink's case and helpful to Charter; (2) monetary sanctions against EarthLink measured by Charter's attorneys' fees and costs expended in connection with this application, including seeking information from EarthLink relating to its preservation of the emails at issue in this motion; (3) reimbursement of Charter's expenses involved with briefing its motion for sanctions related to EarthLink's subscriber calls which EarthLink only located on the eve of the spoliation argument on motion 006. Charter's motion is denied.

Shain Routon was the Director of Strategic Partners whose employment ended in September 2019, while the employment of Gary Vaughan, Senior Product Director, ended in January 2020. (NYSCEF 397, Michael Toplisek[18] January 12, 2023 aff ¶¶11-12.) EarthLink deleted their mailboxes on November 4, 2019 and March 30, 2020, respectively, consistent with its document retention policy for departing employees. (*Id.* ¶¶13-15.) EarthLink retained counsel for this contractual matter on June 9, 2020. (NYSCEF 298, Michael Toplisek November 22, 2022 aff ¶8.) Counsel issued a preservation notice internally on July 27, 2020. (NYSCEF 397, Toplisek aff ¶16.) On August 12, 2022, Charter identified Routon and Vaughan as custodians. (NYSCEF 382, Alexander Noble[19], January 16, 2023 aff ¶13.)

[18] Toplisek is the President of EarthLink. (NYSCEF 397, Toplisek aff ¶1.)
[19] Noble is an attorney for EarthLink. (NYSCEF 382, Noble aff ¶1.)

At the earliest, EarthLink's preservation duty began in June 2020, well after the employee's employment ended and mailboxes were deleted. Litigation is not reasonably anticipated where the parties' correspondence shows that, "[r]ather than threatening impending litigation," they are "willing to explore a negotiated resolution." (*Cache La Poudre Feeds, LLC v Land O'Lakes, Inc.*, 244 FRD 614, 622; *see also Stevenson v City & Cty. of S.F.*, No. C-11-4950 MMC, 2015 U.S. Dist. LEXIS 143373, at *14 (ND Cal Oct. 21, 2015) (denying sanctions motion where "complaint letters d[id] not implicitly or expressly threaten litigation"). Even if EarthLink's preservation duty began in June 2019 (NYSCEF 356, June 26, 2019 Email) or July 2019 (NYSCEF 345, Shain Routon's July 1, 2019 Email), the employees' emails at issue here are available from other sources, including Charter; there is no prejudice. (See NYSCEF 347, May 5, 2017 Email; NYSCEF 348, April 26, 2017 Email; NYSCEF 349, June 30, 2017 Email; 350, July 18, 2017 Email; NYSCEF 353, August 14, 2018 Email; NYSCEF 354, January 9, 2019 Email; NYSCEF 355, March 7, 2018 Email.) Since EarthLink deleted the mailboxes pursuant to its document retention policy, and before its preservation duty was triggered, Charter cannot establish EarthLink's culpable state of mind or gross negligence, and, thus is not entitled to a presumption of relevance.[20] Charter fails to establish that the emails at issue here are uniquely probative of anything unlike the call recordings addressed above.

[20] Nor is Charter entitled to a presumption of relevance in New York State court. Charter's reliance on federal cases for this proposition is misplaced. (*Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, 685 F Supp 2d 456, 467 [SDNY 2010] ["Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner."], *abrogated by Chin v Port Auth. of New York & New Jersey*, 685 F3d 135 [2d Cir 2012].)

Under these circumstances, the court is compelled to deny Charter's requests for sanctions on this motion and a prior motion that Charter withdrew, albeit because EarthLink produced the requested documents 3 days before the argument.

EarthLink's Motion to Dismiss Counterclaims (mot. seq. no. 03)

Charter's counterclaims arise from the High-Speed Services Agreement (HSSA) between the parties here. (NYSCEF 370, Amended Answer to Amended Complaint.) Charter asserts ownership of IP addresses under §1.5 of the HSSA which requires EarthLink to "supply" IP addresses for the purpose of "connecting to the EarthLink High-Speed Service." (*Id*. ¶¶67-68.) The HSSA, however, does not require Charter to return the IP addresses to EarthLink. (*Id*. ¶68.) "By transferring and selling the IP Addresses to third parties, after EarthLink had supplied the IP Addresses to Charter, EarthLink breached Section 1.5. of the Agreement." (*Id*. ¶69.) Charter's counterclaims are for: (1) declaratory judgment that Charter owns the EarthLink IP Addresses; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; and (4) conversion. (*Id.* at 34-38.)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88[1994] [citation omitted].)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and

citation omitted].) "A cause of action may be dismissed under CPLR 3211 (a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].) For evidence to be considered documentary, it must be unambiguous and of undisputed authenticity. (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2nd Dept 2010].)

The court rejects Charter's argument that the court cannot interpret the HSSA on a motion to dismiss or must sustain the counterclaims because Charter has a plausible argument. Indeed, where a contract is clear, the Court has a duty to interpret the contract as a matter of law. (*Picone/WDF, JV v City of N.Y.*, 193 AD3d 433, 434 (1st Dept 2021). "[T]he provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint." (*Ark Bryant Park Corp. v. Bryant Park Restoration Corp.,* 285 A.D.2d 143, 150 [1st Dept 2001].)

The court sustained EarthLink's breach of contract claim. The court found that though HSSA §1.5 is silent on the issue of ownership rights of IP addresses and fails to mention the return or termination of use of the IP addresses, EarthLink obliquely asserts that it owns the IP addresses or has a superior right. (NYSCEF 325, Amended Decision and Order [mot. seq. no. 2] at 17-18.) However, silence does not create ambiguity. (*See Donohue v Cuomo*, 38 NY3d 1, 13 [2022] ["A contract's silence on an issue does not create an ambiguity which opens the door to the admissibility of extrinsic evidence to determine the intent of the parties."] [Quotation marks and internal citation omitted].) Moreover, this earlier decision does not dictate the result here. The timing for the two

contract claims is different; EarthLink came to the transaction with its interest in the IP Addresses while Charter claims to have acquired the IP addresses as a result of the transaction at issue.

The court rejects EarthLink's reliance on the ARIN registration as documentary evidence because it does not resolve the issue of ownership. (NYSCEF 131, ARIN Registration ["(a) . . . are not property (real, personal, or intellectual) of Holder; (b) Holder does not and will not have or acquire any property rights in or to [them] by virtue of this Agreement"].)

Charter claims authority for its ownership of the IP addresses is found in §1.5 which provides:

> "Consistent with DOCSIS 1.0, TWC will supply the public IP address or addresses as reasonably necessary for the management of the cable modem device in the Service Subscriber's home. To the extent any TWC Division provides multiple public IP addresses for residential high-speed service customers, TWC shall consider supplying multiple public IP addresses for residential Service Subscribers and will make such determination in good faith without consideration of whether a particular high-speed service customer is a Service Subscriber or a customer of another Online Provider or Road Runner. As reasonably required by TWC, EarthLink will supply routable IP address ranges for connecting to the EarthLink HighSpeed Service."

Charter's reliance on the word "supply" is fatal to its claim. The plain meaning of the term "supply," is "to make available for use; provide"—not to transfer ownership or title. (NYSCEF 88, 89, 90, various dictionary definitions.) Further, supplying IP addresses to Charter must mean the same thing in the same paragraph when Charter supplies IP addresses to EarthLink subscribers. Charter's theory creates an impermissible inconsistency within §1.5. (*Rivietz v Wolohojian*, 2006 NY Slip Op 30310[U], * 9 [Sup Ct, NY County 2006]) ("Courts must interpret a contract 'to avoid inconsistencies and to give meaning to all of its terms[.]'")

The court also rejects Charter's "system facilities" argument where "systems facilities" are tangibles while IP addresses are intangibles. Section 1.2(a) provides: "TWC shall have the right to determine, in its sole discretion, all aspects of network architecture with respect to the System Facilities that deliver the EarthLink [HSS]." The term "System Facilities" is defined as: "the TWC Cable Systems and other equipment, software and facilities, including but not limited to the networking infrastructure (including all the physical and RF facilities, neighborhood cabling and neighborhood aggregation points), ATD network, connecting the Internet to the cable modem or other device in which the network termination is located at the location of each Service Subscriber." (NYSCEF 85, HSSA at A-6, 34.) In addition, Charter's interpretation is inconsistent with §1.1(a)(ii) which provides that "[a]s between EarthLink and TWC, TWC shall, at its own expense, provide, install, manage, maintain, repair, inspect, replace or remove, operate and control the System Facilities necessary for the delivery of the EarthLink HSS to Service Subscribers and carriage of such IP data traffic." It is undisputed that EarthLink supplied the IP addresses pursuant to §1.5 and Charter did not pay for the IP addresses. Indeed, Charter's interpretation creates an impermissible conflict with §1.5 which requires EarthLink to supply the IP addresses. Contract interpretation cannot destroy otherwise harmonized terms. (*Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473, 480 (1st Dept 2007.)

Finally, Charter's contract claims fail because the breach, EarthLink's transfer of the IP addresses to third parties, occurred after April 6, 2022, while the HSSA terminated on October 31, 2020. (NYSCEF 73, Defendant's Answer to Amended Complaint with Counterclaims, Answer ¶16 at 3, HSSA Counterclaim ¶8 at 24.)

However, §1.5 is not one of the sections that "will survive the completion, expiration, termination or cancellation of the Agreement." (NYSCEF 85, HSSA § 13.4 at C-8 at 44.)

Likewise, the fourth counterclaim for conversion must be dismissed as it presumes Charter has an ownership interest or superior right in the IP addresses; it does not. Therefore, the first (declaratory judgment), second (breach of contract), third (breach of covenant of good faith and fair dealing), and fourth (conversion) counterclaims are dismissed.

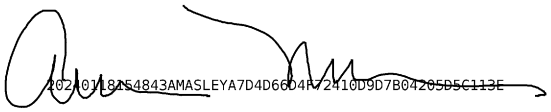
The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that motion 003 is granted and the counterclaims are dismissed; and it is further

ORDERED that motion 004 is granted; and it is further

ORDERED that motion 011 is denied.



1/18/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE