

# **Exhibit 12**

# KING & SPALDING

King & Spalding LLP  
1185 Avenue of the Americas  
New York, NY 10036-4003  
Tel: +1 212 556 2100  
Fax: +1 212 556 2222  
www.kslaw.com

Shaila R. Diwan  
Partner  
Direct Dial: 212-790-5346  
sdiwan@kslaw.com

July 12, 2022

## VIA E-MAIL

H. Gregory Baker  
Saul B. Shapiro  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, NY 10036

**Re: *EarthLink LLC v. Charter Communications Operating, LLC*, No. 654332/2020,  
Plaintiff's Responses to EarthLink's First and Second Document Requests and  
First Set of Interrogatories**

Counsel:

In advance of our July 13, 2022 meet and confer discussion, I write on behalf of EarthLink LLC ("EarthLink" or "Plaintiff") further to our June 29, 2022 letter outlining deficiencies in Charter Communication Operating, LLC's ("Charter" or "Defendant") Responses ("Responses") to EarthLink's First and Second Document Requests to Charter (dated April 8, 2022 and May 27, 2022, respectively) and First Set of Interrogatories (dated May 27, 2022) (collectively, the "Discovery Requests"). This letter responds to Charter's July 7, 2022 letter which purports to address certain of the deficiencies in the Responses and attempts to interpose additional objections to the Discovery Requests.

In the same vein, despite multiple requests from EarthLink for detail on how Charter intends to search for responsive documents and communications, including in our June 23 and June 29 letters, Charter has failed to identify any of the custodians, search terms, data sources, or any other details necessary for EarthLink to evaluate the reasonableness of Charter's proposed search. The conferral is tomorrow, leaving EarthLink with virtually no time to review those terms or hit reports. Nor has Charter agreed to a mutual exchange of hit count reports for the search terms and custodians, as proposed in EarthLink's June 23, 2022 letter. EarthLink reiterates its request that the requested details concerning Charter's proposed search and hit counts be provided immediately and EarthLink will provide the same.

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## **I. Charter's Refusal to Produce Numerous Categories of Relevant Documents**

Charter's wholesale refusal to produce numerous categories of responsive information, without basis, is improper. Please state Charter's basis for withholding each of the following categories of information.

### **A. First Set of Document Requests No. 1**

Charter's July 7 letter confirms that Charter will "produce copies of responsive, non-privileged documents and communications concerning 'policies and procedures' relating to the Agreement and/or Service Subscribers, if any exist." Charter continues to refuse to produce "policies and procedures relating to ... [its] communications with the Service Subscribers." These documents are highly relevant to the extent they relate to the instructions given to Charter's representatives in making representations to EarthLink's customers, as alleged throughout the Amended Complaint. Contrary to your position that this request is duplicative of EarthLink's other requests (July 7, 2022 Charter Letter at 1-2), this request seeks Charter's policies and procedures *related* to those communications. This is essential to the case, as Charter's primary defense to date has been that the conduct complained of in EarthLink's Amended Complaint are simply "stray" comments by rogue Charter representatives. Charter cannot lodge this defense then refuse to actually produce any information concerning what Charter conveyed to its employees concerning communications with EarthLink's customers. Moreover, to the extent Charter incorporates by reference its objections to all EarthLink Request for Production it identifies as related to "communications with Service Subscribers," (*id.*) EarthLink disputes Charter's unsupported and unreasonable objections generally as set forth below.

### **B. First Set of Document Requests No. 8**

Charter's July 7 letter takes the position that it will not search for or produce any communications between Charter and the Service Subscribers other than the mere sixteen Service Subscribers whose statements EarthLink was aware of at the time the Amended Complaint was drafted. This position is baseless for several reasons.

*First*, Charter tacitly concedes the relevance of this information with its specious offer to search for and produce communications between Charter's representatives and the sixteen Service Subscribers Charter requested be identified in its interrogatories. However, Charter cannot unilaterally limit its search to only those individuals who were quoted in the Amended Complaint. Particularly where Charter's defense to date has been that these are limited, "stray" comments by rogue Charter employees.

*Second*, as Charter is well-aware, these sixteen Service Subscribers represent a mere fraction of the 50,000+ EarthLink Service Subscribers whom Charter has information for. Charter cannot seriously contend that EarthLink's request for discovery into Charter's communications with the remaining tens of thousands of the Service Subscribers subjected to this campaign are "not reasonably calculated to lead to the discovery of admissible evidence"—particularly where EarthLink's review of its own calls has disproven this.

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*Third*, EarthLink is highly skeptical of Charter's representation that it "has no systematic means" to search for communications between Charter and the Service Subscribers. To evaluate the veracity of this assertion, please provide answers the following questions:

- In what systems and in which file formats are Charter's communications with the Service Subscribers stored?
- Is Charter able to run search terms over the data location where communications with the Service Subscribers are stored?

*Fourth*, you represent that, "[w]ithout the name of a specific Service Subscriber or account number, Charter cannot realistically locate the information that EarthLink seeks." See July 7, 2022 Charter Letter at 2. Charter itself analyzed and produced this information to EarthLink in monthly reporting. For example, in the monthly commission statements Charter provided to EarthLink's Controller, titled "MISP\_[Date]\_Final Backup for Martha" under the second tab "Customer Detail" with over 74,000 separate rows of customer identification data. See, e.g., Zachary Remming Nov. 12, 2020 Email to Martha Jenkins, attaching "MISP\_202009\_Final Backup for Martha." There is no reason why Charter should not have this information in light of the litigation hold and Charter's general awareness of the dispute.

I ask you for the second time: please confirm Charter has not deleted this information for the time period at issue in the document requests. To date, rather than respond, you have asked EarthLink to produce back to Charter an example of the billing data that Charter provided to EarthLink and alternately claimed such production is prohibited under the Cable Act. While we are willing to produce your own documents back to you for the sake of expending Charter's search, Charter must first confirm the Cable Act does not preclude the parties sharing of such information.

*Finally*, to the extent Charter continues to take the position that the Cable Act, 47 U.S.C. § 551, prohibits the disclosure of EarthLink's Service Subscribers' information to EarthLink, which Charter has already previously provided to EarthLink: Section 551(c)(2)(C) permits the "disclosure of the names and addresses of subscribers to any cable service or other service" such as EarthLink, provided that viewing information is not revealed and the subscriber has had the opportunity to prohibit or limit the disclosure. Considering Charter routinely provided identifying information of the Service Subscribers to EarthLink, Charter plainly obtained authorization to disclose Service Subscriber information pursuant to Section 551(c)(2)(C). Moreover, EarthLink held authorizations to do so. Accordingly, Charter has no proper basis to withhold this information.

If Charter disagrees, please state your legal basis including the specific provisions of the Cable Act you believe apply and advise us immediately so the parties can seek the appropriate relief from the Court confirming Charter's authorization to disclose Service Subscriber information pursuant to, among other things, Section 551(c)(2)(B).

### **C. First Set of Document Requests Nos. 9 and 11**

Charter's July 7 letter states Charter's agreement to produce documents responsive to these requests, but again fails to provide EarthLink with any details necessary to evaluate whether

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Charter has proposed reasonable search terms and parameters, including whether these conversations tended to happen by chat, message board (Teams, Slack, etc.), text message, or some other method of communication and whether Charter is searching those sources. Please provide this information accordingly.

**D. First Set of Document Requests No. 21 and Second Set of Document Requests No. 2**

Charter's July 7 letter states that "will investigate whether it is possible to provide" information responsive to these requests, which seek (1) documents "identifying which of the 1,000,000 EarthLink IP addresses were used by Charter, the dates on which they were first and last used, and the purposes they were used for at any and all applicable times"; and (2) "documents and communications concerning all Network Architecture and the usage of EarthLink IP addresses during the term of the Agreement." While EarthLink appreciates Charter's agreement to investigating this request, Charter limits its agreement to the EarthLink IP Addresses rather than the 1,000,000 Block of EarthLink IP addresses referenced in the request. Please confirm Charter is searching for this broader set that Charter alleges in its Counterclaim were "convey[ed]" by EarthLink to Charter per the word "supply" in the HSSA. EarthLink categorically rejects Charter's continued insistence that it acquired ownership of the IP addresses at issue under the HSSA.

Additionally, given that the Court has granted a one-time three week extension to the discovery schedule due to Charter's inability to make the production deadline, Charter's failure to do more than "investigate" at this juncture is deeply concerning. Charter fails to simply commit to agree to search for and produce these documents. As a result, please confirm Charter's agreement to search for and produce these documents or otherwise state whether Charter is unable to locate these documents, objects to production, etc.

Finally, to the extent Charter claims that "EarthLink is surely aware of which IP addresses or blocks of IP addresses were supplied to Charter under the HSSA" (July 7, 2022 Letter from Charter's Counsel at 3) this is specious at best. EarthLink has never alleged it listed or identified the 1,000,000 addresses that comprised the 1,000,000 Address Block to TWC or Charter. Charter has shown no evidence that it can identify what it now purports to "own" beyond simply identifying back to EarthLink schedules of the smaller subset of 250,000 EarthLink IP Addresses that EarthLink itself identified in a public filing. Charter's inability to produce information identifying by number each of the addresses it now claims to "own" based on the alleged "convey[ance]" by the HSSA is highly relevant. Charter cannot own or possess something that it has been unable to identify, let alone control.

**E. Second Set of Document Requests No. 6**

Charter's July 7 reiterates its meritless objections to EarthLink's request for "[a]ll agreements transferring registration of IP Addresses or conveying rights, title or interest in IP Addresses to any Person." With respect to Charter's purported relevancy objections, EarthLink's June 29 outlines precisely why these documents are relevant: they bear directly on the significance of Charter's lack of any agreement transferring registration of the IP addresses here. Charter's overbreadth objections are equally meritless—EarthLink is not seeking to conduct a "fishing expedition" into the entirety of Charter's documents and communications concerning other IP

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addresses. EarthLink merely seeks, as the request states, a targeted collection of Charter's contractual agreements transferring registration or rights over IP addresses it owns or has owned as well as Charter's RSA Agreements with ARIN—which Charter cites in its July 7, 2022 letter at 3.

Moreover, Charter's obligations as an ARIN registrant are highly relevant to its obligations concerning the proper transfer and usage of IP addresses—both central argument as to why no transfer could have occurred via the HSSA for an ARIN registrant such as Charter. Moreover, Charter's agreements with third parties related to the transfer of IP addresses reflect Charter's course of conduct and industry standards in these conveyances for sophisticated parties.

With respect to Charter's objection as to undue burden, please articulate in detail what efforts you have made to search for responsive documents and metrics concerning the burden presented to Charter so the parties can either tailor this request narrowly to minimize burden or otherwise join issue and raise the matter with the Court.

#### **F. Second Set of Document Requests No. 7**

Charter's relevancy objection to this request, which seeks "[a]ll documents or communications defining the term 'IP Addresses,'" is baseless. Charter's interpretation of the term IP Addresses as part of its "Network Architecture" is centrally important because the HSSA is Charter's sole purported basis for claiming ownership of the IP addresses. Charter's position in the litigation to date involves a number of tortured interpretations of this provision of the HSSA, including, for example, that the IP addresses (even though they are intangible property) should be included with the physical equipment that makes up Charter's "System Facilities" rather than the "IP Services" that make up the "EarthLink High-Speed Service." These arguments are contrary to the plain meaning of the term and industry usage, as will be exemplified in Charter's own agreements. *See* EarthLink's Memorandum of Law in Support of Motion to Dismiss Charter's Counterclaims at 13 n.4. Charter's usage of the term "IP address"—particularly as it relates to "facilities" in its other agreements and internal documents is highly relevant.

### **II. Charter's Deficient Responses to EarthLink's First Set of Interrogatories**

#### **A. Charter's Identification of Current and Former Employees in Response to Interrogatories Nos. 4-9, 11, 15 and 22.**

Charter's July 7 letter identifies former Charter employees David Christman, Raj Kumar, David Scott Weber yet fails to provide any current or last known address other than the same general "corporate address" provided Charter's current employee witnesses. Charter further directs that this corporate address is "where any correspondence addressed to these individuals may be sent," and directs EarthLink to communicate with Charter's former and current employees only through Charter's counsel. Given the foregoing, please confirm that Charter will accept service of notices of deposition for both its current and former employees.

Moreover, Charter has entirely failed respond to EarthLink's June 29 request that Charter identify whether Charter has possession, custody, or control over documents and communications of any of the individuals identified in response to the Interrogatories. As you know, EarthLink

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requested this information in order to evaluate whether these individuals should be added as Charter custodians. Not only has Charter failed to identify whether it has custodial data for the individuals identified in response to EarthLink's interrogatories—it has failed to identify *any* Charter custodians to date, despite multiple requests from EarthLink. Accordingly, EarthLink reiterates its request that Charter immediately identify whether it possesses custodial documents for the individuals identified in response to Interrogatories Nos. 4-9, 11, 15 and 22.

Additionally, EarthLink's document review has revealed a number of Charter employees who appear to have highly relevant information that were not identified by Charter in response to the Interrogatories. These individuals include Charter personnel who corresponded with EarthLink over numerous centrally important issues in this case, including:

- Charter accounting personal who corresponded with EarthLink concerning revenue generated from the Service Subscribers (Zachary Remming, Lorretta Rhoades, Jeffrey Mollett, and Christopher Kidwell);
- Charter customer service personnel who managed communications with the Service Subscribers (Krista Clark, Kim Grose, Aurora Provencher, and Lawrence Clermont);
- Charter customer billing personal who handled billing issues with the Service Subscribers (Christopher Squeri and Dexter Crapps).

For each of these individuals, please advise whether they are current Charter employees, and whether Charter has possession, custody or control over their custodial documents so that EarthLink can evaluate whether they should be Charter document custodians.

**B. Charter Must Search for and Produce Communications with Service Subscribers, including in Response to Interrogatories Nos. 13 and 17.**

1. Interrogatory No. 13

Interrogatory No. 13, like EarthLink's First Set of Document Requests No. 8, seeks Charter's communications with the Service Subscribers that go directly to the breaches and misrepresentations at the core of EarthLink's claims against Charter. As set forth above with respect to First Set of Document Requests No. 8, Charter's purported overbreadth and undue burden objections do not justify its hollow offer to restrict the scope of this request to Charter representatives who communicated with the sixteen Service Subscribers identified in EarthLink's pre-discovery investigation into Charter's misconduct. In fact, Charter's admission that it *is able* to perform searches to identify the Charter representatives and communications concerning "changing services" involving these sixteen Service Subscribers belies its claimed *inability* to search for this information with respect to other Service Subscribers. Accordingly, for these and all the reasons set forth above with respect to First Set of Document Requests No. 8, EarthLink demands that Charter conduct a reasonable and proportional search to identify communications and individuals responsive to Interrogatory No. 13 and First Set of Document Requests No. 8.

Separately, EarthLink is troubled by Charter's clarification in the July 7 letter that—contrary to the suggestion in its June 24, 2022 letter—Charter has not confirmed it has not deleted

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any records of calls with the Service Subscribers responsive to Interrogatory No. 13 and First Set of Document Requests No. 8. While EarthLink is cognizant that Charter's search for responsive documents and communications is "ongoing," Charter should nevertheless be able to confirm that it has not deleted any documents after implementing EarthLink's litigation hold received on June 27, 2020, particularly with respect to these communications with the Service Subscribers that are of vital importance to the issues in this case. Please confirm that no such documents or communications have been lost, deleted, or destroyed, whether intentionally or unintentionally, so that EarthLink can evaluate and seek the appropriate relief from the Court. A list of Service Subscribers can be found under the "Customer Detail" tab of the excel spreadsheet that Charter sent on a monthly basis to Martha Jenkins. *See, e.g.,* Zachary Remming Nov. 12, 2020 Email to Martha Jenkins, attaching "MISP\_202009\_Final Backup for Martha."

2. Interrogatory No. 17

EarthLink's interrogatory seeking identification of Charter communications with Service Subscribers in New York seeks especially relevant and proportional information given, among other things, EarthLink's Count VIII of the Amended Complaint alleging violations of New York General Business Law § 349. Charter cannot, in good faith, argue on the one hand that EarthLink's Count VIII should be dismissed for lack of sufficient nexus within New York (*see* Charter Motion to Dismiss Memorandum, NYSCEF No. 56 at 19-20; Charter Notice of Appeal, NYSCEF No. 125 at 1); and simultaneously deny EarthLink the discovery into Charter's communications necessary to address Charter's argument. For this and all the reasons set forth above with respect to Interrogatory No. 13 and First Set of Document Requests No. 8, Charter must conduct a reasonable and proportional search for the information and materials requested.

3. Interrogatory No. 2

Charter's July 7 letter suggests that its production of documents in response to Second Set of Document Requests No. 22, "if any exist," should satisfy EarthLink's Interrogatory No. 2. However, as set forth above, Charter has not provided EarthLink with any search terms, custodians, or other details concerning the parameters of its search for documents, including in response to Second Set of Document Requests No. 22. More importantly, Charter repeatedly fails to identify the property it claims was conveyed to it by EarthLink. As stated in Section I.D. above, evidence (or lack thereof) of what Charter can identify as its property is highly relevant. Accordingly, EarthLink reiterates its request for this information so that it may evaluate Charter's proposed response to Interrogatory No. 2.

4. Interrogatory No. 19

Charter's July 7 letter again claims confusion over what information EarthLink seeks in response to this interrogatory, which requests that, "[i]f any insurance agreements related to the EarthLink IP Addresses or TWC's representations to Charter concerning the Agreement, state the name(s) of the insurer(s) that provide such coverage, the coverage limits, and the amounts paid or payable thereunder." EarthLink has explained the nature and basis of this request several times, but will again attempt to simplify with the following questions:



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- Are there now, or were there ever, any insurance agreements that relate to the HSSA?
- Are there now, or were there ever, any insurance agreements that relate to the 1,000,000 block of IP addresses, or any portion thereof, that Charter purports EarthLink “convey[ed]” to it pursuant to the word “supply” in the HSSA?
- Did TWC ever represent or warrant to Charter at the time of your merger that it owned the 1,000,000 block of IP addresses, or any portion thereof?
  - If yes, was that property was assigned to Charter upon assignment of TWC’s rights and obligations under the HSSA?
  - If yes, is there any insurance agreement that would cover the breach of TWC’s representation or warranty?

Please confirm Charter’s understanding of these questions and answer them accordingly.

### **III. Charter’s July 12, 2022 Letter Purporting to Identify Deficiencies in EarthLink’s Interrogatory Responses.**

As noted above, we believe it is inappropriate for Charter to raise purported deficiencies in EarthLink’s responses to Charter’s Interrogatories the evening before the July 13, 2022 meet and confer, considering Charter received EarthLink’s responses over two weeks ago on June 24, 2022.

Moreover, the purported deficiencies Charter raises are baseless.

#### **1. Charter Interrogatory No. 4**

Charter’s Interrogatory No. 4, requesting that EarthLink identify the dates and times when Charter representatives made misstatements to EarthLink’s customers, is plainly objectionable for several reasons. As EarthLink explicitly noted in its June 24, 2022 objections and responses to Charter Interrogatory No. 4, the Charter misstatements identified in the Amended Complaint were based on Service Subscribers reporting these misstatements to EarthLink; EarthLink is not in possession, custody, or control of when *Charter’s* representatives made these misstatements to the Service Subscribers. This information is uniquely within the possession, custody, and control of Charter—and Charter has conceded as much in its July 7 letter when it acknowledged its ability to search for Charter communications with the sixteen Service Subscribers as noted above in response to EarthLink’s First Set of Document Requests No. 8. For these and the reasons and objections set forth in EarthLink’s objections and responses to Interrogatory No. 4, EarthLink adheres to its proposal to identify dates and times when Charter’s representatives made the at issue statements upon review of Charter’s production.

#### **2. Charter Interrogatories Nos. 13 and 14**

There is no merit to Charter’s contention that EarthLink is required to provide further information in its responses to Interrogatories Nos. 13 and 14, which request that EarthLink identify the “name[s], address[es], phone number[s], email address[es] and service of agreements”

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of the authors of two social media posts on Reddit.com cited in the Amended Complaint. As an initial matter, a username also acts as the user's contact information for the user through the Reddit platform. *First*, EarthLink clearly objected to these interrogatories on the grounds that they seek information outside EarthLink's possession, custody, or control. *Second*, Should Charter seek to verify the identity of these individuals, it should first search its employees emails for the verbatim text of the solicitations sent to these persons, or use any other manner of discovery device available, such as a third party subpoena or requests for user information directed to Reddit. *Third*, EarthLink is under no obligation to marshal its evidence for Charter at this juncture and "confirm in writing" "what steps, if any, EarthLink has taken to verify the identity of" these individuals or "explain how it intends to rely on statements allegedly made by an anonymous Reddit user in order to support its case." *Fourth*, Charter misses the point of both of these allegations (Am. Compl. ¶¶ 76-77) which is they are used to illustrate the use of formal marketing by Charter through email/mail to EarthLink's Service Subscribers. *See* Am. Compl. ¶ 78 ("Upon information and belief, these communications from Charter are examples of a much broader campaign to directly market Spectrum Internet and email services to the Service Subscribers prior to the termination of the Transition Period and in violation of the HSSA."). Again, to the extent Charter genuinely intends to take issue with the veracity of *whether* these communications were sent by Charter to Service Subscribers—Charter should first collect, search and review its own internal emails and mail to the Service Subscribers. *Finally*, Charter's requests for additional information related to EarthLink's litigation strategy and efforts unquestionably exceeds the limited scope of interrogatory topics under Commercial Division Rule 11-a. For these and the reasons and objections set forth in EarthLink's objections and responses to Interrogatories Nos. 13 and 14, EarthLink adheres to its responses to these interrogatories.

Sincerely,



Shaila R. Diwan