

At I.A.S. Part 48 of the Supreme Court of the State of New York, Commercial Division, held in and for the County of New York at the Courthouse located at 60 Centre Street, New York, New York, on the 29 day of Sept 2022.

P R E S E N T:

**HON. ANDREA MASLEY**  
Hon.                           
Justice of the Supreme Court

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No.: 654332/2020

Hon. Andrea Masley

Mot. Sequence # 004

~~PROPOSED~~ ORDER TO  
SHOW CAUSE FOR  
SPOILATION SANCTIONS  
AGAINST DEFENDANT

UPON the reading and filing of the annexed Affirmation of Alexander Noble and exhibits thereto, Affirmation of Damien Marshall and exhibits thereto, Plaintiff's Memorandum of Law in Support of Order to Show Cause for Spoliation Sanctions against Defendant, and all other papers and proceedings heretofore filed and had herein, and sufficient cause thereon appearing,

LET defendant Charter Communications Operating, LLC ("Charter") show cause before this Court, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York 10007 on the 29th day of Sept 2022, at 10 a.m. of that day,

1106f196

or as soon thereafter as counsel can be heard why an order should not be made and entered herein

pursuant to, *inter alia*, CPLR 3126, finding that Charter spoliated evidence and issuing the following sanctions:

- (1) providing for adverse inferences on summary judgment and/or trial that (a) Charter destroyed its audio recordings of customer service calls with Plaintiff EarthLink's Service Subscribers 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) precluding 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;
- (3) requiring Charter to pay EarthLink's attorneys' fees and costs associated with this application; and
- (4) for any further or other relief that the Court deems just and appropriate.

*by August 5, 2022*

ORDERED that service of this Order to Show Cause and the papers upon which it is based be served on Charter's counsel of record by via email and e-filing using the NYSCEF system and that such shall be good and sufficient service; and it is further

ORDERED that answering papers, if any, shall be served upon counsel of record for EarthLink by serving via email and e-filing so as to be received on or before the 21 day of August, 2022; and it is further

ORDERED that the reply papers, if any, shall be served upon the Charter's counsel by email and e-filing so as to be received on or before the 9 day of Sept, 2022.

**ADDENDUM TO ALL ORDERS TO SHOW CAUSE FOR PART 48  
AS OF MARCH 1, 2022**

1. All appearances will be virtual using TEAMS which will be arranged by the Court. Participants in TEAMS are encouraged to download the application, instead of using a browser, and test it to ensure the highest quality appearance. Please email SFC-Part48@nycourts.gov if you would like to participate or listen. DO NOT COME TO COURT.
2. If there is no opposition, there will be no argument unless the court orders otherwise. However, applications to withdraw as counsel shall proceed even in the absence of opposition and the client must appear unless new counsel has been engaged.
3. Do not deliver paper copies to the court. All papers shall be filed in NYSCEF.
4. For the public, members of the press, and student interns, please email SFC-Part48@nycourts.gov to indicate your interest in listening to the proceedings. Such requests must be made at least 48 hours before the proceeding.
5. For orders to show cause for withdrawal of counsel, counsel shall file in NYSCEF proof of service on the client. The client is referred to the New York City Bar Association, Legal Referral Service for assistance in engaging a new attorney, 212-626-7373. Individual parties may represent themselves. Business entities, e.g. corporations, must appear by counsel.
6. Affidavits of service of the OSC shall be filed in NYSCEF at least 24 hours before the argument.
7. Parties shall read Part 48 rules and use NYSCEF numbers to reference documents filed in the docket.  
[http://ww2.nycourts.gov/courts/comdiv/ny/newyork\\_judges\\_links.shtml#masley](http://ww2.nycourts.gov/courts/comdiv/ny/newyork_judges_links.shtml#masley)
8. FOR ALL ORDERS TO SHOW CAUSE WHERE THE CASE IS NEWLY INITIATED AND PROCESS HAS YET TO BE SERVED, SERVICE OF PROCESS IS TO BE MADE OR ATTEMPTED IMMEDIATELY CONSISTENT WITH THE CPLR, BCL OR ANY AND ALL AGREEMENTS. SERVICE OF PROCESS IS NECESSARY FOR THE COURT TO OBTAIN JURISDICTION TO HEAR THIS CASE.

At I.A.S. Part 48 of the Supreme Court of the State of New York, Commercial Division, held in and for the County of New York at the Courthouse located at 60 Centre Street, New York, New York, on the \_\_\_\_ day of \_\_\_\_\_ 2022.

**P R E S E N T:**

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pursuant to, *inter alia*, CPLR 3126, finding that Charter spoliated evidence and issuing the following sanctions:

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ORDERED that the reply papers, if any, shall be served upon the Charter's counsel by email and e-filing so as to be received on or before the \_\_\_ day of \_\_\_\_\_, 2022.

E N T E R :

---

J.S.C.

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

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

Motion Sequence No. 004

Judge Andrea Masley

**AFFIRMATION OF ALEXANDER NOBLE**

I, Alexander Noble, an attorney admitted to the practice of law before the courts of the State of New York, affirm the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am a Senior Associate in the law firm King & Spalding LLP, counsel for Plaintiff EarthLink, LLC (“EarthLink”). I am fully familiar with the facts and circumstances set forth herein. I submit this affirmation in support of EarthLink’s motion to dismiss defendant’s Counterclaims in this action.

2. Attached hereto as Exhibit 1 is a true and correct copy of Glenn Goad’s August 12, 2019 email to Michael Locke and responses thereto.

3. Attached hereto as Exhibit 2 is a true and correct copy of Michael Toplisek’s June 25, 2020 email to Michael Locke and responses thereto.

4. Attached hereto as Exhibit 3 is a true and correct copy of King & Spalding’s July 27, 2020 email to Charter’s General Counsel attaching a Document Preservation Notice.

5. Attached hereto as Exhibit 4 is a true and correct copy of Charter’s Assistant

General Counsel Cody Harrison's August 10, 2020 email to Damien Marshall requesting a telephone call to discuss the July 27, 2020 Document Preservation Notice.

6. Attached hereto as Exhibit 5 is a true and correct copy of the document requests EarthLink served on Charter on September 15, 2020.

7. Attached hereto as Exhibit 6 is a true and correct copy of Charter's Responses and Objections to EarthLink's First Set of Interrogatories.

8. Attached hereto as Exhibit 7 is a true and correct copy of Charter's Responses and Objections to EarthLink's First Set of Document Requests.

9. Attached hereto as Exhibit 8 is a true and correct copy of King & Spalding's June 23, 2022 letter to Charter's counsel concerning, among other things, Charter's preservation of the audio recordings.

10. Attached hereto as Exhibit 9 is a true and correct copy of Charter's counsel's June 24, 2022 letter responding to King & Spalding's June 23, 2022 letter.

11. Attached hereto as Exhibit 10 is a true and correct copy of King & Spalding's June 29, 2022 letter to Charter's counsel.

12. Attached hereto as Exhibit 11 is a true and correct copy of Charter's counsel's July 7, 2022 letter to King & Spalding.

13. Attached hereto as Exhibit 12 is a true and correct copy of King & Spalding's July 12, 2022 letter to Charter's counsel.

14. Attached hereto as Exhibit 13 is a true and correct copy of Charter's counsel's July 19, 2022 letter to King & Spalding.

15. Attached hereto as Exhibit 14 is a true and correct copy of King & Spalding's July 15, 2022 letter to Charter's counsel.

16. Attached hereto as Exhibit 15 is a true and correct copy of King & Spalding's July 25, 2022 letter to Charter's counsel. As of the time of this application, Charter has yet to provide a response to this letter.

17. Attached hereto as Exhibit 16 is a true and correct copy of the Dallas County Court's June 6, 2022 Order Granting Plaintiffs' Motion for Spoliation Jury Instructions and Sanctions against Charter. *See Goff v. Roy James Holden Jr. and Charter Communications, LLC*, No. CC-20-01579-E, (Dallas Cty. Ct. June 6, 2022), *writ of mandamus denied In re Charter Communs.*, No. 05-22-00557-CV, 2022 Tex. App. LEXIS 3959, at \*1 (Tex. App. June 9, 2022).

18. During the July 13, 2022 meet and confer telephone call, in which I participated on behalf of EarthLink, Charter's counsel H. Gregory Baker stated that the EarthLink Service Subscribers calls were routed to Charter call centers, and were recorded for training purposes. Mr. Baker further stated that the calls, as part of Charter's normal practices, were saved for only 120 days, and that "the recordings were not saved as part of this litigation." Mr. Baker stated that, due to the foregoing, "there are no recordings between Charter and the Service Subscribers." Mr. Baker confirmed that "there are no customer calls from 2020 and before."

19. During the July 13 call, Mr. Baker further conveyed to me that Charter had preserved its "Customer Notes," which he explained are notes prepared by Charter representatives reflecting their characterizations of interactions with the Service Subscribers.

20. No prior application for the relief sought herein has been made to the Court.

21. The undersigned affirms that, prior to making this application, EarthLink engaged in good faith efforts to confer with Charter concerning the issues raised herein. On July 13, 2022

during the parties' telephonic met and confer, Charter's counsel revealed that the call recordings requested in EarthLink's discovery demands were destroyed. Due to this definitive statement from Charter about its inability to comply with EarthLink's discovery demands related to these call recordings, there is no other further avenue to pursue.

Dated: New York, New York  
July 28, 2022

**KING & SPALDING LLP**

By:



Alexander Noble  
1185 Avenue of the Americas  
New York, New York 10036  
Tel: (212) 556-2100  
Fax: (212) 556-2222

*Attorneys for Plaintiff EarthLink, LLC*

**CERTIFICATE OF LENGTH OF PAPERS**  
**COMPLIANCE**

The foregoing affirmation complies with Rule 17 of Section 202.70 of the Uniform Rules for the Supreme Court and County Court because it is less than 7,000 words.

Dated: July 28, 2022  
New York, New York

**KING & SPALDING LLP**

By: 

# **Exhibit 1**

RECEIVED NYSCEF: 08/08/2022

**Cc:** Toplisek, Mike [Mike.Toplisek@elnk.com]  
**From:** Locke, Michael G [Michael.Locke@charter.com]  
**Sent:** Tue 8/20/2019 12:51:09 PM (UTC-04:00)  
**Subject:** RE: Connect

Glenn;

Apologies for delay but have been out of the office for an extended period of time.

Know we plan to get the billing dispute resolved here over the next week or 2. We have another meeting planned with your team later this week where we'll look for closure.

I'm certainly interested in hearing more about the customer complaints and yes we should look to get-together in the near future.

Let's see if we can get you up in Stamford before the busy 4<sup>th</sup> Q.

How does the last week in September look for you?

.....ml

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**From:** Goad, Glenn [mailto:glenngoad@elnk.com]

**Sent:** Monday, August 12, 2019 12:23 PM

**To:** Locke, Michael G <Michael.Locke@charter.com>

**Cc:** Toplisek, Mike <mike.toplisek@elnk.com>

**Subject:** Connect

Michael,

Hope all is well. Hopefully you are getting to enjoy your lake house this summer. I wanted to get some time on your calendar to discuss our partnership. There are a few items that make sense for us to discuss and figure out.

1. As you know, our teams have been working on this billing discrepancy. I appreciate you and your team engaging and want to be flexible on how we resolve it. My guess is it is not in anybody's budget and we can work out a schedule that spreads it out over time if that helps.
2. We have been getting customer calls/emails that are very concerning. It appears Spectrum is trying to get customers to end their relationship with EarthLink. I can share more when we talk.
3. We have a number of IP addresses in the current Spectrum network. We need to figure out a solution for these long term.

I am in New York frequently, so it may make sense to try and meet at your offices or we could meet in Atlanta on one of your trips through here. We have a lot going on and lot more to come. Finding ways to work together on some of our opportunities would always be welcome.

Glenn

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# **Exhibit 2**

RECEIVED NYSCEF: 08/08/2022

**From:** Toplisek, Mike <mike.toplisek@elnk.com>  
**Sent:** Fri 6/26/2020 8:21:41 AM (UTC-04:00)  
**Subject:** RE: Follow up / re-cap

Mike, received and will socialize accordingly.....thanks.....ml

**From:** Toplisek, Mike <mike.toplisek@elnk.com>  
**Sent:** Thursday, June 25, 2020 7:49 PM  
**To:** Locke, Michael G <Michael.Locke@charter.com>  
**Subject:** [EXTERNAL] Follow up / re-cap

**CAUTION:** The e-mail below is from an external source. Please exercise caution before opening attachments, clicking links, or following guidance.

Michael, as always, it was good catching up with you. I really appreciate you keeping this moving forward. As promised, here is a recap of our call and our position. Over the last two weeks I have spent time with Glenn and our board to review our proposal and your verbal guidance around that offer. A couple of points that make these customers much more valuable than "new" customers you acquire every day.

1. These customers are very tenured and are not going anywhere unless forced.
2. These customers are much more valuable than current customers you pay to acquire.... No early churn, no truck roll, no equipment required, and they are *embedded heavy email users*. Therefore, we offered to make email part of the go forward deal.

All of that said, I want to try and be a good partner, but to be honest, our team is struggling based on the information I shared, that we have gathered.

1. I forgot to mention this, but not long after we acquired the business, Spectrum changed the reporting, which is puzzling. Obviously, this makes it harder to analyze current results and to compare them to historic trends.
2. In listening to calls and doing email surveys with customers who have left EarthLink, the information we have received is troubling. Both sides are required to comply with the agreement until the end of the Transition Period. We have. It's clear that Spectrum has been churning these customers for their own benefit and refusing to save them to EarthLink's product in direct conflict with sections 2.2(f) and 5.3 of the agreement. Maybe even more disturbingly, we are seeing evidence that Spectrum is making knowingly false statements about EarthLink, including that we are not in business, that seem to be intended to harm our ability to compete. As you know, we have invested substantial amounts in the brand, so seeing evidence that Spectrum is deliberately spreading false information about us is particularly disturbing.
3. Here are just a few verbatim comments from EarthLink customers who have churned:
  - a. Spectrum told me that they took you over
  - b. Spectrum cut you guys off without my approval
  - c. I was told by Spectrum that I could not keep EarthLink Internet because I dropped my TV subscription with Spectrum. I still don't understand why and wish I was still with EarthLink
  - d. Spectrum made an unauthorized change to my EarthLink Internet account which could not be reversed by EarthLink. Consequently, I had to switch to Spectrum
  - e. Spectrum did not support EarthLink
  - f. EarthLink stopped the contract with TWC and couldn't get service anymore
  - g. I was switched to Spectrum.... they told me EarthLink wasn't in business anymore

Michael, this is all with very little effort or discovery. These are customers who provided this information during calls to buy email from us or through a customer satisfaction survey. Spectrum had a responsibility to do everything possible to keep these customers as EarthLink customers and in many cases did just the opposite. I am concerned that EarthLink has been damaged in ways that we haven't been able to fully calculate yet.

We are still interested in doing a deal, if a fair deal can be reached. We want to get to a place where we both give these customers a great transition experience with Internet and email.

We made a fair offer before that would allow for a transition of these customers and a peaceful end to our relationship. Since we don't have an official counteroffer from Spectrum, we would like something in writing from Spectrum by July 9th on what that looks like based on the information I have shared today.

Mike Toplisek  
President  
**[EarthLink](#)**  
1439 Peachtree Street NE, Atlanta, GA 30309  
**E:** [mike.toplisek@elnk.com](mailto:mike.toplisek@elnk.com)  
**M:** 614-332-2087

The contents of this e-mail message and any attachments are intended solely for the addressee(s) and may contain confidential and/or legally privileged information. If you are not the intended recipient of this message or if this message has been addressed to you in error, please immediately alert the sender by reply e-mail and then delete this message and any attachments. If you are not the intended recipient, you are notified that any use, dissemination, distribution, copying, or storage of this message or any attachment is strictly prohibited.

# **Exhibit 3**

**From:** [Evan Ennis \(recovered\)](#)  
**To:** [Rick.Dykhouse@charter.com](mailto:Rick.Dykhouse@charter.com)  
**Cc:** [Damien Marshall](#); [Larry Slovensky](#)  
**Subject:** EarthLink Document Preservation Notice  
**Date:** Monday, July 27, 2020 10:31:48 AM  
**Attachments:** [image001.png](#)  
[7.27.20 Letter.pdf](#)

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Mr. Dykhouse,

Please see the attached correspondence on behalf of EarthLink, LLC.

Regards,

---

**Evan Claire Ennis**

*Senior Associate*

T: +1 212 556 2262 | E: [eennis@kslaw.com](mailto:eennis@kslaw.com) | [www.kslaw.com](http://www.kslaw.com)

[BIO](#) | [vCARD](#)

King & Spalding LLP  
1185 Avenue of the Americas  
New York, NY 10036

**KING & SPALDING**

# KING & SPALDING

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Damien Marshall  
Partner  
Direct Dial: 212-790-5357  
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[dmarshall@kslaw.com](mailto:dmarshall@kslaw.com)

July 27, 2020

## VIA E-MAIL

Richard R. Dykhouse  
Charter Communications Operating, LLC  
400 Atlantic Street, 10th Flr.  
Stamford, CT 06901

Re: Document Preservation Notice

Dear Mr. Dykhouse:

We represent EarthLink, LLC (“EarthLink”) and are writing to notify you that we are investigating potential claims on behalf of EarthLink against Charter Communications Operating, LLC, as successor to Time Warner Cable Inc. (“Spectrum”) concerning breaches of certain provisions of the High-Speed Service Agreement, as amended (the “Agreement”). In that regard, we hereby notify Spectrum of its obligation to preserve information, documents, and electronically stored information potentially relevant to the aforementioned misconduct.

As used in this letter, the term “Documents” is broad and includes all forms of recorded information, including without limitation: hard copies and all forms of electronic files, final and draft correspondence, reports, memoranda, notes, graphs, presentations, photographs, calendars, emails, recordings, and any data compilations from which information can be obtained, such as email, spreadsheets, databases, PDA files, videos, CDs, electronic calendars, archives, floppy disks, computer drives, PSTs, shared drives, data sites, online and cloud based databases, and any other electronic media and/or electronic data storage platforms whatsoever. The term “Communications” means all communications between Spectrum, its directors, managers, agents, employees, and/or any other person or persons including, without limitation, communications with Spectrum’s legal counsel, and any third parties.

To fulfill Spectrum’s preservation obligations, it must preserve all forms of Documents and Communications that relate in any way to the potential litigation referenced above. This includes, without limitation, all Documents and Communications related to the Agreement. This also includes all currently existing recordings of Spectrum’s sales and service calls with EarthLink Service Subscribers; all Documents evidencing Communications between Spectrum’s call center employees and agents and EarthLink Service Subscribers referencing or relating to EarthLink’s service offerings or business; all Documents relating to Spectrum’s sales efforts with

respect to EarthLink Service Subscribers; all Documents relating to Spectrum's marketing efforts with respect to EarthLink Service Subscribers; all Documents referencing the Transition Period in the Agreement; and all Documents otherwise referencing or relating to the termination of the Agreement (collectively, the "Relevant Documents").

Until further notice, all Relevant Documents must be preserved and may not be discarded, deleted, altered, or destroyed. Regardless of any document retention/destruction policies that may otherwise be applicable, Spectrum must not discard, destroy, alter or delete any Relevant Documents until further notice. To preserve emails and information contained therein, Spectrum should immediately review every Inbox, Sent Items, Deleted Items, and other folders for all email addresses within its access and/or control. Spectrum also should preserve any relevant materials stored on its hard drives, relevant shared drives, and any online and/or cloud-based data storage platforms, including any and all storage systems on which Spectrum maintains call center recordings. This letter applies to any materials that relate to the above categories of documents that may be found on personal and laptop computers, as well as in personal email accounts, and personal digital devices such as iPhones, Android phones, or Blackberries.

Spectrum is responsible for ensuring that its document preservation obligations are communicated to every person, employee, and/or agent of Spectrum who may discard or destroy documents, records, or information, and/or the responsible person at any "off-site" repositories of such materials.

This letter is not intended to state all the facts or legal issues relating to the foregoing, and EarthLink shall not be deemed to waive any of its rights or remedies, in law or in equity, all of which are expressly reserved.

Sincerely,

/s/ Damien Marshall  
Damien Marshall

# **Exhibit 4**

**From:** Harrison, Cody J <Cody.J.Harrison@charter.com>  
**Sent:** Monday, August 10, 2020 11:21 AM  
**To:** Marshall, Damien <dmarshall@kslaw.com>  
**Subject:** EarthLink/Charter

\*\*External Sender\*\*

Damien,

I left you a voicemail message, but can you give me a call with respect to your letter? Charter's relationship with EarthLink has been in place for many years, so I need to understand in more detail the nature of EarthLink's demand in order to comply with the document preservation notice.

Cody



**Cody J. Harrison** | Vice President, Associate General Counsel  
Cody.J.Harrison@charter.com | 203.705.4829  
400 Atlantic Street | Stamford, CT 06901

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# **Exhibit 5**

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

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

**PLAINTIFF'S FIRST SET OF DOCUMENT REQUESTS TO DEFENDANT**

PLEASE TAKE NOTICE that, pursuant to Article 31 of the New York Civil Practice Law and Rules (“CPLR”), and particularly Rules 3120 and 3122, Plaintiff EarthLink, LLC (“EarthLink”) requests that Defendant Charter Communications Operating, LLC (“Charter”) respond to the following requests and produce for inspection and copying the documents and things identified below at the offices of EarthLink’s attorneys King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036, on or before October 6, 2020.

**DEFINITIONS**

The following definitions apply to the Document Requests:

1. “Agreement” means the High-Speed Services Agreement dated June 30, 2006, and all amendments thereto.
2. “Call Center” means any call center that is operated by Charter or with which Charter contracts.
3. “Charter” means Charter Communications Operating, LLC and its predecessors, successors, parents, subsidiaries, divisions, affiliates, or anyone acting or purporting to act on their

behalf, including any of their respective directors, officers, managing agents, agents, employees, attorneys, accountants, or other representatives or committees thereof.

4. "Communication" is used in its broadest sense to encompass any transmission or exchange of information, ideas, facts, data, proposals, or any other matter, whether between individuals or between or among members of a group, whether face-to-face, by telephone, whether oral or in writing, or by means of electronic or other medium.

5. "Concerning" means constituting, relating to, referring to, reflecting, describing, commenting on, discussing, or evidencing.

6. "Document" is used in the broadest sense permissible under CPLR 3120 and includes each and every written, recorded, or graphic matter of any kind, type, nature or description that is or has been in your possession, custody, or control, including but not limited to, computer files, computer databases, computer printouts, correspondence, electronic mail, memoranda, tapes, stenographic or handwritten notes, written forms of any kind, drafts of documents, exhibits, work papers, schedules, forms, audits, charts, plans, articles, specifications, diaries, letters, telegraphs, photographs, minutes, contracts, agreements, reports, surveys, data compilations of any kind, teletypes, telexes, facsimiles, invoices, checks, statements, receipts, summaries, books, ledgers, or any written or recorded materials of any other kind, however stored, recorded, produced, or reproduced and also including, but not limited to, drafts or copies of any of the foregoing that contain any notes, comments, or markings of any kind not found in the original documents or that are otherwise not identical to the original documents.

7. "EarthLink" means EarthLink, LLC and its predecessors, successors, parents, subsidiaries, divisions, affiliates, or anyone acting or purporting to act on their behalf, including

any of their respective directors, officers, managing agents, agents, employees, attorneys, accountants, or other representatives or committees thereof.

8. "EarthLink High-Speed Service" means the wholesale version of Charter's high-speed data service that EarthLink brands, markets and resells over Charter's cable systems to consumers/residential customers.

9. "June 25 Email" means the email from Mike Toplisek of EarthLink to Michael Locke of Charter dated June 25, 2020 titled "Follow up / re-cap."

10. "Person" means any individual, corporation, partnership, firm, association, government agency, or other organization recognizable at law, and its agents and employees.

11. "Relate to" or "relating to" means analyzing, containing, concerning, dealing with, constituting, defining, describing, discussing, embodying, evidencing, explaining, identifying, mentioning, reflecting, referring to, setting forth, showing, stating, summarizing, supporting, or in any way pertaining to the subject matter of the relevant request.

12. "Service Subscribers" means the consumers/residential customers who subscribe to EarthLink High-Speed Service pursuant to the Agreement.

13. "Spectrum" means Charter's trade name used to market consumer and commercial cable television, Internet, telephone and wireless services.

14. "Transition Period" means the three-year period following the expiration of the Agreement, which will terminate on October 31, 2020.

15. "You" or "your" means Charter and all divisions, departments, area or regional offices, managing general agents, parents (whether whole or part owners), subsidiaries (whether wholly or partly owned), affiliates, predecessors, successors, each and every other person within

their control, and each officer, employee, agent, director, representative, attorney, investigator, contractor, subcontractor, expert, and consultant of any of them.

**INSTRUCTIONS**

1. Each Document Request is to be read, construed, and responded to separately and independently without reference to, or being limited by, any other Document Request.
2. These instructions and definitions should be construed to require an answer based upon the knowledge of, and information available to, the responding party as well as its agents and representatives.
3. The Document Requests are continuing in nature so as to require supplemental answers to be served in a timely manner if further or different information is obtained with respect to any Document Request.
4. Each Document Request includes all documents that are within your possession, custody, or control, including all documents held by your employees or representatives that exist either in hard-copy files, whether centrally or individually maintained, or in electronic form, whether maintained on your servers, cloud services, or individually maintained on company-owned or employee-owned personal computers, laptop computers, tablets, mobile phones, or other computing devices of all individuals in whose files you search for responsive documents.
5. Each document should be produced with all of its attachments, appendices, schedules, and exhibits.
6. To the extent responsive documents or data are maintained in an electronic format, including but not limited to on a disk, tape, or other magnetic or machine-readable format, please produce the electronic version along with manual and all other documents sufficient to operate, display, read, and interpret the programs, documents, or data.

7. Documents should be produced either (a) as they are kept in the usual course of business, complete with the original file folders, binders, or other containers in which they are stored (or legible copies of the labels from those folders, binders, or containers), and should be stapled, clipped, or otherwise unitized as they are kept in the usual course of business, or (b) organized according to the request or requests to which they are responsive. If you elect the latter mode of production, each document or set of documents from a particular file, binder, or other container should be accompanied by a legible copy of the label from that container or some other reliable indicator of the file from which it was taken, and documents should be stapled, clipped, or otherwise unitized as they are kept in the usual course of business.

8. If a claim of privilege is asserted with respect to any Document Request, in whole or in part, or you refuse to answer any Document Request on any other ground, specify the exact basis for your claim that such Document Request need not be answered with sufficient specificity to permit the Court to determine the validity of your objection or position. In the event you serve a proper and timely objection to a portion of a Document Request, please respond to all portions of the Document Request that do not fall within the ambit of your objection. For example, if you object to a Document Request on the ground that it is too broad insofar as it covers time periods that you contend are not relevant to this litigation, you should answer as to all time periods that you contend are relevant.

9. In answering these Document Requests, if you claim an ambiguity in interpreting a Document Request, or any definition, instruction or request, that claim shall not be used as a basis for refusing to respond, but there shall be set forth as a part of the response the language deemed to be ambiguous and the interpretation chosen or used in responding to the Document Request.

10. If more than one copy of a responsive document exists, produce each copy that includes (a) any notations or markings not on other copies, including handwritten notations or routing or filing instructions; and/or (b) attachments not included as part of other copies.

11. In the event that any requested document has been destroyed, lost, discarded, or is otherwise not capable of being produced at the time that documents are produced pursuant to these Document Requests; identify any such document; identify the person who previously or currently has possession, control, or custody of the document; indicate the request(s) to which such document is responsive; and set forth the circumstances under which the document was destroyed or discarded or an explanation of why the document is not capable of being produced.

12. Unless otherwise defined herein, all words and phrases used in these Document Requests are to be given their plain, customary, and usual meaning.

13. All uses of the conjunctive include the disjunctive (and vice versa). All words in the singular include the plural (and vice versa). All uses of the word "all" include "any" (and vice versa). All uses of the word "each" include "every" (and vice versa). The use of a verb in any tense encompasses the use of the verb in all tenses.

14. Unless otherwise indicated, each Document Request seeks documents and/or communications concerning the period from January 1, 2017 to the present.

15. If any document is withheld under any claim of privilege, including without limitation, the work product doctrine, attorney-client privilege and/or any joint defense or common interest privilege, consistent with the Commercial Division Rule 11-b, provide a privilege log.

16. EarthLink reserves the right to serve supplemental Document Requests.

**FORMAT OF PRODUCTION**

1. Please produce documents on hard drive, DVD or zip disk in standard black-and-white, single page TIFF format with Opticon image cross reference and Concordance.DAT load files that contain corresponding extracted text and related metadata fields. Format black and white images as 300 DPI Group IV single-page TIFF that contain a unique bates number filename. Please endorse images with sequential Bates numbers in the lower right corner of each page and produce non-redacted spreadsheet files (such as Microsoft Excel (.xls) files) and non-redacted presentation files (such as Microsoft Powerpoint (.ppt) files) in native format with a corresponding placeholder TIFF image named by the Bates number associated with the file. The format should be searchable and compatible with the Kcura Relativity hosting platform.

2. Please supply the following metadata for the production: Bates Begin, Bates End, Attachment Begin, Attachment End, Attachment Range, Parent ID, Attachment IDs, Number of Attachments, Custodian, Duplicate Custodians, From, To, CC, BCC, Author, Subject, Title, Date Sent, Date Received, Date Created, Date Last Modified, Time Sent, Time Received, Tim Created, Time Last Modified, IntMSGID, Conversation Index, Time Zone, File Extension, File Name, File Size, Original File Path, Number of Pages.

**REQUESTS FOR PRODUCTION OF DOCUMENTS**

1. All documents and communications concerning your policies and procedures relating to the Agreement with EarthLink and/or communications with the Service Subscribers.
2. All documents and communications concerning your efforts to “save” Service Subscribers who indicate that they wish to terminate their EarthLink High-Speed Service.
3. All documents and communications concerning any efforts by you to market Spectrum Internet service to the Service Subscribers.

4. All documents and communications relating to your decision to no longer provide EarthLink with customer level reporting.
5. All documents and communications concerning Service Subscribers who terminated their EarthLink High-Speed Service, including Service Subscribers who became Charter customers.
6. All documents and communications concerning training provided to the Call Center employees who communicate with Service Subscribers, including copies of any training materials.
7. All documents pertaining to Call Center employee compensation plans
8. All documents relating to communications between Call Center employees and Service Subscribers, including all recordings or transcriptions of those communications.
9. All documents and communications relating to any instructions provided to the Call Centers and their employees concerning communications with the Service Subscribers.
10. All documents and communications relating to your monitoring of communications between the Call Centers and the Service Subscribers.
11. All documents and communications relating to any feedback provided by you to the Call Centers concerning communications between Call Center employees and the Service Subscribers.
12. All documents and communications concerning your plans to market Spectrum Internet to the Service Subscribers after the Transition Period, including documents and communications relating to your ability to provide email and broadband Internet service to the Service Subscribers.
13. All documents and communications concerning the value ascribed by you to the Service Subscribers.

14. All documents and communications concerning negotiations with EarthLink regarding the status of the Service Subscribers after the Transition Period.
15. All documents and communications concerning the July 22, 2020 meeting between representatives of Charter and EarthLink.
16. All documents and communications concerning the proposed EarthLink Transition Services Agreement dated July 24, 2020.
17. All documents and communications concerning the June 25 Email, including documents concerning any investigation or remedial action undertaken by you as a result.
18. Copies of any insurance policy that may provide full or partial coverage for any of the claims asserted in the instant litigation.
19. Copies of your document retention or destruction policies, including, but not limited to, the destruction of electronic mail and computer hard drives and disks.
20. Documents sufficient to identify any experts you have retained or with whom you have consulted in connection with this litigation that you intend to call to testify at any hearing or trial in this litigation.
21. Documents sufficient to identify the qualifications and experience of any expert witness that you intend to call to testify at any hearing or trial in this litigation, including, without limitation, the most recent *curriculum vitae* and/or resumes for each person.
22. All documents that you have provided to or received from any expert that you may call as a witness at trial of this action.
23. All documents that you intend to introduce or rely upon at any trial or any hearing in this litigation.

Dated: New York, New York  
September 15, 2020

**KING & SPALDING LLP**

By: Damien Marshall  
Damien Marshall  
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*Attorneys for Plaintiff EarthLink, LLC*

# **Exhibit 6**

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

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

**DEFENDANT'S RESPONSES AND OBJECTIONS TO  
PLAINTIFF'S FIRST SET OF INTERROGATORIES**

Defendant Charter Communications Operating, LLC (“Charter”), pursuant to Article 31 of the Civil Practice Law and Rules of the State of New York (“CPLR”) and Rule 11-a of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), by and through its undersigned counsel, hereby responds and objects to Plaintiff EarthLink, LLC’s (“EarthLink”) First Set of Interrogatories (“Interrogatories”).

**GENERAL OBJECTIONS**

1. Charter objects to each of the Interrogatories to the extent that they purport to impose obligations beyond those required by the CPLR and any other applicable rules and orders.
2. Charter objects to these Interrogatories to the extent that they seek the identification of documents not in Charter’s possession, custody, or control.
3. Charter objects to the Interrogatories to the extent that they seek identification of documents and information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege that makes such information non-discoverable. Charter claims these privileges and protections to the full extent implicated by each Interrogatories, and will exclude privileged and protected information from their productions in

response to the Interrogatories. The fact that Charter does not specifically object to any individually numbered Interrogatories on the ground that it seeks privileged information or documents shall not be deemed a waiver of the protection afforded by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege, immunity, or exemption from discovery. Any documents or information identified in response to the Interrogatories shall be disclosed without waiving any of these privileges.

4. Charter objects to the Interrogatories to the extent that they seek identification of documents or information in the possession, custody, or control of Plaintiff, or to the extent that the documents are obtainable from sources other than Charter in a manner that is more convenient, less burdensome, or less expensive.

5. Charter objects to the Interrogatories to the extent that they are overbroad, unduly burdensome, and not proportional to the needs of the case. To the extent that Charter agrees to identify documents, Charter will conduct a reasonable search of the locations reasonably likely to contain the requested documents and communications.

6. Charter objects to any Interrogatory that is unreasonably cumulative or duplicative of other discovery requests.

7. Charter objects to any Interrogatories that is vague, ambiguous, or confusing and therefore not susceptible of a clear and definitive response. To the extent an Interrogatory is vague or ambiguous, Charter will respond to the best of its ability.

8. Charter objects to any Interrogatory that calls for a legal conclusion, or that purports to require Charter to form, read, set forth, or perform a legal analysis.

9. Charter objects to the Interrogatories to the extent that they are premature.

10. Charter objects to any Interrogatory to the extent that it seeks to require identification and/or organization of documents in any specific order or grouping. To the extent that Charter identifies documents in response to these Interrogatories, responsive non-privileged documents will be identified as they are kept in the usual course of business.

11. Neither these Interrogatories nor Charter's responses to them shall be construed as admissions by Charter that any fact or circumstance alleged in any Interrogatory occurred or existed. Moreover, the responses provided are not intended to be, and shall not be construed to be, an agreement or concurrence by Charter that Plaintiff's characterization of any facts or circumstances is correct.

12. Charter reserves the right to amend or modify these responses at any time should it discover information that makes the present response incomplete or inaccurate. By reserving the right, Charter does not intend to assume a duty to modify or amend these responses, other than as required by the CPLR.

13. In providing these responses and asserting these objections, Charter does not intend to waive any objections as to relevancy, materiality or admissibility of evidence in this matter or any other matter or proceeding.

14. Charter responds to the Interrogatories as it interprets and understands each Interrogatory as set forth. If EarthLink subsequently asserts an interpretation of any Interrogatory that differs from Charter's understanding of that Interrogatory, Charter reserves the right to supplement its objections and/or responses.

15. The General Objections asserted herein shall be deemed to be applicable to and continuing with respect to each of Charter's responses to the within the Interrogatories. The General Objections asserted herein are incorporated into each and every response set forth herein.

Such objections are not waived, nor in any way limited, by any response to any specific Interrogatory.

16. Charter does not waive, and expressly preserves, all objections submitted in connection with its responses and objections to EarthLink's first and second requests for production of documents.

### **SPECIFIC RESPONSES AND OBJECTIONS**

Subject to and without waiting any of the foregoing objections, Charter responds as follows to EarthLink's Interrogatories:

**INTERROGATORY NO. 1:** Provide a computation of each category of damages alleged by Charter in its Answer and Counterclaims.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as premature because the computation of damages is a question that is the subject of fact discovery, which has only recently commenced, and ultimately of expert discovery.

Subject to the foregoing General and Specific Objections, Charter responds as follows: Charter will produce a computation of damages in connection with its expert disclosures, consistent with the production schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 2:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information), detailing which IP Addresses Charter alleges were conveyed based on Section 1.5 of the Agreement and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory because it is unreasonably cumulative and duplicative of other discovery requests, including, but not limited to, Request Nos. 18 and 21 of

Plaintiff's First Set of Document Requests to Defendant ("First RFPs"), and Request Nos. 1, 2, 5, 12 and 22 of Plaintiff's Second Set of Document Requests to Defendant ("Second RFPs"). Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents. Charter further objects to this Interrogatory to the extent it seeks, with respect to "each Document, record, tangible thing, or other materials identified, . . . a general description, the location, and the name, office address, and title of the custodian," insofar as the request is unduly burdensome in light of the potentially substantial volume of responsive documents.

Subject to and without waiving the foregoing General and Specific Objections, Charter responds as follows: Charter will produce documents responsive to First RFPs No. 18 and Second RFPs Nos. 1, 5, 12, and 22, which are duplicative of this Interrogatory, consistent with the production schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 3:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information), detailing which IP Addresses Charter "continued to use" as "service subscribers rolled off of them" and the identity of the Persons using them and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory because it is unreasonably cumulative and duplicative of other discovery requests, including, but not limited to, First RFPs No. 21 and Second RFPs Nos. 2 and 5. Charter further objects to this Interrogatory to the extent it seeks, with respect to "each Document, record, tangible thing, or other materials identified, . . . a general description, the location, and the name, office address, and title of the custodian," insofar as the request is unduly burdensome in light of the potentially substantial volume of responsive

documents. Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents.

Subject to and without waiving the foregoing General and Specific Objections, Charter responds as follows: Charter will produce documents responsive to Second RPFs No. 5, which is duplicative of this Interrogatory, consistent with the schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 4:** Identify the Persons most knowledgeable about TWC's involvement in the negotiation, drafting, and approval of the Agreement for the period January 1, 2005 to present.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory to the extent it is not limited to a reasonable, relevant time frame, insofar as it seeks information for the period from January 1, 2005 to present. Charter further objects to the Interrogatory on the grounds that the phrase "Persons most knowledgeable" is a vague, ambiguous and subjective phrase that is subject to multiple interpretations.

Subject to and without waiving the foregoing General and Specific Objections, Charter identifies the following individuals who, to the best of its knowledge, are responsive to Interrogatory No. 4:

- Rick Davies (deceased)
- Michael Adams
- Beau Coughlin
- David Christman
- Raj Kumar
- Howard Pheffer
- Jeff King
- Mike Lajoe

The names provided above are based on a reasonable inquiry conducted by Charter based on the best information currently available. Given the passage of time, however, it is possible that other individuals may be or may have been the Persons most knowledgeable about TWC's involvement

in the negotiation, drafting, and approval of the Agreement, and consequently, may not be included in this list.

**INTERROGATORY NO. 5:** Identify the Persons most knowledgeable about Charter's diligence concerning the Agreement, including the IP Addresses at the time of its merger with TWC from May 1, 2014 to present.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to the Interrogatory on the grounds that the phrase "Persons most knowledgeable" is a vague, ambiguous and subjective phrase that is subject to multiple interpretations. Charter further objects to this Interrogatory on the grounds that the phrase "Charter's diligence concerning the Agreement" is vague, ambiguous and subject to multiple interpretations.

Subject to and without waiving the foregoing General and Specific Objections, Charter repeats and reincorporates its response to Interrogatory No. 4 and further identifies the following individuals whom, to the best of its knowledge, are responsive to Interrogatory No. 5:

- Peter Stern
- Robert Rusak

The names provided above are based on a reasonable inquiry conducted by Charter based on the best information currently available. Given the passage of time, however, it is possible that other individuals may be or may have been the Persons most knowledgeable about Charter's diligence concerning the Agreement, and consequently, may not be included in this list.

**INTERROGATORY NO. 6:** Identify each and every person who was responsible for the drafting and negotiation of the Agreement, (including the following terms "EarthLink High-Speed Service," "IP services," "EarthLink Software," and "EarthLink Deliverables"); and state as to each person their full name, current address, current employer, and the subject matter about which the person has knowledge.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory to the extent it is not limited to a reasonable, relevant time frame, insofar as the Agreement was entered into in June 2006. Charter further objects to this Interrogatory to the extent it seeks information concerning individuals' "current address, current employer, and the subject matter about which the person has knowledge," as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules.

Subject to and without waiving the foregoing General and Specific Objections, Charter repeats and reincorporates its response to Interrogatory No. 4 as responsive to Interrogatory No. 6.

**INTERROGATORY NO. 7:** Identify each and every owner, director, manager, employee, agent and/or representative of TWC, Charter/Spectrum who participated in negotiations or communications concerning the Agreement, stating as to each person their full name, current address, and current employer, and the nature of the person's participation.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case, insofar as it seeks the identity of "each and every owner, director, manager, employee, agent and/or representative of TWC, Charter/Spectrum who participated in negotiations or communications concerning the Agreement." Charter further objects to this Interrogatory because it is not limited to a reasonable, relevant time frame, insofar as the Agreement was negotiated and entered into in June 2006. Charter further objects to this Interrogatory to the extent it seeks information concerning individuals' "current address, and current employer, and the and the nature of the person's participation," as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules.

Subject to and without waiving the foregoing General and Specific Objections, Charter repeats and reincorporates its response to Interrogatory No. 4 as responsive to Interrogatory No. 7.

**INTERROGATORY NO. 8:** Identify each and every owner, director, manager, employee, agent and/or representative of TWC, Charter/Spectrum who you believe has knowledge or information concerning Your policies and procedures concerning ARIN registration, stating as to each person their full name, current address, and current employer.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory on the grounds that the phrase "policies and procedures concerning ARIN" is vague, ambiguous and undefined. Charter further objects to the Interrogatory to the extent it seeks information concerning individuals' "current address, and current employer," as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules.

Subject to and without waiving the foregoing General and Specific Objections, Charter identifies the following individuals who, to the best of its knowledge, are responsive to Interrogatory No. 8:

- Charlotte Field
- Dustin Phillips
- Daniel Schatte
- Eilisa Reid
- John Hendrickson
- Matt Stanek
- Scott Webber

The names provided above are based on a reasonable inquiry conducted by Charter based on the best information currently available. Charter had over 93,000 employees as of the end of fiscal year 2021. Accordingly, it is possible that other individuals have knowledge or information concerning Charter's policies and procedures concerning ARIN registration who have not been included on the list above.

**INTERROGATORY NO. 9:** Identify each and every person who has knowledge of any fact or circumstance relating to the allegations made in the Answer and Counterclaims, including any affirmative defenses, stating as to each person their full name, current address, current employer, and the subject matter about which the person has knowledge.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to the Interrogatory as unduly burdensome, overbroad and not proportional to the needs of the case to the extent it seeks the identity of “each and every person who has knowledge of any fact or circumstance relating to the allegations made in the Answer and Counterclaims, including any affirmative defenses,” regardless of whether such individuals are current or former employees of Charter, or are even employed by Charter. Charter further objects to the Interrogatory to the extent it seeks information concerning individuals’ “current address, current employer, and the subject matter about which the person has knowledge,” as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules.

Subject to and without waiving the foregoing General and Specific Objections, Charter repeats and reincorporates its responses to Interrogatory Nos. 4, 5 and 8, and also identifies the following individuals in response to Interrogatory No. 9:

- Nomi Bergman
- Leo Cloutier
- Stephen Colafrancesco
- William Erickson
- Edward Fallon
- William Futera
- David Gray
- Mark Guberman
- Jonathan Hargis
- Cody Harrison
- Emmanuel Jones
- John Keib
- Greta Kim
- Chia Liu
- Michael Locke
- Sharon Peters
- Wendy Rasmussen

- Daniel Schatte
- Patricia Eliason
- John Hendrickson
- Joseph Leonard
- Eilisa Reid
- Matthew Paul Stanek
- Laurence Christopher
- Kimberly Steuterman
- Charlotte Field
- Dustin Phillips
- Daniel Schatte
- Scott Webber

The names provided above are based on a reasonable inquiry conducted by Charter based on the best information currently available. Charter had over 93,000 employees as of the end of fiscal year 2021. Accordingly, it is possible that there are other individuals with knowledge or information relevant to the subjects of the counterclaims and affirmative defenses who have not been included on this list. Should Charter learn the identities of additional individuals, it will update its response.

**INTERROGATORY NO. 10:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information) considered and/or used to support your Answer and Counterclaim, including any affirmative defenses, and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is unreasonably cumulative and duplicative of other discovery requests, including, but not limited to, Second RPFs Nos. 5, 21, 22 and 23. Charter further objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case because it calls for Charter to identify all documents “considered and/or used.” Charter further objects to this Interrogatory to the extent it seeks, with respect to “each Document, record, tangible thing, or other materials identified, . . . a general description, the location, and the name, office address, and title of the custodian,” insofar as the request is unduly burdensome in

light of the potentially substantial volume of responsive documents. Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents.

Subject to and without waiving the foregoing General and Specific Objections, Charter responds as follows: Charter will produce documents responsive to Second RFPs Nos. 5, 21, 22, and 23, which are duplicative of this Interrogatory, consistent with the schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 11:** Identify each and every owner, director, manager, employee, agent and/or representative of Charter/Spectrum who you believe has knowledge or information concerning Your transfer or purchase of rights, title and interest in use of IP Addresses with any other Person, stating as to each person their full name, current address, and current employer, for the time period January 1, 2016 to present.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case, insofar as it seeks the identity of “each and every owner, director, manager, employee, agent and/or representative of Charter/Spectrum who [we] believe has knowledge or information concerning [our] transfer or purchase of rights, title and interest in use of IP Addresses with any other Person,” regardless of whether such IP Addresses bear any relevance to the issues in this matter. Charter further objects to the Interrogatory to the extent it seeks information concerning individuals’ “current address, and current employer,” as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules. Charter further objects to the time period of the request as unduly burdensome, insofar as it seeks information dating back to January 1, 2016.

Subject to and without waiving the foregoing General and Specific Objections, Charter repeats and reincorporates its responses to Interrogatory Nos. 4, 5 and 8.

**INTERROGATORY NO. 12:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information, instant messages, and/or audio recordings), concerning Charter/Spectrum agreements and policies related to the transfer or purchase of rights, title and interest in use of IP Addresses, and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to the needs of the case, insofar as it seeks the identity of “any and all Documents, records, tangible things, or other materials (including electronically-stored information, instant messages, and/or audio recordings), concerning Charter/Spectrum agreements and policies related to the transfer or purchase of rights, title and interest in use of IP Addresses,” regardless of whether such IP Addresses bear any relevance to this issues in this matter. Charter further objects to the Interrogatory on the grounds that the phrase “agreements and policies related to the transfer or purchase of rights, title and interest in use of IP Addresses” is vague, ambiguous and undefined. Charter further objects to this Interrogatory because it is unreasonably cumulative or duplicative of other discovery requests, including, but not limited to, First RFPs Nos. 13, 18, 19, 21 and 22, and Second RFPs Nos. 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 23. Charter further objects to this Interrogatory to the extent it seeks, with respect to “each Document, record, tangible thing, or other materials identified, . . . a general description, the location, and the name, office address, and title of the custodian,” insofar as the request is unduly burdensome in light of the potentially substantial volume of responsive documents. Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents.

Subject to and without waiving the foregoing General and Specific Objections, Charter responds as follows: Charter will produce documents responsive to First RFPs Nos. 13, 18, 19 and

22, and Second RFPs Nos. 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 23, which are duplicative of this Interrogatory, consistent with the schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 13:** Identify each and every owner, director, manager, employee, agent and/or representative of Charter/Spectrum who has made statements to a Service Subscriber concerning changing services during the period of January 1, 2019 to January 1, 2021, stating as to each person their full name, current address, and current employer.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory on the grounds that the phrase “changing services” is vague, ambiguous and undefined. Charter further objects to the Interrogatory to the extent it seeks information concerning individuals’ “current address, current employer” as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules.

Subject to and without waiving the foregoing General and Specific Objections, Charter responds as follows: Charter is unable to respond to this Interrogatory on the grounds that a response is neither practical nor feasible. Charter employs or works with third-party contractors to staff its call centers. Depending on the nature of their issues, EarthLink Service Subscribers may have been routed to Charter’s Inbound Sales and Retention (“IBS&R”) group, or to its Customer Service representatives. IBS&R had 6,883 employees as of year-end 2019, and 7,892 employees as of year-end 2020. In addition, there were 18,674 customer service agents as of year-end 2019 and 20,044 customer service agents as of year-end 2020. During the period of January 1, 2019 to January 1, 2021, those call centers fielded an average of around 20 million calls per month. Accordingly, Charter cannot respond to this Interrogatory.

**INTERROGATORY NO. 14:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information, instant messages, and/or audio recordings), where any owner, director, manager, employee, agent and/or representative of Charter/Spectrum made statements to a Service Subscriber concerning changing services, during the period of January 1, 2019 to January 1, 2021, and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory because it is unreasonably cumulative or duplicative of other discovery requests, including, but not limited to First RFPs Nos. 2, 4, 5, 6, 8, 9, 10 and 11 and Second RFPs No. 4. Charter further objects to this Interrogatory to the extent it seeks, with respect to “each Document, record, tangible thing, or other materials identified, . . . a general description, the location, and the name, office address, and title of the custodian,” insofar as the request is unduly burdensome in light of the potentially substantial volume of responsive documents. Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents.

Subject to and without waiving the foregoing General and Specific objections, Charter responds as follows: Charter will produce documents responsive to First RFPs Nos. 2, 4, 5, 6, 9, 10 and 11, and Second RFPs No. 4, which are duplicative of this Interrogatory, consistent with the schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 15:** Identify each and every owner, director, manager, employee, agent and/or representative of Charter/Spectrum involved in creating or approving Documents or Communications marketing to the EarthLink Service Subscribers, including, without limitation Spectrum’s 2020 email to the Services Subscribers from Kathleen Griffin, VP, Marketing Communications, stating as to each person their full name, current address, and current employer.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs

of the case. Charter further objects to this Interrogatory on the grounds that the term “marketing” is vague, ambiguous and undefined. Charter further objects to this Interrogatory because it is not limited to a reasonable, relevant time frame. Charter further objects to the Interrogatory to the extent it seeks information concerning individuals’ “current address, and current employer,” as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules.

Subject to and without waiving the foregoing General and Specific Objections, Charter identifies the following individuals in response to Interrogatory No. 15:

- Kathleen Griffin
- Stephen Colafrancesco
- Patricia Aliason
- William Erickson
- David Gray
- Mark Guberman
- Emmanuel Jones
- Joseph Leonard
- Michael Locke
- Wendy Rasmussen

The names provided above are based on a reasonable inquiry conducted by Charter based on the best information currently available. Charter had over 93,000 employees as of the end of fiscal year 2021. Accordingly, it is possible that other individuals have knowledge or information related to Interrogatory No. 15 who have not been included on the list above.

**INTERROGATORY NO. 16:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information, instant messages, and/or audio recordings), where any owner, director, manager, employee, agent and/or representative of Charter/Spectrum marketed Charter/Spectrum services to the EarthLink Service Subscribers, and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to

the needs of the case. Charter further objects to this Interrogatory because it is unreasonably cumulative or duplicative of other discovery requests, including, but not limited to, First RFPs Nos. 1, 2, 5 and 12 and Second RFPs No. 4. Charter further objects to this Interrogatory on the grounds that the term “marketed” is vague, ambiguous and undefined. Charter further objects to this Interrogatory to the extent it seeks, with respect to “each Document, record, tangible thing, or other materials identified, . . . a general description, the location, and the name, office address, and title of the custodian,” insofar as the request is unduly burdensome in light of the potentially substantial volume of responsive documents. Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents.

Subject to and without waiving the foregoing General and Specific objections, Charter responds as follows: Charter will produce documents responsive to First RFPs Nos. 1, 2, 5 and 12 and Second RFPs No. 4, which are duplicative of this Interrogatory, consistent with the schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 17:** Identify each and every owner, director, manager, employee, agent and/or representative of Charter/Spectrum engaged in any means of Communication with EarthLink Service Subscribers in New York (including email, hard copy mail, telephone or chat) and stating as to each person their full name, current address, and current employer.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory on the grounds that the phrase “changing services” is vague, ambiguous and undefined. Charter further objects to the Interrogatory to the extent it seeks information concerning individuals’ “current address, current employer,” as such subjects are beyond the scope of proper interrogatories set forth in Rule 11-a of the Commercial Division Rules.

Subject to and without waiving the foregoing General and Specific Objections, Charter responds as follows: Charter incorporates its response to Interrogatory No. 13. Charter further responds that given the volume of representatives who may have communicated with EarthLink Service Subscribers, which exceeds 20,000 individuals, it is unable to identify which “owner, director, manager, employee, agent and/or representative of Charter/Spectrum” communicated with EarthLink Service Subscribers in New York.

**INTERROGATORY NO. 18:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information, instant messages, and/or audio recordings), where any owner, director, manager, employee, agent and/or representative of Charter/Spectrum made representations concerning Charter/Spectrum services to the EarthLink Service Subscribers in New York, and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory because it is unreasonably cumulative or duplicative of other discovery requests, including, but not limited to First RFPs Nos. 2, 4, 5, 6, 8, 9, 10 and 11 and Second RFPs No. 4. Charter further objects to this Interrogatory to the extent it seeks, with respect to “each Document, record, tangible thing, or other materials identified, . . . a general description, the location, and the name, office address, and title of the custodian,” insofar as the request is unduly burdensome in light of the potentially substantial volume of responsive documents. Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents.

Subject to and without waiving the foregoing General and Specific objections, Charter responds as follows: Charter will produce documents responsive to First RFPs Nos. 2, 4, 5, 6, 9,

10 and 11 and Second RFPs No. 4, which are duplicative of this Interrogatory, consistent with the schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 19:** If 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.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter further objects to the interrogatory on the grounds that the phrase "TWC's representations to Charter concerning the Agreement" is vague, ambiguous and undefined.

Subject to and without waiving the foregoing General and Specific Objections, Charter responds as follows: Charter is not aware of any insurance agreements related to the IP Addresses supplied to Charter under the Agreement. Charter continues to investigate this issue. In the event that it identifies applicable insurance coverage, it will update its response accordingly. Charter is unable respond to the Interrogatory to the extent it seeks insurance information concerning "TWC's representations to Charter concerning the Agreement," as Charter is unclear on what is meant by the phrase.

**INTERROGATORY NO. 20:** Identify any and all Documents, records, tangible things, or other materials (including electronically-stored information) considered and/or used to prepare or support your answers to these Interrogatories, and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory because it is unreasonably cumulative or duplicative of other discovery requests. Charter further objects to this Interrogatory on the grounds that the phrase "considered and/or used to prepare or support" is vague, ambiguous and undefined. Charter further objects to this Interrogatory to the extent it seeks, with respect to "each Document, record, tangible thing, or other materials identified, . . . a general description, the

location, and the name, office address, and title of the custodian," insofar as the request is unduly burdensome in light of the potentially substantial volume of responsive documents. Charter further objects to this Interrogatory as premature because discovery in this matter remains in its very early stages and neither party has produced documents.

Subject to and without waiving the foregoing General and Specific objections, Charter responds as follows: Charter will produce documents responsive to the First RFPs and Second RFPs consistent with the schedule set forth in the Preliminary Conference Order.

**INTERROGATORY NO. 21:** Identify all witnesses that Charter may call at trial or may rely on for any summary judgment motion.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter objects to this Interrogatory as premature on the grounds that the parties have only just commenced discovery.

Subject to and without waiving the foregoing General and Specific objections, Charter responds as follows: Charter will identify its trial witnesses at an appropriate time according to the Preliminary Conference Order, the CPLR, the Commercial Division Rules, and any further orders issued by the Court.

**INTERROGATORY NO. 22:** Identify each Person who supplied information for or participated in the preparation of your answers to these Interrogatories.

**RESPONSE:** Charter incorporates by reference the General Objections set forth above. Charter further objects to this Interrogatory because it is overbroad, unduly burdensome, and not proportional to the needs of the case. Charter further objects to this Interrogatory on the grounds that the terms "information," "supplied," "participated in" and "preparation" are vague, ambiguous and undefined.

Subject to and without waiving the foregoing General and Specific Objections, Charter identifies the following individuals as responsive to Interrogatory No. 22:

- Kimberly Steuterman
- Laurence Christopher
- Cody Harrison

Dated: June 24, 2022  
New York, New York

PATTERSON BELKNAP WEBB & TYLER  
LLP

*/s/ Saul B. Shapiro*

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*Attorneys for Defendant Charter  
Communications Operating, LLC*

**VERIFICATION**

STATE OF CONNECTICUT) : ss:  
CITY OF STAMFORD )

I, Cody Harrison, declare under penalty of perjury that I am the Vice President and Associate General Counsel for Charter Communications Operating, LLC, and I certify that the above responses to Plaintiff's First Set of Interrogatories to Defendant are true and correct to the best of my knowledge.

Dated: June 24, 2022  
Stamford, CT

By: C. Harrison  
Title: Vice President and Associate General Counsel  
Charter Communications Operating, LLC

Sworn to and subscribed before me  
this 24<sup>th</sup> day of June, 2022.

Notary Public

Anna-Laura Wilhelm  
NOTARY PUBLIC  
State of Connecticut  
My Commission Expires 08/31/2023



**CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 2022, I caused the foregoing to be served via email on the following counsel of record:

**KING & SPALDING LLP**

Damien J. Marshall, Shaila R. Diwan  
1185 Avenue of the Americas  
New York, New York 10036

*/s/ Saul B. Shapiro*

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Saul B. Shapiro

# **Exhibit 7**

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

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING,  
LLC,

Defendant.

Index No. 654332/2020

**DEFENDANT'S RESPONSES AND  
OBJECTIONS TO PLAINTIFF'S  
FIRST SET OF DOCUMENT  
REQUESTS TO DEFENDANT**

Defendant Charter Communications Operating, LLC (“Charter”), pursuant to Article 31 of the Civil Practice Law and Rules of the State of New York (“CPLR”), by and through its undersigned counsel, hereby serves the following objections and responses to Plaintiff EarthLink, LLC’s First Set of Document Requests to Defendant (“Requests”).

**GENERAL OBJECTIONS**

1. Charter objects to each of the Requests to the extent that they purport to impose obligations beyond those required by the CPLR and any other applicable rules and orders.
2. Charter objects to these Requests to the extent that they seek the production of documents not in Charter’s possession, custody, or control. Charter will produce only responsive documents that are located by a reasonable search of items over which they have possession, custody, or control.
3. Charter objects to the Requests to the extent that they seek documents and information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege that makes such information non-discoverable. Charter claims these privileges and protections to the full extent implicated by each Request, and will

exclude privileged and protected information from their productions in response to the Requests. The fact that Charter does not specifically object to any individually numbered Request on the ground that it seeks privileged information or documents shall not be deemed a waiver of the protection afforded by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege, immunity, or exemption from discovery. Any documents or information disclosed in response to the Requests shall be disclosed without waiving any of these privileges.

4. Charter objects to the Requests to the extent that they seek documents or information in the possession, custody, or control of Plaintiff, or to the extent that the documents are obtainable from sources other than Charter in a manner that is more convenient, less burdensome, or less expensive.

5. Charter objects to the Requests to the extent that they are overbroad, unduly burdensome, and not proportional to the needs of the case. Charter will conduct a reasonable search of the locations reasonably likely to contain the requested documents and communications.

6. Charter objects to any Request that is unreasonably cumulative or duplicative of other discovery requests.

7. Charter objects to any Request that is vague, ambiguous, or confusing and therefore not susceptible to a clear and definitive response. To the extent a Request is vague or ambiguous, Charter will respond to the best of its ability.

8. Charter objects to any Request that calls for a legal conclusion, or that purports to require Charter to form, read, set forth, or perform a legal analysis.

9. Charter objects to any Request to the extent that it seeks to require identification and/or organization of documents in any specific order or grouping. To the extent that Charter

produces documents in response to these Requests, responsive non-privileged documents will be produced as they are kept in the usual course of business.

10. Charter objects to any Request to the extent it requires the creation of documents that do not presently exist.

11. Neither these Requests nor Charter's responses to them shall be construed as admissions by Charter that any fact or circumstance alleged in any Request occurred or existed. Moreover, the responses provided are not intended to be, and shall not be construed to be, an agreement or concurrence by Charter that Plaintiff's characterization of any facts or circumstances is correct.

12. No response or objection made herein, or the lack thereof, is an admission by Respondents as to the existence or non-existence of any information or documents. A response that Respondents will produce documents should not be deemed an admission that such documents exist, but only that if the documents should exist, they will be produced by Respondents.

13. Charter reserves the right to amend or modify these responses at any time should it discover information that makes the present response incomplete or inaccurate. By reserving the right, Charter does not intend to assume a duty to modify or amend these responses, other than as required by the CPLR.

14. In providing these responses and asserting these objections, Charter does not intend to waive any objections as to relevancy, materiality or admissibility of evidence in this matter or any other matter or proceeding.

15. The General Objections asserted herein shall be deemed to be applicable to and continuing with respect to each of Charter's responses to the within Requests. The General

Objections asserted herein are incorporated into each and every response set forth herein. Such objections are not waived, nor in any way limited, by any response to any specific Request.

### **SPECIFIC RESPONSES AND OBJECTIONS**

Subject to and without waiving any of the foregoing objections, Charter responds to Plaintiff's Requests as follows:

#### **Request No. 1**

All documents and communications concerning your policies and procedures relating to the Agreement with EarthLink and/or Service Subscribers, and/or communications with the Service Subscribers.

#### **Response to Request No. 1**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as vague, ambiguous, and indefinite insofar as "policies and procedures" are not defined and may be subject to different interpretations. Charter further objects to the phrase "policies and procedures relating to the Agreement with EarthLink and/or Service Subscribers" as vague, ambiguous, and indefinite insofar as it is unclear to which Agreement with Service Subscribers the Request is referring. Charter further objects to the Request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, and disproportionate to the needs of the case, insofar as it requests all "communications with the Service Subscribers," regardless of whether or not such communications bear any relevance to the issues in this litigation.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents and communications, if any exist, of documents and communications concerning policies and procedures related to the Agreement with EarthLink. Charter will not produce documents and communications responsive to the request for all "communications with the Service Subscribers."

**Request No. 2**

All documents and communications concerning any efforts by you to market Charter and/or Spectrum Internet service to the Service Subscribers.

**Response to Request No. 2:**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as vague and ambiguous insofar as the terms "efforts" and "Spectrum Internet" are not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents and communications, if any exist, responsive to this Request.

**Request No. 3**

All documents and communications relating to your decision to no longer provide EarthLink with customer level reporting, as referenced in Paragraph 55 of the Amended Complaint.

**Response to Request No. 3**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as vague and ambiguous on the grounds that the term "decision" and the phrase "customer level reporting" are not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents and communications, if any exist, responsive to this Request.

**Request No. 4**

All documents and communications concerning Service Subscribers who terminated their EarthLink High-Speed Service, including Service Subscribers who switched to Charter and/or Spectrum Internet.

**Response to Request No. 4**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and disproportionate to the needs of the case, insofar as it seeks “[a]ll documents and communications concerning Service Subscribers who terminated their EarthLink High-Speed Service,” regardless of whether such Service Subscribers became Charter customers, and regardless of the nature and extent of their interactions with Charter.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents and communications, if any exist, responsive to this Request, to the extent such documents and communications concern Service Subscribers who switched to Charter and/or Spectrum Internet.

**Request No. 5**

All documents and communications, including without limitation, emails, fliers, hard copy mail/letters, or drafts of any of these items, from Charter to the Service Subscribers referencing EarthLink’s contract with Charter, the contract’s expiration, the expiration of EarthLink High-Speed Service, a potential disruption in services or email, an exclusive or limited offer, and/or the potential effect of the expiration on the Service Subscriber’s ability to access EarthLink’s High Speed Service, an EarthLink email account, cable, email or internet access generally, and/or any of the other matters including those discussed at paragraphs 75 to 78 of the Amended Complaint.

**Response to Request No. 5**

Charter incorporates by reference the General Objections set forth above. Charter further objects to the Request as vague and ambiguous insofar as the following phrases are undefined: “EarthLink’s contract with Charter”; “a potential disruption in services or email”; and “other matters including those discussed at paragraphs 75 to 78 of the Amended Complaint.” Charter further objects to the Request on the grounds that it references a “potential effect of the expiration” without clarifying what expiration it is referencing. Charter further objects to this Request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of

admissible evidence, and disproportionate to the needs of the case. Charter further objects to this Request to the extent it is duplicative and cumulative of Request No. 2. Charter further objects to this Request to the extent the Documents requested are already in the possession of EarthLink.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents and communications, if any exist, responsive to this Request.

#### **Request No. 6**

All documents and communications concerning training or guidance provided to the Call Center employees who communicated with Service Subscribers, including, without limitation, copies of any training materials.

#### **Response to Request No. 6**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, insofar as it requests “[a]ll documents and communications concerning training or guidance provided to the Call Center employees who communicated with Service Subscribers,” regardless of whether such documents or communications concern issues alleged in the Amended Complaint. Charter further objects to this Request as vague, ambiguous, and indefinite insofar as the phrases “training or guidance” and “training materials” are not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents and communications, if any exist, responsive to this Request.

#### **Request No. 7**

All documents pertaining to Call Center employee compensation or incentive plans and/or sales goals, including without limitation, incentives or goals related to attracting and/or retaining Service Subscribers to Charter.

**Response to Request No. 7**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request on the grounds that it is vague and ambiguous, insofar as the phrase “Call Center employee compensation or incentive plans and/or sales goals” is not defined. Charter further objects to the Request to the extent that it seeks documents related to EarthLink’s claim that Charter “violated the terms of the HSSA by failing to make good faith efforts to ‘save’ Service Subscribers,” insofar as that claim was dismissed by the Court. Charter further objects to the Request on the grounds that it seeks discovery unrelated to the subject matter of this proceeding.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, Responsive to this Request.

**Request No. 8**

All documents relating to communications between Call Center employees and Service Subscribers, including all recordings or transcriptions of those communications.

**Response to Request No. 8:**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request on the grounds that it is overbroad, unduly burdensome and not reasonably tailored to lead to the discovery of admissible evidence, and disproportionate to the needs of the case insofar as it seeks “[a]ll documents relating to communications between Call Center employees and Service Subscribers,” regardless of whether such communications relate to any issues in this case. Charter further objects to the Request to the extent that it seeks transcriptions that have not been created and do not currently exist. Charter further objects to the Request on the grounds that it is duplicative of Requests Nos. 1, 2, 4 and 5.

For the foregoing reasons, Charter will not produce documents and communications responsive to this Request. Charter adds that during the period requested, from January 1, 2017 to

present, Charter's call centers received hundreds of millions of calls from subscribers, including both EarthLink and non-EarthLink subscribers.

**Request No. 9**

All documents and communications relating to any instructions or guidance provided to the Call Centers and their employees concerning communications with the Service Subscribers.

**Response to Request No. 9**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request on the grounds that it is overbroad, unduly burdensome and not reasonably tailored to lead to the discovery of admissible evidence, and disproportionate to the needs of the case insofar as it seeks “[a]ll documents and communications relating to any instructions or guidance provided to the Call Centers and their employees concerning communications with the Service Subscribers,” regardless of whether such documents or communications relate to any of the issues in this case. Charter further objects to the Request as vague and ambiguous on the grounds that the phrase “instructions or guidance provided to the Call Centers and their employees” is undefined. Charter further objects to this Request on the grounds that it is duplicative of Request Nos. 1, 6, and 7.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request, that concern EarthLink or its Service Subscribers.

**Request No. 10**

All documents and communications relating to your monitoring of communications between the Call Centers and Service Subscribers.

**Response to Request No. 10**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request on the grounds that it is overbroad, unduly burdensome and not reasonably

tailored to lead to the discovery of admissible evidence, and disproportionate to the needs of the case insofar as it seeks “[a]ll documents and communications relating to [Charter’s] monitoring of communications between the Call Centers and Service Subscribers,” regardless of whether such documents and communications relate to the issues in this case. Charter further objects to the Request as vague and ambiguous on the grounds that the phrase “monitoring of communications” is not defined. Charter further objects to the Request on the grounds that it is duplicative of Requests Nos. 1, 6, 8, and 9.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 11**

All documents and communications relating to any feedback provided by you to the Call Centers concerning communications between Call Center employees and the Service Subscribers.

**Response to Request No. 11**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request on the grounds that it is overbroad, unduly burdensome and not reasonably tailored to lead to the discovery of admissible evidence, and disproportionate to the needs of the case, insofar as it seeks “[a]ll documents and communications relating to any feedback provided by [Charter] to the Call Centers concerning communications between Call Center employees and the Service Subscribers,” regardless of whether such documents and communications relate to the issues in this case. Charter further objects to this Request as vague and ambiguous insofar as the phrase “any feedback” is not defined. Charter further objects to this Request on the grounds that it is duplicative of Request Nos. 1, 6, 8, 9 and 10.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request, concerning the subject matter of the lawsuit.

**Request No. 12**

All documents and communications concerning your plans to market Charter and/or Spectrum Internet to the Service Subscribers after the Transition Period.

**Response to Request No. 12**

Charter incorporates by reference the General Objections set forth above. Charter further objects to the Request as vague and ambiguous insofar as the phrase “plans to market Charter and/or Spectrum Internet” is not defined. Charter further objects to the Request on the grounds that it is duplicative of Request Nos. 1, 2, 5, and 7.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 13**

All documents and communications concerning the value of and/or revenue generated from the Service Subscribers and/or EarthLink IP Addresses.

**Response to Request No. 13**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as vague and ambiguous insofar as the phrase “value of” is not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 14**

All documents and communications concerning negotiations with EarthLink regarding the status of the Service Subscribers after the Transition Period.

**Response to Request No. 14**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as vague and ambiguous insofar as the phrase “status of the Service Subscribers after the Transition Period” is not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 15**

All documents and communications concerning the July 22, 2020 meeting between representatives of Charter and EarthLink.

**Response to Request No. 15**

Charter incorporates by reference the General Objections set forth above.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 16**

All documents and communications concerning the proposed EarthLink Transition Services Agreement dated July 24, 2020.

**Response to Request No. 16**

Charter incorporates by reference the General Objections set forth above.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 17**

All documents and communications concerning the June 25 Email, including documents concerning any investigation or remedial action undertaken by you as a result.

**Response to Request No. 17**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as vague and ambiguous insofar as the phrase “remedial action” is not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 18**

All documents and communications concerning Charter’s alleged “ownership” of the EarthLink IP Addresses, including without limitation any communications with Windstream Holdings, Inc. and Windstream Services, LLC, at any time, regarding the EarthLink IP Addresses.

**Response to Request No. 18**

Charter incorporates by reference the General Objections set forth above. Charter further objects to the Request on the grounds that it is overbroad, unduly burdensome, and not reasonably tailored to lead to the discovery of admissible evidence. Charter further objects to this Request as vague and ambiguous, insofar as the phrase “EarthLink IP Addresses” is not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 19**

All documents and communications concerning any ARIN registration or efforts to register the EarthLink IP Addresses by Charter, at any time.

**Response to Request No. 19**

Charter incorporates by reference the General Objections set forth above. Charter further objects to the Request on the grounds that it is overbroad, unduly burdensome, and not reasonably tailored to lead to the discovery of admissible evidence, insofar as it seeks “[a]ll documents and communications concerning any ARIN registration,” regardless of whether such registration

relates to any issues in this case. Charter further objects to this Request as vague and ambiguous, insofar as the phrase “EarthLink IP Addresses” is not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 20**

All documents and communications concerning any efforts by Charter to negotiate terms requiring or otherwise requesting transfer of ARIN registration of the EarthLink IP Addresses to Charter, at any time.

**Response to Request No. 20**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request to the extent that it is duplicative of Request No. 19.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 21**

All documents and communications 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.

**Response to Request No. 21**

Charter incorporates by reference the General Objections set forth above. Charter objects to the Request as overbroad, unduly burdensome, and not reasonably tailored to lead to the discovery of admissible evidence. There is no dispute that Charter was entitled to use IP Addresses supplied to it by EarthLink under the Agreement (even if EarthLink disputes who owns the IP Addresses), and consequently, the Request seeks an overwhelming amount of information that has no bearing on the issues in this case. Charter further objects to this Request as vague and ambiguous, insofar as the phrase “EarthLink IP Addresses” is not defined.

For the foregoing reasons, Charter will not produce documents and communications responsive to Request No. 21.

**Request No. 22**

Charter's policies and procedures concerning ARIN registration and use of IP Addresses.

**Response to Request No. 22**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as vague and ambiguous insofar as the phrases "policies and procedures" and "use of IP Addresses" are not defined.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 23**

All documents and communications concerning the October 7, 2020, email from EarthLink to the Service Subscribers, (referenced in Paragraphs 14 and 70 of the Amended Complaint) including without limitation, any internal communications concerning Charter's response.

**Response to Request No. 23**

Charter incorporates by reference the General Objections set forth above.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 24**

Copies of your document retention or destruction policies, including, but not limited to, the destruction of electronic mail, audio recordings, and computer hard drives and disks.

**Response to Request No. 24**

Charter incorporates by reference the General Objections set forth above.

Subject to the foregoing General and Specific Objections, Charter will produce copies of responsive and non-privileged documents, if any exist, responsive to this Request.

**Request No. 25**

Documents sufficient to identify any experts you have retained or with whom you have consulted in connection with this litigation that you intend to call to testify at any hearing or trial in this litigation.

**Response to Request No. 25**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as premature because it seeks documents regarding expert witnesses which Charter intends to call to testify in the future in the course of this litigation.

Subject to the foregoing General and Specific Objections, Charter will produce documents responsive to this Request pursuant to the CPLR and Rules of the Commercial Division, and within the schedule set by the Court.

**Request No. 26**

Documents sufficient to identify the qualifications and experience of any expert witness that you intend to call to testify at any hearing or trial in this litigation, including, without limitation, the most recent *curriculum vitae* and/or resumes for each person.

**Response to Request No. 26**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request to the extent it is duplicative of Request No. 25. Charter further objects to this Request as premature because it seeks documents regarding expert witnesses which Charter intends to call to testify in the future in the course of this litigation.

Subject to the foregoing General and Specific Objections, Charter will produce documents responsive to this Request pursuant to the CPLR and Rules of the Commercial Division, and within the schedule set by the Court.

**Request No. 27**

All documents that you have provided to or received from any expert that you may call as a witness at trial of this action.

**Response to Request No. 27**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request to the extent it is duplicative of Request Nos. 25 and 26. Charter further objects to this Request as premature because it seeks documents regarding expert witnesses which Charter “may call” as a witness in the future in the course of this litigation.

Subject to the foregoing General and Specific Objections, Charter will produce documents responsive to this Request pursuant to the CPLR and Rules of the Commercial Division, and within the schedule set by the Court.

**Request No. 28**

All documents that you intend to introduce or rely upon at any trial or any hearing in this litigation.

**Response to Request No. 28**

Charter incorporates by reference the General Objections set forth above. Charter further objects to this Request as premature because it seeks documents on which Charter intends to introduce in the future in the course of this litigation.

Subject to the foregoing General and Specific Objections, Charter will produce documents responsive to this Request pursuant to the CPLR and Rules of the Commercial Division, and within the schedule set by the Court.

Dated: June 24, 2022  
New York, New York

PATTERSON BELKNAP WEBB & TYLER  
LLP

/s/ Saul B. Shapiro

Saul B. Shapiro  
H. Gregory Baker  
Greg Margolis  
Elisabeth Shane  
1133 Avenue of the Americas  
New York, NY 10036-6710  
Telephone: (212) 336-2000  
Fax: (212) 336-2222  
[sbshapiro@pbwt.com](mailto:sbshapiro@pbwt.com)  
[hbaker@pbwt.com](mailto:hbaker@pbwt.com)  
[gmarginis@pbwt.com](mailto:gmarginis@pbwt.com)  
[eshane@pbwt.com](mailto:eshane@pbwt.com)

*Attorneys for Defendant Charter  
Communications Operating, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 2022, I caused the foregoing to be served via email on the following counsel of record:

**KING & SPALDING LLP**

Damien J. Marshall, Shaila R. Diwan  
1185 Avenue of the Americas  
New York, New York 10036

*/s/ Saul B. Shapiro*  
Saul B. Shapiro

# **Exhibit 8**

# 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](http://www.kslaw.com)

Shaila R. Diwan  
Partner  
Direct Dial: 212-790-5346  
[sdiwan@kslaw.com](mailto:sdiwan@kslaw.com)

June 23, 2022

## VIA E-MAIL

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*, 654332/2020

Dear Saul:

I write on behalf of EarthLink LLC (“EarthLink”) regarding EarthLink’s First and Second Document Requests to Charter (dated September 15, 2020 and May 27, 2022, respectively) and First Set of Interrogatories (dated May 27, 2022) (collectively, the “Discovery Requests”). Given that the Court has ordered document production completed no later than July 15, 2022, we are providing the attached proposed search terms, for Charter’s document collection, review and production. While Charter’s responses to the Discovery Requests are not due until June 24, 2022, given the compressed timeline, it is our hope the parties can work cooperatively to negotiate search terms and custodians in order to facilitate efficient and timely review of responsive documents. While we ask that you identify additional custodians you believe have information responsive to the Discovery Requests, we are also providing an initial list of custodians who should be included in the broader set of custodians identified by Charter. EarthLink’s proposed search terms and custodians for Charter’s document collection and review are attached as **Exhibits A and B**, respectively.

Of course, EarthLink reserves the right to modify the proposed custodians and search terms after receiving and reviewing Charter’s responses to the Discovery Requests on June 24, 2022.

We ask that Charter provide proposed search terms and custodians to EarthLink as well. We also propose the parties each take the time to run initial searches and discuss hit counts / propose narrowed searches at a meet and confer on July 1, 2022. If Charter is not available at that time, please propose dates and times you are available.

Separately, we attach hereto EarthLink’s document preservation notice to Richard Dykhouse, Charter’s Executive Vice President, General Counsel and Corporate Secretary, dated July 27, 2020 (the “Document Preservation Notice”) as **Exhibit C**. Pursuant to the Document Preservation Notice, please confirm that no materials relating to the allegations and issues in this

June 23, 2022

Page 2

case have been deleted or lost, including any audio files or recordings, after the July 27, 2020 date. If any such materials have been deleted, lost, or otherwise not preserved, please identify them by description and file type in order to expedite negotiation of the ESI protocol and Confidentiality Agreement.

Please confirm no later than June 24, 2022 the general description and file formats of any potentially sources of data that may contain information responsive to the Requests that Charter has deleted (or otherwise cannot locate) after its receipt of the Document Preservation Notice (e.g., audio tapes in .wav format; emails in .msg format). Please also confirm specifically whether Charter is able to locate audio files of customer service calls with EarthLink subscribers for the requested time period, including the time period after Charter's receipt of the Document Preservation Notice.

Please confirm the format of Charter's audio files and any other file formats that are not currently addressed in the parties' ESI protocol (*see* Section 1(b)(3) of ESI Protocol). Please confirm the file formats and general volume of the data so that the parties can begin to work on an ESI protocol related to the files, including the audio files. Marked up versions in response to Charter's last set of edits to the Confidentiality Agreement and ESI protocol are attached hereto as **Exhibits D and E**. It is EarthLink's desire that the parties begin production quickly and we will need the ESI protocol in place in order to do so.

Lastly, as you know, pursuant to the Court's Preliminary Conference Order, the parties must report to the Court concerning their compliance with the Preliminary Conference Order on June 30, 2022. To that end, we propose that the parties meet and confer on or before June 28, 2022 at 9:30 a.m. to determine whether a joint report can be made and if not, meet and confer in an effort to resolve or otherwise join issue on any potential discovery disputes prior to reporting to the Court.

Sincerely,



Shaila R. Diwan

**EXHIBIT A****Preliminary List of Custodians from EarthLink to Charter as of June 23, 2022**

No.	Custodian Name
1.	David E. O'Hayre
2.	Michael G. Locke
3.	Chris Czekaj
4.	Jonathan Hargis
5.	Cody J. Harrison
6.	Kathleen Griffin
7.	Richard Dykhouse
8.	Happy Marino

**EXHIBIT B****Proposed List of Search Terms from EarthLink to Charter as of June 23, 2022**

EarthLink proposes both general search terms and more targeted search terms in the event the general search terms are voluminous. Please run all terms and the parties can meet and confer regarding whether the general terms or the more targeted search terms are most appropriate.

No.	Proposed Search Term
1.	EarthLink OR EL OR earthlink OR "Earth Link" OR "ELNK" OR @elnk.com
2.	Windstream OR "Wind Stream" OR @windstream.com OR WIN OR WIND
3.	"EarthLink High-Speed Service"
4.	"ATD Network"
5.	("High-Speed Service Agreement" OR HSAA OR Agreement OR contract OR "Service Agreement" OR "High-Speed Agreement") AND (EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com)
6.	Address! w/15 (EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com)
7.	(Transfer! OR supp! OR Prov! OR convey! OR furnish! OR grant! OR equip! OR purchas!) w/15 (EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com)
8.	("ARIN" OR "American Registry for Internet Numbers") AND (registration OR ticketing OR transfer OR EarthLink OR earthlink OR "Earth Link" OR EL OR el OR "ELNK" OR @elnk.com)
9.	Network Architecture AND (EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com)
10.	(Subscribe! OR customer!) w/15 (EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com)
11.	(Customer OR offer OR mov! OR new OR transfer OR report) AND (EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com)
12.	Bankruptcy AND (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)
13.	claim w/15 (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)
14.	Address! w/15 (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)
15.	Insurer AND (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)
16.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)

No.	Proposed Search Term
17.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) w/15 (sav! OR promotion! OR advertis!)
18.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) w/30 defin!
19.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND (system facilit! OR component part!)
20.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND (diligence OR title OR own OR interest)
21.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND IP servic!
22.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) w/5 software
23.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) w/5 deliverable!
24.	(IP Address!) AND (polic! OR proced! OR ownership)
25.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND (misappropriate OR sale OR sell OR sold OR block)
26.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND (polic! OR proc!)
27.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND (terminat! OR cancel! OR unsubscribe!)
28.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND ("Call Center" OR training)
29.	"Call Center" AND (compensation OR bonus OR payment)
30.	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND "Transition Services Agreement"
31.	Retent! Preserv! Hold! Retain! Delet! AND (EarthLink OR EL OR earthlink OR "Earth Link" OR el OR "ELNK" OR @elnk.com)

**EXHIBIT C**

**July 27, 2020 Document Preservation Notice**

**From:** [Evan Ennis \(recovered\)](#)  
**To:** [Rick.Dykhouse@charter.com](mailto:Rick.Dykhouse@charter.com)  
**Cc:** [Damien Marshall](#); [Larry Slovensky](#)  
**Subject:** EarthLink Document Preservation Notice  
**Date:** Monday, July 27, 2020 10:31:48 AM  
**Attachments:** [image001.png](#)  
[7.27.20 Letter.pdf](#)

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Mr. Dykhouse,

Please see the attached correspondence on behalf of EarthLink, LLC.

Regards,

---

**Evan Claire Ennis**

*Senior Associate*

T: +1 212 556 2262 | E: [eennis@kslaw.com](mailto:eennis@kslaw.com) | [www.kslaw.com](http://www.kslaw.com)

[BIO](#) | [vCARD](#)

King & Spalding LLP  
1185 Avenue of the Americas  
New York, NY 10036

**KING & SPALDING**

# KING & SPALDING

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Damien Marshall  
Partner  
Direct Dial: 212-790-5357  
Direct Fax: 212-556-2222  
[dmarshall@kslaw.com](mailto:dmarshall@kslaw.com)

July 27, 2020

**VIA E-MAIL**

Richard R. Dykhouse  
Charter Communications Operating, LLC  
400 Atlantic Street, 10th Flr.  
Stamford, CT 06901

Re: Document Preservation Notice

Dear Mr. Dykhouse:

We represent EarthLink, LLC (“EarthLink”) and are writing to notify you that we are investigating potential claims on behalf of EarthLink against Charter Communications Operating, LLC, as successor to Time Warner Cable Inc. (“Spectrum”) concerning breaches of certain provisions of the High-Speed Service Agreement, as amended (the “Agreement”). In that regard, we hereby notify Spectrum of its obligation to preserve information, documents, and electronically stored information potentially relevant to the aforementioned misconduct.

As used in this letter, the term “Documents” is broad and includes all forms of recorded information, including without limitation: hard copies and all forms of electronic files, final and draft correspondence, reports, memoranda, notes, graphs, presentations, photographs, calendars, emails, recordings, and any data compilations from which information can be obtained, such as email, spreadsheets, databases, PDA files, videos, CDs, electronic calendars, archives, floppy disks, computer drives, PSTs, shared drives, data sites, online and cloud based databases, and any other electronic media and/or electronic data storage platforms whatsoever. The term “Communications” means all communications between Spectrum, its directors, managers, agents, employees, and/or any other person or persons including, without limitation, communications with Spectrum’s legal counsel, and any third parties.

To fulfill Spectrum’s preservation obligations, it must preserve all forms of Documents and Communications that relate in any way to the potential litigation referenced above. This includes, without limitation, all Documents and Communications related to the Agreement. This also includes all currently existing recordings of Spectrum’s sales and service calls with EarthLink Service Subscribers; all Documents evidencing Communications between Spectrum’s call center employees and agents and EarthLink Service Subscribers referencing or relating to EarthLink’s service offerings or business; all Documents relating to Spectrum’s sales efforts with

respect to EarthLink Service Subscribers; all Documents relating to Spectrum's marketing efforts with respect to EarthLink Service Subscribers; all Documents referencing the Transition Period in the Agreement; and all Documents otherwise referencing or relating to the termination of the Agreement (collectively, the "Relevant Documents").

Until further notice, all Relevant Documents must be preserved and may not be discarded, deleted, altered, or destroyed. Regardless of any document retention/destruction policies that may otherwise be applicable, Spectrum must not discard, destroy, alter or delete any Relevant Documents until further notice. To preserve emails and information contained therein, Spectrum should immediately review every Inbox, Sent Items, Deleted Items, and other folders for all email addresses within its access and/or control. Spectrum also should preserve any relevant materials stored on its hard drives, relevant shared drives, and any online and/or cloud-based data storage platforms, including any and all storage systems on which Spectrum maintains call center recordings. This letter applies to any materials that relate to the above categories of documents that may be found on personal and laptop computers, as well as in personal email accounts, and personal digital devices such as iPhones, Android phones, or Blackberries.

Spectrum is responsible for ensuring that its document preservation obligations are communicated to every person, employee, and/or agent of Spectrum who may discard or destroy documents, records, or information, and/or the responsible person at any "off-site" repositories of such materials.

This letter is not intended to state all the facts or legal issues relating to the foregoing, and EarthLink shall not be deemed to waive any of its rights or remedies, in law or in equity, all of which are expressly reserved.

Sincerely,

/s/ Damien Marshall  
Damien Marshall

**EXHIBIT D**

**EarthLink Proposed Revisions to ESI Protocol**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, COMMERCIAL PART 48

EARTHLINK, LLC,  
Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING,  
LLC,

Defendant.

Index No. 654332/2020

**STIPULATION FOR THE  
EXCHANGE OF  
ELECTRONICALLY-  
STORED INFORMATION**

It is stipulated and agreed by EarthLink LLC and Charter Communications Operating, LLC, through their counsel (each singularly, Party; together, Parties), to comply with the procedures and obligations for the exchange and production of electronically stored information (ESI) set forth below. If a provision of this agreement (ESI Stipulation) conflicts with the terms of the Stipulation and Order for the Production and Exchange of Confidential Information (Confidentiality Stipulation) previously entered in this action, the Confidentiality Stipulation will control absent further order of the court. The Parties agree:

1. Format of Files for Production

(a) Digitized Paper Documents:

(i) Documents originally in paper/physical form will be digitized into single-page, group IV (G4) format, black and white TIFF files at 300 into single-page TIFF images, group IV format, 300 dots per inch (dpi).

(ii) Every filename will match the document's Bates number, and be zero padded with no blank spaces; i.e., D000000001 (Defendant's Date Stamp Page 1, P000820009 (Plaintiff's Date Stamp Page 000820009);

(iii) The Parties will include with each production delivery an archival image link file as agreed (i.e., an Opticon (.OPT) file or similar).

(iv) The Parties will include standard Concordance default delimited text files as agreed in .DAT or similar format, and will include all available fielding data, including but not limited to beginning and ending Bates numbers, beginning and ending attachment numbers, and number of pages except where otherwise agreed.

(v) The parties will apply Optical Character Recognition (OCR) software to all applicable documents and create OCR-searchable files in .TXT format for each page digitized as in (i) above; filenames for .TXT files will synchronize with/be identical to the filename for the corresponding TIFF file (see [i] above). Delivery TIFF files will be accompanied by the corresponding full text .TXT files.

(b) Documents Originating Electronically: Standard electronic documents, emails, and presentations will be produced as TIFF images in the manner described above in (a) (i); however, all attachments, addendums, enclosures, and/or exhibits to a parent documents will be produced and identified as they relate to the respective parent document

(i) Digital documents will be produced with corresponding .TXT files as outlined above in section (a), as well as extracted metadata fields (where available), as agreed and set forth in the Metadata Table contained in the endnote below.<sup>1</sup>

(ii) Extracted text, as opposed to OCR text, delivered with production and formatted in .TXT file as above with OCR text files.

---

<sup>1</sup> Pursuant to Provision 1 (B) (i) above, the Parties agree to include the information set forth and explained in the following Metadata Table:

(iii) All spreadsheets, audio, video, multi-media, or other types of files that cannot reasonably be produced as .tiff images, will be produced in native format and order of storage in native, ordinary course of business manner. For instance, emails with attached spreadsheets will be identified and linked per ATTACH\_RANGE field above. To avoid unnecessary duplications, placeholder TIFF files will be produced to preserve the native location of files; placeholder will identify the document by associated Bates number, the original file name, and state that the document was natively produced. For all natively produced documents, the .DAT file should include a field with the original file name. Other aAvailable metadata and text will be produced in the same manner as other documents.

(iv) The Parties will produce, upon request, documents or databases in native format if produced in TIFF or other static format (PDF, etc.) if inadequate in the form produced. Producing Party will provide native files with delimited TXT file containing BEGPROD, ENDPROD, ATTACH\_RANGE, Path to Native File, and MD5/Hash value.

## 2. Deduplication (Global)

The Parties will endeavor to deduplicate ESI. Documents will be deduplicated as against the entire population for all custodians and deduplicated custodians listed as above in Section 1. The Parties will retain all deduplicated documents for the duration of the action or as agreed and may request production of deduplicated documents for particular custodians by identifying the applicable Bates numbers in writing.

3. Clawback Mechanisms for Inadvertent ESI Disclosure

The Parties agree that inadvertent disclosure of privileged or protected documents/information will not constitute a waiver of any such privilege or protection and will apply the following procedures:

(a) Notice

Within ten business days from the date on which a disclosing Party discovers an inadvertent disclosure of ESI, it will notify the receiving Party by written Clawback Notice identifying the inadvertent disclosure(s) and directing the receiving Party to promptly return, destroy, and/or make inaccessible the inadvertently- disclosed information/documents and all copies.

(b) Parties' Obligations

Within three days of receipt of the Notice, the receiving Party will inform the disclosing Party that compliance will be effectuated or challenge the Notice in a formal responsive writing. If the Notice is not challenged, the receiving Party will destroy, return, and/or disable all access to the specified documents/information within ten days or as agreed by the Parties.

- (i) Where the inadvertent disclosure is in the form of a disc or access to a password-protected server, the producing Party must replace, upon receipt of intent to comply with the Notice, a replacement of the production containing all documents/information but for those identified in the Notice.
- (ii) The receiving Party will endeavor in good faith to retrieve any copies of the identified documents/information to return, destroy, or otherwise dispose of the materials, and take all steps necessary to prevent further sharing of those materials. The receiving Party will identify, in writing responsive to the Notice, the persons or entities that have received copies of the information/documents, identify the facts surrounding the sharing of those materials, and describe its best efforts to retrieve those materials in its affirmation of compliance.
- (iii) Any use of the identified inadvertent disclosures prior to receipt of the Notice is not a violation of this ESI Stipulation but may be subject to the provisions of the Confidentiality Stipulation.
- (iv) If the receiving Party challenges the Notice, it will return, destroy, or disable all copies of the documents/information, but may retain one copy for the purpose of challenging the designation of privilege/protection or inadvertency of the disclosure.
- (v) The Parties will meet and confer within two days to resolve the dispute if the Notice is challenged, and, if not resolved, the Parties will request an immediate discovery conference pursuant to the Part 48 Part Rules.
- (vi) Under all circumstances, the disclosing Party must preserve all documents/information subject to the Notice until any dispute has been resolved by the Parties' agreement or court order.

(c) Receiving Party's Affirmative Obligation

A receiving Party that discovers privileged or protected documents/information it will inform the disclosing Party in writing within five business days regardless whether a challenge to such privilege or protection is anticipated.

4. Confidentiality Designations and ESI From Other Individuals/Entities:

The Parties will designate documents as confidential or otherwise according to the terms of the Confidentiality Stipulation.

This ESI Stipulation may be re-executed and/or modified by agreement of the Parties; for instance, to allow non-signatory parties to this action or nonparties producing ESI to join this agreement.

Date: \_\_\_\_\_ [Executed Signature Blocks for the Parties]

Field Name	Sample Data	Description
PRODBEG	P000000222	First Bates number of native file document/email
PRODEND	P000000222	Last Bates Number of native file document/email (single-page documents will list beginning and ending Bates number)
PRODBEG_ATTACH	P000000222	First production bates number in a family range
PRODEND_ATTACH	P000000229	Last production bates number in a family range
CUSTODIAN	Adams, John	Email: Individual who originated the document, unless name is not available and then field will display available identifying information.. Native: Individual who originated the document
DUPLICATE CUSTODIAN	Franklin, Ben; Hancock, John, Whipple, William	When global deduplicating has been employed, the custodians who had duplicates of the identical document
FROM	Adams, John	Email author/sender
TO	Hancock, John [mailto:HANCOCK@JOHNHANCOCK.co m]	Recipient(s) of email separated by semicolon
CC	Franklin, Ben [mailto:bennyf@1776.com]	Carbon copy recipient(s) of email
BCC	NA	Blind carbon copy recipient(s) of email
SUBJECT	Declaration w/ edits	Email: subject line Native: document title
DATE_SENT	7/3/1776	Email: date the email was sent

TIME_SENT	12:59 AM	Email: time at which email was sent on date in date field
NATIVE_LINK	D:\1969\P000000222.MSG	Hyperlink to web address, named uniformly with first bates of parent document
FILE_EXTEN	i.e., MSG, DOCX, PDF, etc.	File extension of email or native document
AUTHOR	Jefferson, Thomas	Author of native document (MS Word, etc.)
DATE_CREATED	6/1/2009	Date native document was created
DATE_MOD	10/12/2010	Date native document was last modified
PGCOUNT	1	Total pages of each original document/email
Full Text Path	D:\1969\P000000222.txt	UNC path to text files of extracted/OCR text (unless redacted)
MD5/SHA1	E4d909c290d0fb1ca068ffaddf22cbd0	Hash code created for file in connection with deduplication

5. Audio, Video, Multimedia Files/Structured Data/Database:

The parties shall produce structured data or other types of data not already contemplated in this stipulation in a reasonably usable format or meet and confer to determine a mutually agreeable format ~~and protocol for producing audio, video, multimedia, or other forms of data / files not already contemplated in this stipulation.~~

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*Attorneys for Defendant Charter  
Communications Operating, LLC*

SO ORDERED:

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Hon. Andrea Masley, J.S.C.

**EXHIBIT E**

**EarthLink Proposed Revisions to Confidentiality Stipulation and Order**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, COMMERCIAL PART 48

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

STIPULATION AND ORDER FOR  
THE PRODUCTION AND  
EXCHANGE OF CONFIDENTIAL  
INFORMATION

This matter, having come before the Court by stipulation of plaintiff, EarthLink and defendant, Charter Communications (collectively, the "Parties"), for the entry of a protective order pursuant to CPLR 3103 (a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms of this stipulation;

It is ORDERED that:

1. This stipulation is entered to facilitate the production, exchange and discovery of documents and information that the Parties and, as appropriate, non-parties, agree merit confidential treatment ("Documents" or "Testimony").

2. Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as "Confidential" or "Highly Confidential," either by designating by notation each page of the Document, a statement on the record of a deposition, written notice to the respective undersigned counsel for the Parties, or other appropriate means.

(a) In the case of documents, designation shall be made prior to production by

stamping or writing the word "Confidential" or "Highly Confidential," as the case may be, on each page of any such document.

(b) Documents may be produced for inspection prior to their designation as Confidential or Highly Confidential but shall be designated as "Confidential" or "Highly Confidential," as the case may be, prior to the transmission of a physical copy of the document to the party requesting the document. The contents of such documents shall be treated as Confidential or Highly Confidential during their inspection and in the interim prior to their designation upon production of said physical copy.

(c) In the case of interrogatory answers, designation shall be made by stamping or writing the word "Confidential" or "Highly Confidential," as the case may be, on each page containing such answers, with the relevant portion of any such answer bracketed.

(d) In the case of depositions, designation of the portion of the transcript (including exhibits) which contains "Confidential" or "Highly Confidential" Information shall be made either (1) by a statement to such effect on the record during the course of the deposition or (2) within thirty (30) days of receipt of the transcript of the deposition by counsel for the party claiming confidentiality. If the designation is made during the course of a deposition, the reporter attending such deposition shall thereafter bind the transcript thereof in separate portions containing the non-confidential Information and Confidential or Highly Confidential Information, and the reporter shall write or stamp the word "Confidential" or "Highly Confidential," as the case may be, on the cover of the relevant portions of the transcript. If the designation is made following review of the transcript, the party so designating shall do so by identifying the page and line numbers corresponding to the portions of testimony the

party wishes to designate Confidential or Highly Confidential. Between the date of the deposition and (30) thirty days after the transcript has been received by the parties, the entire transcript is to be treated as if designated Highly Confidential. If no party has designated any portion of a deposition transcript Confidential or Highly Confidential thirty days after receipt of the transcript, the entire transcript will be treated as non-confidential. The parties may modify this procedure for any particular deposition through agreement on the record at such deposition, or after the deposition and in writing, without further court order.

(e) All briefs, pleadings or other filings with the Court which incorporate or disclose Confidential or Highly Confidential Information shall be appropriately labeled on the cover page and filed under seal.

3. Definitions of terms used in this stipulation:

(a) "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party's or non-party's business or the business of any of that Party's or non-party's customers or clients.

(b) "Highly Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as highly confidential, that counsel in good faith believes contains or constitutes that party's extremely sensitive confidential information or other such proprietary information such that disclosure of such information could be

expected to result in injury to the producing party.

(c) "Producing Party" shall mean the Parties to this action and any non-parties producing "Confidential or Highly Information" in connection with depositions, document production or otherwise, or the Party or non-party designating a Document or Testimony as Confidential or Highly Confidential, as the case may be.

(d) "Receiving Party" shall mean the Parties to this action and/or any non-party receiving "Confidential or Highly Confidential Information" in connection with depositions, document production, subpoenas or otherwise.

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential or Highly Confidential Information. If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential or Highly Confidential Information. Notwithstanding anything to the contrary in this stipulation, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential or Highly Confidential Information. All depositions shall presumptively be treated as Highly Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen-day period, the deposition shall be classified appropriately.

5. Except with the prior written consent of the Producing Party or by order of the Court, Confidential Information shall not be furnished, shown, or disclosed to any person or entity except:

- (a) personnel of the Parties who are engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;
  - (b) counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;
  - (c) expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 8 below;
  - (d) the Court and court personnel;
  - (e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;
  - (f) trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 10 and 11, respectively, below; and
  - (g) any other persons who may be specifically designated by advanced written consent of all attorneys of record or pursuant to Court Order, but only after such persons have executed the Confidentiality Agreement attached hereto as Exhibit 1.
6. Except with the prior written consent of the Producing Party or by order of the

Court, Highly Confidential Information must be maintained and kept at all times in a secure place in the offices of outside counsel for the parties (except as necessary for use in court or at depositions in a manner consistent with this Stipulation and Order), and shall be not furnished, shown, or disclosed to any person or entity except:

- (a) Attorneys of Record for a party in the above-captioned action;
- (b) Persons regularly members of, employed by or associated with the law firms retained by a party, or lawyers or paralegals engaged in whole or in part to assist the law firms of record, when the assistance of such persons is required by said attorneys in the preparation for or trial of the above-captioned action;
- (c) Expert witnesses and consultants retained in connection with the above-captioned action, to the extent such disclosure is necessary for the preparation for trial or trial of the action, but only after such persons have executed the Confidentiality Agreement contained at Exhibit 1;
- (d) The Court (including court reporters, stenographic reporters and court personnel). Disclosure of any Highly Confidential Information at trial or in any other proceeding herein shall be made in camera unless the Court orders otherwise or the parties otherwise agree. Other than as specifically set forth above, Highly Confidential Information cannot be disclosed in any way to any other individuals or entities, specifically including the parties in the above-captioned matter;
- (e) Any person or persons who have prepared the particular documents produced; or
- (f) Any person or persons to whom copies of any documents were addressed or delivered.

7. Confidential or Highly Confidential Information shall be utilized by the Receiving Party and its counsel only for purposes of this litigation and for no other purposes.

8. Any person who is to be given access to Confidential or Highly Confidential discovery material pursuant to paragraphs 5(c) and 6(c) shall read this order and sign the Confidentiality Agreement attached as Exhibit 1, indicating that he/she had read this order and will abide by its terms. A copy of the signed Confidentiality Agreement shall be served on opposing counsel, along with a resume or *curriculum vitae* for the person who is to be given the material, by facsimile and first-class mail at least five (5) business days prior to the disclosure of the Material. If an objection is made and served by facsimile and first-class mail within the five (5) day period, disclosure is not permitted until the matter is resolved by the parties or the Court.

9. All depositions shall presumptively be treated as Confidential or Highly Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen-day period, the deposition shall be classified appropriately.

10. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential or Highly Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, that Party or, as appropriate, nonparty, may do so only after taking such steps, if any, that the Court, following a motion by the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information.

11. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as "Confidential or Highly Confidential Information" under the terms hereof. If a Party seeks to give access to Confidential or Highly Confidential Information to a deposition witness, the Party shall provide the witness with a copy of this Stipulation and request that the witness execute a written agreement, in the form of Exhibit 1 attached below, to comply with and be bound by its

terms. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that a witness refuses to execute the agreement to be bound by this Stipulation, the Court may, upon the Party's application, enter an order directing the witness's compliance with the Stipulation, or directing such other steps as the Court may deem necessary under the circumstances.

12. A Party may designate as Confidential or Highly Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion of such materials or information. In the case of Documents, produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality designation. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information.

- (a) Any Receiving or Producing Party who seeks to file any material—including but not limited to pleadings, motion/application papers, affidavits, memoranda, briefs, and exhibits—to the Court using Documents or Testimony which have previously been designated as comprising or containing Confidential or Highly Confidential Information, and/or which reproduces, paraphrases, or discloses Confidential or Highly Confidential Information (the Filing Party), shall, fourteen (14) days prior to filing such material, provide all Parties with written notice of its intent to file such material with the Court such that any Party may file, by Order to Show

Cause, a motion to redact and/or seal the Confidential or Highly Confidential Information pursuant to the Part Rules; such motion to redact and/or seal must be filed seven (7) days prior to the Filing Party's submission of such material in conformance with the Court's decision and order resolving the redact/seal motion or, if undecided, by filing such material to NYSCEF under temporary seal until the Court renders its decision.

(b) If the motion to seal or redact is granted in whole or in part, or denied, the Parties shall ensure that all documents that are the subject of the order to seal or redact are properly filed in accordance with the procedures that govern the filing of sealed or redacted documents on the NYSCEF system and the Part Rules within three (3) business days (i.e., if the motion to seal/redact is denied, the documents filed under temporary seal must be replaced with unsealed and unredacted publicly-available copies).

(c) All pleadings, briefs, memoranda or other documents which reproduce, paraphrase or disclose any document or content of a document which has previously been designated by a party as comprising or containing Confidential or Highly Confidential Information shall identify each designated document by the production number ascribed to it at the time of production.

13. Any person receiving Confidential or Highly Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms of this Stipulation and shall use reasonable measures to store and maintain the Confidential Information so as to prevent unauthorized disclosure.

14. Any document or information that may contain Confidential or Highly Confidential Information that has been inadvertently produced without identification as to its

“confidential” or “highly confidential” nature as provided in paragraphs 2 and/or 12 of this Stipulation may be so designated by the party asserting the confidentiality designation by written notice to the undersigned counsel for the Receiving Party identifying the document or information as “confidential” or “highly confidential” within a reasonable time following the production from which the document or information was disclosed without such designation.

15. Extracts and summaries of Confidential or Highly Confidential Information shall also be treated as confidential or highly confidential as the case may be, in accordance with the provisions of this Stipulation.

16. The production or disclosure of Confidential or Highly Confidential Information shall in no way constitute a waiver of each Producing Party’s right to object to the production or disclosure of other information in this action or in any other action. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential. Failure to challenge a Confidential or Highly Confidential designation Prior to showing the Material to the witness, the party’s counsel shall show the Material to the opposing counsel (i.e., counsel for the party designating the document as “Confidential” or “Highly Confidential”).

17. This Stipulation is entered without prejudice to the right of any Party or non-party to seek relief from, or modification of, this Stipulation or any of its provisions by properly-noticed motion to the Court, or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

18. This Stipulation shall continue to be binding after the conclusion of this litigation; however, there shall be no restriction on documents that are used as exhibits in Court unless, and only insofar as, such exhibits were sealed or redacted pursuant to an order of the Court). Further, nothing in this Stipulation prevents a Receiving Party from seeking the written permission of the Producing Party, or further order of the Court, to dissolve or modify the Stipulation. The

provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action; however, documents sealed or redacted by order of the Court prior to, or for a purpose other than, trial shall not remain sealed or redacted for use as trial exhibits absent further order of the Court extending the sealed or redacted status of such documents for use at trial.

19. Nothing in this Stipulation shall be deemed to waive any privilege recognized by law or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

20. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential or Highly Confidential Information produced or designated, and all reproductions of such materials, shall be returned to the Producing Party or, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, that Receiving Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts, and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter. Any materials produced to the Court at any stage of the action will be handled pursuant to the Part Rules.

21. ~~The inadvertent production or disclosure of any documents or other information~~

~~or materials shall not be deemed a waiver or impairment of any claim or privilege or protection, including but not limited to the attorney client privilege, the protection afforded to work product materials, or the subject matter thereof, or the confidential nature of any such information, provided that the producing party shall immediately notify the receiving party in writing when inadvertent production or disclosure is discovered. Upon receiving written notice from the producing party that privileged information or work product material has been inadvertently produced or disclosed, all such information, and all copies thereof, shall be kept by counsel for the receiving party and counsel shall not use such information for any purpose until further order of the Court. Any analyses, memoranda, or notes which were generated based upon such inadvertently produced or disclosed information shall also be kept by counsel for the receiving party and counsel shall not use such information for any purpose until further order of the Court.~~

21. The Parties agree that inadvertent disclosure of privileged or protected documents/information will not constitute a waiver of any such privilege or protection and will apply the following procedures:

- (a) Notice Within ten business days from the date on which a disclosing Party discovers an inadvertent disclosure of any privileged or protected documents/information, it will notify the receiving Party by written Clawback Notice identifying the inadvertent disclosure(s) and directing the receiving Party to promptly return, destroy, and/or make inaccessible the inadvertently disclosed information/documents and all copies.
- (b) Within three days of receipt of the Notice, the receiving Party will inform the disclosing Party that compliance will be effectuated or challenge the Notice in a formal responsive writing. If the Notice is not challenged, the receiving Party will destroy, return, and/or disable all access to the specified documents/information within ten days or as agreed by the Parties.

- (i) Where the inadvertent disclosure is in the form of a disc or access to a password-protected server, the producing Party must replace, upon receipt of intent to comply with the Notice, a replacement of the production containing all documents/information but for those identified in the Notice.
- (ii) The receiving Party will endeavor in good faith to retrieve any copies of the identified documents/information to return, destroy, or otherwise dispose of the materials, and take all steps necessary to prevent further sharing of those materials. The receiving Party will identify, in writing responsive to the Notice, the persons or entities that have received copies of the information/documents, identify the facts surrounding the sharing of those materials, and describe its best efforts to retrieve those materials in its affirmation of compliance.
- (iii) Any use of the identified inadvertent disclosures prior to receipt of the Notice is not a violation of this ESI Stipulation but may be subject to the provisions of the Confidentiality Stipulation.
- (iv) If the receiving Party challenges the Notice, it will return, destroy, or disable all copies of the documents/information, but may retain one copy for the purpose of challenging the designation of privilege/protection or inadvertency of the disclosure.
- (v) The Parties will meet and confer within two days to resolve the dispute if the Notice is challenged, and, if not resolved, the Parties will request an immediate discovery conference pursuant to the Part 48 Part Rules.
- (vi) Under all circumstances, the disclosing Party must preserve all documents/information subject to the Notice until any dispute has been

resolved by the Parties' agreement or court order.

A receiving Party that discovers privileged or protected documents/information it will inform the disclosing Party in writing within five business days regardless whether a challenge to such privilege or protection is anticipated.

(c)

22. If Material or information designated "Confidential" or "Highly Confidential" is disclosed by a receiving party to any person other than in the manner authorized by this Stipulation and Order, the receiving party responsible for the disclosures must immediately bring all facts relating to such disclosure to the attention of the designating party, and without prejudice to the rights and remedies of the designating party, make every effort to prevent further unauthorized disclosure on its own part or on the part of such information or material.

23. If a Receiving Party is called upon to produce Confidential or Highly Confidential Information in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential or Highly Confidential Information is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of such Confidential or Highly Confidential Information, if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

24. This Stipulation may be changed by further order of this Court and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

25. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original document, and electronic signatures of counsel of record shall be deemed original signatures.

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eshane@pbwt.com

*Attorneys for Defendant Charter  
Communications Operating, LLC*

SO ORDERED:

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Hon. Andrea Masley, J.S.C.

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, COMMERCIAL PART 48

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

STIPULATION AND ORDER FOR  
THE PRODUCTION AND  
EXCHANGE OF CONFIDENTIAL  
INFORMATION

I, \_\_\_\_\_, state that:

1. My address is \_\_\_\_\_.
2. My present occupation or job description is \_\_\_\_\_.
3. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the “**Stipulation**”) entered in the above-entitled action on \_\_\_\_\_.
4. I have carefully read and understand the provisions of the Stipulation.
5. I will comply with all of the provisions of the Stipulation, will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential or Highly Confidential Information that is disclosed to me.
6. I will return all Confidential or Highly Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential or Highly Confidential Information.
7. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: \_\_\_\_\_ Signature: \_\_\_\_\_

# **Exhibit 9**

# Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 [www.pbwt.com](http://www.pbwt.com)

June 24, 2022

H. Gregory Baker  
(212) 336-2871  
[hbaker@pbwt.com](mailto:hbaker@pbwt.com)

**VIA EMAIL**

Shaila R. Diwan  
King & Spalding LLP  
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34th Floor  
New York, NY 10036  
[sdiwan@kslaw.com](mailto:sdiwan@kslaw.com)

Re: **EarthLink LLC v. Charter Communications Operating, LLC,**  
**654332/2020**

Dear Shaila:

I write on behalf of Charter Communications Operating, LLC and its affiliates (“Charter”) in response to your letter, dated June 23, 2022, concerning certain discovery-related matters in connection with the above referenced case.

In your letter, you provided “proposed search terms for Charter’s document collection, review and production,” and expressed an interest in working “cooperatively to negotiate search terms and custodians in order to facilitate efficient and timely review of responsive documents.” EarthLink LLC issued its First Set of Document Requests to Charter on April 8, 2022, and its Second Set of Document Requests to Charter on May 27, 2022. In light of the July 15, 2022 deadline set by the Court, Charter’s efforts to collect documents is well underway, and Charter has already identified search terms that it intends to run across custodians. While we believe there is substantial overlap between Charter’s search terms and the terms you have provided, we will review your list and consider modifications. We will also review your list of proposed custodians.

Separately, we welcome the invitation to provide our own list of search terms to EarthLink. Charter will compile a list of search terms and provide it to EarthLink early next week, and we propose conducting the meet and confer during the week of July 5<sup>th</sup> to allow the parties time to adequately prepare for the meeting.

In your letter, you also ask that Charter “confirm that no materials relating to the allegations and issues in this case have been deleted or lost, including any audio files or recordings, after the July 27, 2020 date.” Charter confirms that a legal hold was implemented shortly after the receipt of the letter from Mr. Dykhouse. Charter’s document collection and review is ongoing. If we learn that any documents, including audio files, were deleted or lost, we

June 24, 2022

Page 2

will update EarthLink accordingly, just as we expect EarthLink to inform Charter if any of its own documents have been deleted or lost.

We will review your proposed edits to the Confidentiality Agreement and ESI protocol and respond in due course. We believe it is premature to discuss file formats not captured by the ESI protocol, as Charter's collection and review of documents is ongoing. If necessary, the parties may subsequently seek a modification of the ESI, if it is determined that there are file formats not covered by the existing protocols.

Finally, with respect to the status report, we recommend that EarthLink prepare a draft status report for our review by June 29th, so that we may provide comments.

Best regards,



H. Gregory Baker

Cc:

Via Email

Damien Marshall (dmarshall@kslaw.com)  
Alexander Noble (anoble@kslaw.com)  
Lauren Devendorf (ldevendorf@kwlaw.com)

# **Exhibit 10**

# KING & SPALDING

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Shaila R. Diwan  
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[sdiwan@kslaw.com](mailto:sdiwan@kslaw.com)

June 29, 2022

## VIA E-MAIL

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

**Re: *EarthLink LLC v. Charter Communications Operating, LLC, 654332/2020,***  
**Plaintiff's Responses to EarthLink's First and Second Document Requests**  
**and First Set of Interrogatories**

Dear Gregory:

I write on behalf of EarthLink LLC (“EarthLink” or “Plaintiff”) regarding Charter Communication Operating, LLC’s (“Charter” or “Defendant”) Responses (“Responses”) to EarthLink’s First and Second Document Requests to Charter (dated April 8, 2022<sup>1</sup> and May 27, 2022, respectively) and First Set of Interrogatories (dated May 27, 2022) (collectively, the “Discovery Requests”). As set forth below, several of Defendants’ Responses are deficient. We ask that you please supplement those Responses and/or explain your bases for objection, as outlined below and, given the upcoming discovery deadlines in this case, that you do so by no later than July 5, 2022. EarthLink is available to meet and confer on the issues described herein.

**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 has failed to respond if it is providing “documents and communications concerning [its] policies and procedures relating to … the Service Subscribers.” Charter has also refused to

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<sup>1</sup> For sake of clarification, our June 23, 2022 letter erroneously referred to the EarthLink’s First Set of Document Requests to Defendant as dated September 15, 2020. As Charter is aware, the September 15, 2020 requests were amended and re-served as the operative First Set of Document Requests to Defendant on April 8, 2022, to which Charter responded on June 24, 2022.

June 29, 2022

Page 2

provide documents and communications concerning “communications with the Service Subscribers.” These materials are highly relevant, given that the Amended Complaint alleges a calculated effort by Charter to engage in improper communications with the Service Subscribers wherein: (1) Charter made a series of similar false statements to multiple, distinct customers, concerning EarthLink’s services telephonically, in an effort to convince customers to switch to Charter (Am. Compl. ¶ 59); and (2) Charter’s representatives made identical, coordinated communications (including mass emails) to the Service Subscribers related to switching their services from EarthLink to Charter (*see, e.g., id.* at ¶¶ 76-77). These are just some of the examples of the alleged conduct that indicates that there was a ***policy or procedure*** related to these communications that was communicated internally at Charter.

Moreover, even Charter has admitted this is relevant, as it has taken the position that these communications were merely “stray” and not the product of a coordinated effort. If Charter is correct in its statement, then there should be no communications or documents creating this policy at a high level within Charter, discussing the mail and its contents to customers, or announcing Charter’s policy or procedure to its call center workers concerning these contacts with Service Subscribers.

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

Charter objects to providing all “documents relating to communications between Call Center employees and Service Subscribers, including all recording or transcriptions of those communications” on the basis that the call center has received “millions of calls from subscribers, including both EarthLink and non-EarthLink subscribers.”

These calls are the heart of the case for all the reasons explained in EarthLink’s Amended Complaint. (Am. Compl. ¶¶ 56-59). Charter’s conduct in its customer service calls show its efforts to poach EarthLink’s clients through demonstrable falsehoods. (*Id.* at ¶ 59). And, as stated above, Charter’s ***primary*** argument on these matters has been that the conduct is not widespread—making its wholesale refusal to search for these items all the more troubling. For all these reasons, the relevance of these materials cannot be disputed.

To the extent Charter claims this discovery is burdensome, it fails to state how many calls originate from ***EarthLink*** Service Subscribers during that time period. Moreover, these calls (and other data responsive to this request) are easily searchable utilizing both metadata as well as search terms. For this reason, please detail how many calls from Service Subscribers are within Charter’s possession, custody, and/or control during the time period of this request, as well as any other call notes, records or other data sources that may be responsive to this request. EarthLink can assess the potential burden associated with this request and propose limiting terms to narrow the search, if necessary.

#### C. First Set of Documents Requests No. 9

EarthLink requested, “[a]ll documents and communications relating to any instructions or guidance provided to the Call Centers and their employees concerning communications with the Service Subscribers.” In contrast to Charter’s responses to EarthLink’s other requests for production stating Charter “will produce copies of responsive and non-privileged documents, if

June 29, 2022

Page 3

any exist, responsive to this Request,” Charter’s response to this request adds an apparent limitation: “that concern EarthLink or its Service Subscribers.” It is unclear how any instructions or guidance provided to the Call Centers and their employees concerning communications with the Service Subscribers would not *also* “concern EarthLink or its Service Subscribers,” and if Charter intends to withhold certain documents on this basis. Please confirm what, if any, categories of documents and/or communications Charter intends to exclude from its search with this limiting language.

#### D. First Set of Document Requests No. 11

EarthLink requested “[a]ll documents and communications relating to any feedback provided by you to the Call Centers concerning communications between Call Center employees and the Service Subscribers.” Charter’s response to this request, again in contrast to its other responses, adds the apparent limitation that it will only produce responsive documents “concerning the subject matter of the lawsuit.” We request that you confirm what categories of documents and/or communications, if any, Charter intends to exclude from production based on its conception of what matters do and do not “concern[] the subject matter of the lawsuit.”

#### E. First Set of Document Requests No. 21 and Second Set of Document Requests No. 2

In its Responses to EarthLink’s First Set of Document Requests No. 21, Charter refuses to provide any “documents and communications 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.” However, Charter alleges in its Counterclaim that “this larger pool” of “1 million IP addresses” was “conveyed to Charter under Section 1.5 of the HSSA” when “EarthLink supplied approximately 1 million IP addresses to Charter.” (Counterclaim ¶16).

EarthLink flatly denies that any such conveyance or transfer was made. Charter is obligated to identify *which* 1,000,000 addresses it is referring to as well as the details of their use. Charter cannot have Counterclaims on this theory or take the position in its defense against EarthLink’s claims that these were all “transferred” to it without identifying the property at issue.

As to its claimed burden of responding to this request, Charter’s conclusory objection that this request “seeks an overwhelming amount of information that has no bearing on the issues in this case” is plainly wrong. Charter cannot make this statement in its pleading without having the ability to isolate and identify the 1,000,000 addresses. Moreover, these addresses are expressed as *blocks*, not individual addresses comprising one million separate entries—this greatly reduces burden. Additionally, as Charter is aware, ARIN requires proof of use for allocation of IP resources as a prerequisite to registration. See ARIN Number Resources Manual, Chapter 4.2.3.7. Registration (“ISPs are required to demonstrate efficient use of IP address space allocations by providing appropriate documentation, including but not limited to assignment histories, showing their efficient use.”).<sup>2</sup> To this end, a spreadsheet supporting use must be provided in order to

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<sup>2</sup> Available at: <https://www.arin.net/participate/policy/nrpm/#4-2-3-7-registration>.

June 29, 2022

Page 4

register the IPs. This is information any registrant controlling IP addresses would have and could readily provide.

*First*, as to Charter’s conversion claim, we are entitled to know what exactly what property Charter is claiming ownership of. *Second*, we understand that Charter may have made unauthorized use of the IP addresses at issue, thus, evidence of when and how the IP addresses were used are highly relevant and directly support both EarthLink’s conversion claim and its defenses against Charter’s multiple Counterclaims. *Third*, for the purposes of damages, we are entitled to know of any unauthorized use of the IP addresses by Charter. *Fourth*, ARIN registration of IP addresses requires evidence of consistent use of IP Addresses. EarthLink has regularly had control over and used its IP addresses for its customers. Charter, by contrast, cannot show that as to any of the larger IP address block. This goes directly to disproving Charter’s allegations in its counterclaims and supporting EarthLink’s defenses thereto. *Fifth*, to the extent Charter now claims ownership as to the 1,000,000 block solely through the use of the word “supply” in the HSSA, it has placed in issue the larger block in the context of its counterclaims.

Similarly, in its response to EarthLink’s Second Set of Document Requests No. 2, Charter refuses to provide any “documents and communications concerning all Network Architecture and the usage of EarthLink IP addresses during the term of the Agreement, including, without limitation, data showing which customers or Persons utilized the EarthLink IP Addresses (including any Persons or customers that were not EarthLink Service Subscribers).” Charter’s objections purporting to justify this wholesale refusal to search for or produce documents are meritless. *First*, to the extent Charter claims it cannot respond on the ground that “Network Architecture” is not explicitly defined in the requests, EarthLink clarifies that this term has the same meaning as used in Section 1.2 of the HSSA (“Network Architecture”). *Second*, contrary to Charter’s objection that this request seeks an “overwhelming amount of information that has no bearing on the issues in this case,” EarthLink’s request is limited to the smaller subset of IP addresses and goes directly to evidence of Charter’s Network Architecture and use. *Third*, this evidence is highly relevant as it goes to whether Charter’s use was consistent with the sole permitted purpose of connecting EarthLink Service Subscribers to the High Speed Service, as well as to damages to EarthLink based on the scope and extent of Charter’s misuse.

#### **F. Second Set of Document Requests No. 6**

EarthLink requested, “[a]ll agreements transferring registration of IP Addresses or conveying rights, title or interest in IP Addresses to any Person.” Charter’s objection suggesting that such agreements do not “concern issues alleged in the Amended Complaint” is incorrect. Charter’s claim that it owns the IP addresses in question is belied by, among other things, its apparent lack of any agreement or document transferring its registration of the IP addresses. Given publicly available information showing Charter owns or controls IP addresses other than those in contention in this action,<sup>3</sup> EarthLink is entitled to ascertain whether other IP addresses over which Charter claims ownership are supported by any agreement or document evidencing registration or

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<sup>3</sup> See, e.g., Terms of Service/Policies, SPECTRUM, available at: <https://www.spectrum.com/policies/lea> (“Charter requires law enforcement officials to consult ARIN to “verify an IP address belongs to Charter . . . prior to serving legal process.”).

June 29, 2022

Page 5

transfer thereof to Charter. Moreover, to the extent Charter claims the word “supply” is sufficient to “convey” IP addresses, its agreements with other parties directly bearing on the transfer or sale of IP addresses is directly relevant.

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

EarthLink requested, “[a]ll documents or communications defining the term “IP Addresses.”” This request goes to the centrally important issue of how Charter interprets the term “IP Addresses” as used in the HSSA, which is the sole source of Charter’s allegation that it acquired ownership of the IP addresses at issue from EarthLink. Given Charter’s position on the source of its claimed ownership of the IP addresses, Charter must search for and produce documents within its possession, custody, and/or control evidencing its understanding of the definition of this term.

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

#### **A. Charter’s Failure to Provide Contact Information, Titles, or Current Employees in Response to Any of the Interrogatories.**

For each of the individuals Charter identifies in Interrogatories Nos. 4-9, 11, 15 and 22, Charter has not provided titles or contact information as requested. These requests for information are well within the CPLR and Commercial Division Rules. *See 2138747 Ontario Inc. v. Lehman Bros. Holdings, Inc.*, No. 156759/2017, 2021 WL 2665639, at \*2 (N.Y. Sup. Ct. June 29, 2021) (Masley, J.) (requiring production of addresses in response to interrogatories on a motion to compel in a Commercial Division case); *see also Princeton Glass & Stone Tile Wholesale Inc. v. Hu*, No. 611202/2017, 2018 WL 11232636, at \*4 (N.Y. Sup. Ct. July 20, 2018) (requiring identification of title and contact information of identified individuals on a motion to compel responses to interrogatories).

Indeed, Charter itself directed EarthLink to supply these identifying details in Charter’s First Set of Interrogatories to EarthLink—an instruction EarthLink complied with when identifying individuals in its responses. Moreover, this information is particularly within Charter’s control and is essential to the parties’ ability to meaningfully and efficiently negotiate custodians. Please supplement your responses accordingly.

Additionally, for each of those persons, please identify whether Charter has possession, custody or control over the individual’s documents or communications so that EarthLink can assess whether the individuals named in Charter’s responses should be added as Charter custodians.

#### **B. Charter’s Unsupported Burden Arguments as to Interrogatories Nos. 13 and 17.**

##### **1. Interrogatory No. 13**

For example, in its Response to Interrogatory No. 13, Charter states “During the period of January 1, 2019 to January 1, 2021, those call centers fielded an average of around 20 million calls per month. Accordingly, Charter cannot respond to this Interrogatory” However, as Charter is

June 29, 2022

Page 6

well aware, only a fraction of these individuals are “Service Subscribers.” Charter has confirmed it has not deleted these calls and these calls are easily searchable for metadata as well as search terms. For this reason, please detail how many calls from Service Subscribers Charter has during the time period of this interrogatory so that EarthLink can assess the potential burden associated with it and propose limiting terms to narrow the search, if necessary.

**2. Interrogatory No. 17**

Similarly, in its response to Interrogatory No. 17, Charter states, “given the volume of representatives who may have communicated with EarthLink Service Subscribers, which exceeds 20,000 individuals, it is unable to identify which ‘owner, director, manager, employee, agent and/or representative of Charter/Spectrum’ communicated with EarthLink Service Subscribers in New York.” Metadata would allow Charter to identify EarthLink Subscribers and calls originating from New York. Accordingly, we request that Charter identify the number of calls originating from New York so that EarthLink may assess the potential burden and propose limiting terms to narrow the search, if necessary.

**C. Interrogatory No. 2**

EarthLink’s Interrogatory No. 2 requested that Charter, “[i]dentify any and all Documents, records, tangible things, or other materials (including electronically-stored information), detailing which IP Addresses Charter alleges were conveyed based on Section 1.5 of the Agreement and as to each Document, record, tangible thing, or other materials identified, provide a general description, the location, and the name, office address, and title of the custodian.” Charter’s response, which refers EarthLink to its forthcoming productions of documents in response to EarthLink’s document requests, is deficient because Charter has not agreed to identify the IP addresses underlying Charter’s alleged conversion claim.

As detailed above, EarthLink flatly denies any such conveyance or transfer was made. But Charter must, at a minimum, identify which IP addresses it claims EarthLink converted.

**D. Interrogatory No. 19**

EarthLink seeks clarification of Charter’s representations in response to Interrogatory No. 19, 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.” Charter’s objections state, “Charter is unable respond to the Interrogatory to the extent it seeks insurance information concerning “TWC’s representations to Charter concerning the Agreement,” as Charter is unclear on what is meant by the phrase.” As Charter alleges, TWC merged with Charter in 2016 and assigned its rights under the HSSA to Charter in 2017. (Counterclaims ¶ 2). Please clarify whether, either in connection with TWC’s merger with Charter or its subsequent assignment of HSSA rights to Charter, TWC ever represented to Charter that TWC gained ownership of the IP addresses at issue from EarthLink pursuant to the HSSA. If any such representation was made by TWC, please clarify whether Charter is aware of any insurance policy or agreement relating to such a representation.

June 29, 2022

Page 7

Separately, we have not yet received the search terms you agreed to provide early this week. As you note, Charter has had EarthLink's Discovery Requests for much longer than EarthLink has had Charter's. For this reason, EarthLink cannot afford further delay by Charter. Please provide your custodians, search terms Charter applied and any proposal to EarthLink no later than the morning of Thursday, June 30, 2022. Should we receive these items timely in advance of the upcoming holiday, we are happy to meet and confer on those terms, as well as your assessment of the hits EarthLink proposed terms, on July 5, 2022.

Sincerely,



Shaila R. Diwan

# **Exhibit 11**

# Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 [www.pbwt.com](http://www.pbwt.com)

July 7, 2022

H. Gregory Baker  
Partner  
(212) 336-2871  
[hbaker@pbwt.com](mailto:hbaker@pbwt.com)

Shaila R. Diwan  
King & Spalding LLP  
1185 Avenue of the Americas  
New York, NY 10036-4003

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

Dear Shaila:

I write on behalf of Charter Communications Operating, LLC (“Charter”) in response to your June 29, 2022, letter regarding certain alleged deficiencies in Charter’s Responses and Objections to EarthLink, LLC’s (“EarthLink”) First Set of Document Requests (“First RFPs”), Second Set of Document Requests (“Second RFPs”) (each a “Request”), and First Set of Interrogatories (“Interrogatories”). We are sending this letter to you in advance of the parties’ meet and confer, in the hopes that it will help streamline the meeting. We submit this letter without waiving any objections set forth in Charter’s responses to the Requests and Interrogatories, all of which are expressly reserved.

## I. EarthLink’s First and Second RFPs

### A. First RFPs No. 1

Charter understands this Request to be seeking “documents and communications concerning your *policies and procedures* relating to the Agreement with EarthLink and/or Service Subscribers” and “documents and communications concerning your *policies and procedures* relating to . . . communications with the Service Subscribers.” (Emphasis added.) In its responses and objections to this Request, Charter indicated that, subject to general and specific objections, it would produce copies of responsive, non-privileged documents and communications concerning “policies and procedures” relating to the Agreement and/or Service Subscribers, if any exist. Thus, to the extent the Request is focused on *policies and procedures*, Charter intends to search for and produce responsive documents and communications.

To the extent that EarthLink intends this Request to encompass all “communications with Service Subscribers,” however, it is duplicative of other Requests, including, but not limited to, First RFPs Nos. 2, 5, 6, 8, 9, 10, 11, and 12, and Second RFPs No.

July 7, 2022  
Page 2

4. Charter reiterates its responses and objections to those Requests, supplemented by any additional responses raised in this letter. Given the volume of such communications, and the burdensomeness associated with collecting and reviewing all such communications, Charter will not produce all communications with Service Subscribers.

#### **B. First RFPs No. 8**

Charter stands by its objections to this Request, including that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, in light of EarthLink's disclosures in its Responses and Objections to Charter's First Set of Interrogatories, Charter responds that it is searching for documents and communications with respect to the sixteen Earthlink Service Subscribers that EarthLink has identified. Subject to and without waiving Charter's general and specific objections pertaining to this Request, Charter agrees to produce responsive, non-privileged documents and communications regarding these sixteen individuals, if any exist. Charter further objects on the grounds that the Cable Act prohibits it from producing personally identifiable information. Cable Act, 47 U.S.C. § 551. Accordingly, any productions from Charter will not include personally identifiable information.

At this time, Charter does not agree to produce documents and communications concerning Service Subscribers beyond the sixteen that EarthLink has thus far identified. Charter reiterates its position that collecting documents and communications related to the remaining Service Subscribers would be a substantial and unjustified burden on Charter. To begin with, Charter has no systematic means of identifying and isolating communications with Service Subscribers across the multiple electronic platforms that Charter used to manage and track its interactions with customers during the relevant time period. Any documentation or communication related to interactions with Service Subscribers is integrated into Charter's platforms alongside Charter's own customers. Without the name of a specific Service Subscriber or account number, Charter cannot realistically locate the information that EarthLink seeks. Additionally, Charter has no systematic means of collecting and aggregating communications with customers—Service Subscribers or otherwise. Reports of communications with Service Subscribers, or any other customers, are not logged in a segregated, easily accessible location.

#### **C. First RFPs No. 9**

Charter does not believe there is any disagreement over this Request. EarthLink requested that Charter produce “[a]ll documents and communications relating to your monitoring of communications between the Call Centers and Service Subscribers.” Subject to general and specific objections, Charter has agreed to produce documents responsive to this Request, if any exist.

#### **D. First RFPs No. 11**

July 7, 2022

Page 3

Likewise, Charter does not believe there is any disagreement over this Request. EarthLink requested that Charter produce “[a]ll documents and communications relating to any feedback provided by you to the Call Centers concerning communications between Call Center employees and the Service Subscribers.” Subject to general and specific objections, Charter agreed to produce documents responsive to this Request, if any exist.

#### **E. First RFPs No. 21 and Second RFPs No. 2**

First RFPs No. 21 seeks documents and communications “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.” Second RFPs No. 2 seeks all “documents and communications concerning all Network Architecture and the usage of EarthLink IP addresses during the term of the Agreement.”

Subject to its objections, Charter will investigate whether it is possible to provide this information. To the extent that EarthLink seeks this information to investigate “unauthorized use of the IP addresses” during the term of the High-Speed Services Agreement (“HSSA”), that appears to be a new theory of the case, which was not alleged in the Amended Complaint. Charter asks that EarthLink identify where, specifically, it alleged in the Amended Complaint that Charter was engaging in the unauthorized use of any of the IP Addresses during the term of the HSSA.

Your letter further suggests that EarthLink is “entitled to know exactly what property Charter is claiming ownership of” vis-à-vis Charter’s claim for conversion. As EarthLink is aware, however, Charter, in its Counterclaims, identified the blocks of IP Addresses that it claims EarthLink converted by purporting to transfer and/or sell them to third parties. (*See* Counterclaims ¶¶ 43-45.) More broadly, Charter submits that any IP addresses supplied by EarthLink to Charter under the HSSA are now the property of Charter. EarthLink is surely aware of which IP addresses or blocks of IP addresses were supplied to Charter under the HSSA. (*See, e.g.*, Am. Compl. ¶ 45.)

Your continued reliance on ARIN is misplaced. As EarthLink is aware, ARIN itself does not take a position regarding ownership of IP addresses and, specifically, does not believe that IP addresses are property. (*See* Registration Services Agreement, ARIN, at ¶ 7.) Charter contends that it owns the IP Addresses because, pursuant to the HSSA, EarthLink supplied them to Charter, transferring ownership.

#### **F. Second RFPs No. 6**

Charter stands by its refusal to produce documents responsive to this Request. As Charter stated in its responses and objections, this Request is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. This Request is extraordinarily extensive in scope, seeking “agreements” related to IP addresses beyond those

July 7, 2022

Page 4

that EarthLink supplied to Charter pursuant to the HSSA. EarthLink is not entitled to conduct a fishing expedition into Charter's operations and the acquisition, use, and management of all of its IP addresses. In addition to the fact that such information is not relevant, it is neither practical nor feasible for Charter to attempt to collect, review, and produce the documents that EarthLink purports to seek through this request.

#### **G. Second RFPs No. 7**

Charter stands by its refusal to produce documents responsive to this Request, which seeks “[a]ll documents or communications defining the term “IP Addresses.”” The Request is overbroad and unduly burdensome, and is neither properly tailored nor reasonably calculated to lead to the discovery of admissible evidence. Through this Request, EarthLink plainly seeks documents wholly unrelated to this litigation, which concerns the ownership of the IP Addresses supplied to Charter pursuant to the terms of the HSSA. Charter is under no obligation to conduct such an open-ended and untargeted inquiry and will not produce documents responsive to this Request.

### **II. EarthLink's First Set of Interrogatories**

#### **A. Title, Contact Information, and Custodial Status of Individuals Identified in Response to Interrogatories 4-9, 11, 15, and 22.**

Charter agrees to provide the last known title for the individuals identified in its responses to Interrogatories 4-9, 11, 15, and 22. We are further providing a corporate address where any correspondence addressed to these individuals may be sent.<sup>1</sup>

<b>Name</b>	<b>Present or Last Known Title<sup>2</sup></b>	<b>Last Known Business Contact Information</b>
Rick Davies (deceased)	N/A	N/A
Michael Adams		c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Beau Coughlin		c/o Kim Steuterman Charter Communications

<sup>1</sup> EarthLink should direct any communications with any current and/or former Charter employees, including but not limited to those listed below, to Charter's undersigned counsel.

<sup>2</sup> At present, Charter is still investigating the titles for the individuals left blank below.

July 7, 2022

Page 5

		12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
David Christman (former employee)	SVP, Deputy General Counsel at L-TWC	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Raj Kumar (former employee)	GVP, Chief Counsel, Commercial at L-TWC	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Howard Pfeffer	SVP, Broadband Engineering and Tech	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Jeff King		c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Mike Lajoe	EVP, Chief Tech and Net Ops Officer	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Peter Stern	EVP, Product, People and Strategy	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Robert Rusak	GVP, Finance	c/o Kim Steuterman Charter Communications

July 7, 2022

Page 6

		12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Charlotte Field	SVP, Application Platform Operations	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Dustin Phillips	VP, Device, Identity and Domain Name System	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Eilisa Reid	GVP, Service Delivery	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
John Hendrickson	SVP, Core and Backbone Operations	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Matt Stanek	SVP, Network Technology Operations	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
David Scott Webber (former employee)	EVP, Network Operations	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Naomi Bergman	VP (CO)	c/o Kim Steuterman Charter Communications

July 7, 2022

Page 7

		12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Leo Cloutier	SVP, Strategy and Business Development	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Stephen Colafrancesco	VP, Market Intelligence	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
William Erickson	GVP, Field Sales	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Edward Fallon	Senior Director, Senior Counsel	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
William Futera	Vice President, Financial Planning	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
David Gray	GVP, Market Intelligence	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Mark Guberman	Director, Marketing	c/o Kim Steuterman Charter Communications

July 7, 2022

Page 8

		12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Jonathan Hargis	Special Advisor to the Chief Operating Officer (“COO”)	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Cody Harrison	Vice President, Associate General Counsel	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Emmanuel Jones	Senior Director, Sales and Operations	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
John Keib	Executive Vice President and COO, Residential Services	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Greta Kim	VP, Customer Service Operations Support	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Chia Liu	VP, Engineering IP Management	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Michael Locke	VP, Retail Sales	c/o Kim Steuterman Charter Communications

July 7, 2022

Page 9

		12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Sharon Peters	EVP, Chief Marketing Officer	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Wendy Rasmussen	VP, Marketing	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Daniel Schatte	VP, Service Design	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Patricia Eliason	SVP, Spectrum Stores and Retail	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Joseph Leonard	SVP, Marketing and Creative Strategy	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Laurence Christopher	SVP and Associate General Counsel, Litigation/Chief Compliance Officer	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Kimberly Steuterman	Director, Senior Counsel	c/o Kim Steuterman Charter Communications

July 7, 2022

Page 10

		12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555
Kathleen Griffin	VP, Marketing Communications	c/o Kim Steuterman Charter Communications 12405 Powerscourt Dr. St. Louis, MO 63131 (314) 965-0555

#### B. Interrogatory No. 13

Charter stands by its objections to this Interrogatory. As Charter explained above in response to First RFP No. 8, without Service Subscriber names or account numbers, it is neither feasible nor practical for Charter to identify and isolate every interaction between a Service Subscriber and a Charter representative concerning the subject matter of this Interrogatory. Your letter suggests erroneously that Charter “has confirmed [that] these calls are easily searchable for metadata as well as search terms.” Charter has not made such a representation.

To the extent that Charter is able to identify the interactions involving the sixteen Service Subscribers EarthLink has disclosed, and to the extent Charter can assess whether any of those interactions concerned “changing service,” subject to the general and specific objections articulated in its responses and objections to Interrogatory No. 13, Charter will endeavor to disclose the names of the representatives with whom the sixteen service subscribers spoke during the period of January 1, 2019 to January 1, 2021 concerning “changing service,” if any such conversations took place.

Your letter also states that Charter “has confirmed [that] it has not deleted these calls . . .” This again misstates what Charter has represented. As Charter noted previously, in a letter sent June 24, 2022, a legal hold notice was implemented shortly after the receipt of EarthLink’s July 27, 2020, Document Preservation Notice. Charter’s collection of responsive documents and communications is ongoing. Charter further directs EarthLink to its response to First RFPs No. 8 above.

#### C. Interrogatory No. 17

Charter stands by its objections to this Interrogatory. For similar reasons to those Charter articulated in its response above to Interrogatory No. 13, it is neither feasible nor practical for Charter to respond to this Interrogatory. Subject to the same limitations described above in response to Interrogatory No. 13, Charter will endeavor to disclose the names of the

July 7, 2022  
Page 11

representatives with whom the six New York Service Subscribers identified by EarthLink in its Responses and Objections to Charter's First Set of Interrogatories spoke.

**D. Interrogatory No. 2**

Charter disagrees that its response to this Interrogatory is deficient. Your letter states that Charter's response is deficient because "Charter has not agreed to identify the IP addresses underlying Charter's alleged conversion claim." This is incorrect. In its Counterclaims, Charter identified the specific blocks of IP Addresses that EarthLink misappropriated and that form the basis of Charter's claim for conversion. (*See* Counterclaims ¶¶ 43-45.) In addition, Charter has agreed to produce responsive, non-privileged documents, if any exist, responsive to Second RFPs No. 22, which seeks documents and communications supporting Charter's allegation that EarthLink misappropriated certain blocks of the IP Addresses and purported to transfer them to third parties.

**E. Interrogatory No. 19**

Charter stands by its responses and objections to this Interrogatory. EarthLink's request for clarification "whether . . . TWC ever represented to Charter that TWC gained ownership of the IP addresses at issue from EarthLink pursuant to the HSSA" is not a proper subject of an Interrogatory. (*See* Commercial Division Rule 11-a(b).) In addition, Charter is unclear what is meant by the statement "whether Charter is aware of any insurance policy or agreement relating to such a representation."

Best regards,



H. Gregory Baker

# **Exhibit 12**

# KING & SPALDING

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July 12, 2022

## VIA E-MAIL

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Saul B. Shapiro  
Patterson Belknap Webb & Tyler LLP  
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**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.

July 12, 2022

Page 2

**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.

July 12, 2022

Page 3

*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 expediting 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

July 12, 2022

Page 4

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

July 12, 2022

Page 5

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

July 12, 2022

Page 6

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

July 12, 2022

Page 7

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:

July 12, 2022

Page 8

- 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”

July 12, 2022

Page 9

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

# **Exhibit 13**

# Patterson Belknap Webb & Tyler LLP

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July 19, 2022

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

Dear Alex:

I write on behalf of Charter Communications Operating, LLC (“Charter”) concerning certain deficiencies in EarthLink, LLC’s (“EarthLink”) responses to Charter’s interrogatories, and in response to your letters to us, dated June 29, 2022 (“June 29 EarthLink Letter”), July 12, 2022 (“July 12 EarthLink Letter”) and July 15, 2022 (“July 15 EarthLink Letter”), relating to certain discovery disputes in this matter.

## **I. EarthLink’s Deficient Responses to Charter’s First Set of Interrogatories**

### **A. Charter’s Interrogatory No. 4**

Charter reiterates its position that EarthLink has failed to sufficiently respond to this Interrogatory, which seeks the “dates and times when each of the alleged misstatements” from Charter customer service representatives took place. EarthLink attempts escape its obligation by suggesting erroneously that Charter has “withdrawn” its objection to EarthLink’s improper response to Charter’s Interrogatory. (See July 15 EarthLink Letter at 11.) Further, Charter rejects EarthLink’s proposal to “identify dates and times . . . upon review of Charter’s production.” (See July 12 EarthLink Letter at 9.) Charter once again requests that EarthLink provide the dates and times when the comments set forth in Interrogatory No. 3 were made to Service Subscribers. If EarthLink does not know the dates and times, Charter requests that EarthLink confirm that fact to Charter explicitly.

### **B. Charter’s Interrogatories Nos. 13 and 14**

Charter reiterates its position that EarthLink has failed to sufficiently respond to Interrogatories Nos. 13 and 14, which seek identifying information concerning the alleged EarthLink Service Subscribers identified in paragraphs 76 and 77 of the Amended Complaint. Charter likewise rejects EarthLink’s baseless contention that Charter has “withdrawn” its objection to EarthLink’s deficient response. (See July 15 EarthLink Letter at 11.) Charter rejects EarthLink’s position that the obligation is on Charter to verify the identity of the two Reddit users whose usernames EarthLink disclosed in response to this Interrogatory. Furthermore, EarthLink’s proposal for Charter to “search its employees [sic] emails for the verbatim text of

July 19, 2022

Page 2

the solicitation” (*See* July 12 EarthLink Letter at 9) is nonsensical because Charter has no way of matching generic promotional material allegedly from Charter with specific recipients *who remain anonymous*.

The notion that the purpose of this request is to have EarthLink “marshal . . . evidence for Charter” is absurd. (*Id.*) As EarthLink admits, EarthLink relies on these allegations “to illustrate the use of formal marketing by Charter.” (*Id.*) EarthLink cannot shirk its obligation to provide the bases for its allegations simply by stating they are made “[u]pon information and belief.” (*Id.* (citing Am. Compl. ¶ 78).) Charter is entitled to know what steps, if any, EarthLink took to verify the veracity of these anonymous statements posted on Reddit.com, upon which EarthLink purports to rely in support of its claims. If EarthLink does not have further information about these individuals—either because EarthLink failed to investigate or because, after a reasonable investigation, EarthLink was unable to uncover their identities—Charter is entitled to know. Indeed, by stating that it objects “on the grounds that [this information is] outside EarthLink’s possession, custody, or control” (*id.* at 9), EarthLink tacitly acknowledges that it was either unwilling to investigate or unable to uncover these individuals’ identities.

Charter reiterates its request for EarthLink to verify the identities of these two Reddit users or confirm explicitly that EarthLink does not know their identities (including name, address, phone number, email address and service agreements).

## II. Clarification of EarthLink’s Responses to Charter’s Discovery Requests

In its responses and objections to Charter’s First Set of Document Requests, EarthLink agreed to produce documents responsive to Document Request No. 40, which sought documents and communications concerning call recordings that EarthLink made and reviewed between EarthLink and Service Subscribers. During the July 13, 2022 meet and confer, Charter inquired as to whether EarthLink would produce its own call recording that it made of calls with Service Subscribers. EarthLink indicated that it would produce those recordings but did not explain the surrounding context around the recordings to which EarthLink has access. Charter seeks clarification in order to properly evaluate EarthLink’s response. Please include answers to the following questions in your response to this letter:

1. How many recordings were made of phone calls between Service Subscribers and EarthLink call center representatives over the period of January 1, 2017 through October 31, 2020?
2. Describe whether EarthLink’s policy was to record every single such phone call or only a subset thereof. If the latter, please describe how EarthLink determined which calls to record.
3. How many of the recordings referenced in Question 1, above, are still in existence as of today?

July 19, 2022

Page 3

4. Please describe EarthLink's policy regarding preservation of the call recordings referenced in Question 1, above, including any automatic deletion policies?
5. What is the data system and file format that EarthLink used during the relevant time period to preserve recorded calls?
6. How many of the recordings referenced in Question 1, above, have been transcribed?
7. How many of the transcripts referenced in Question 6, above, are still in existence as of today?
8. Please confirm whether the recordings of a "small subset of customer service calls" referenced in paragraph 57 of the Amended Complaint were recorded as part of EarthLink's standard practice of recording all phone calls between EarthLink call center representatives and Service Subscribers or whether such recordings were made for the purpose of the present dispute.
9. Please confirm (a) whether and when EarthLink issued a legal hold notice in connection with this litigation, and (b) whether such legal hold notice expressly covered recordings of phone calls between EarthLink call center representatives and Service Subscribers. Please also confirm that you intend to produce such legal hold notices.

We ask that you provide a response to these questions by no later than July 22, 2022.

### III. Customer Call Recordings

Your July 15 Letter omits several key facts concerning Charter's customer call recordings, many of which were explained to you during our July 13, 2022 meet and confer. During the period at issue, from roughly March 27, 2020<sup>1</sup> to October 31, 2020, Charter received an average of approximately 20 million phone calls from EarthLink and Charter customers each month, for a total of approximately **140 million calls** during this seven-month period. Per Charter's standard document preservation policy, given the extraordinary volume of calls and attendant amount of cost required in retaining that volume of data indefinitely, Charter's standard and longstanding practice is to retain recordings of a given customer phone call for 120 days, after which time calls are automatically overwritten so as to make room to store recordings of subsequent calls.

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<sup>1</sup> Because Charter's customer recording preservation system automatically overwrites phone calls every 120 days, at the time your preservation notice was sent on July 27, 2020, Charter would have already overwritten any customer calls that pre-dated March 27, 2020.

July 19, 2022

Page 4

The July 15 EarthLink Letter references a July 27, 2020 document preservation notice (“Notice”) sent to Charter’s General Counsel, Richard Dykhouse. Although at the time you sent the Notice you were apparently aware of the identity of certain EarthLink customers whom you allege in the Complaint as having received certain comments from Charter’s customer service representatives, you did not disclose the identities of any such individuals in the Notice; in the Complaint filed on September 9, 2020; in your Amended Complaint filed on March 18, 2021; in any of your Requests for Production of Documents issued to Charter, or in any interrogatories issued to Charter. You only disclosed the identities of 16 EarthLink customers—out of the 40,000+ EarthLink customers—on June 24, 2022, in response to Charter’s interrogatories requesting that information. Instead of identifying in your Notice the 16 EarthLink customers whom you allege took part in phone calls that are relevant to EarthLink’s claims in this suit, you sent a Notice demanding that Charter preserve all customer communications.

Furthermore, *even to this day*, you have been unable to provide Charter with any specifics concerning the dates when such calls allegedly took place, other than to respond that the calls took place “on or before July 10, 2020.” (Responses and Objections of Plaintiff EarthLink, LLC to Defendant Charter Communications Operating, LLC’s First Set of Interrogatories at Response No. 4.) When confronted with this glaring lack of detail, your response was effectively that you’ll let us know when the calls took place after you see Charter’s production. (*See* July 12 EarthLink Letter at 9 (“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.”)).

Charter further vehemently rejects your 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. We confirmed that fact for you during our meet and confer on July 13, 2022. We suggest that EarthLink re-read Charter’s discovery responses and correspondence more carefully prior to making such accusations against fellow members of the Bar of this State. Your insinuation that we have been anything less than candid is completely and utterly baseless. These types of accusations are completely unproductive: they do not help resolve our disputes or promote the efficient administration of justice.

#### **IV. Charter’s On-Going Reasonable Efforts to Meet the August 5, 2022, Production Deadline**

Charter must also correct your assertions regarding Charter’s document collection and review. EarthLink’s characterization of Charter’s efforts as “[l]ong-delayed” and “[n]on-[c]ommittal” (*see* July 15 EarthLink Letter at 3) flagrantly ignores the facts. To the extent there has been any delay, it can only fairly be characterized as the result of EarthLink’s efforts to overwhelm Charter with document requests and informal requests for information outside of the

July 19, 2022

Page 5

formal discovery process, and EarthLink's efforts to dictate which search terms Charter must use, and for which custodians.

As EarthLink is aware, discovery in this matter was stayed for more than a year and a half while the Court considered Charter's motion to dismiss EarthLink's Amended Complaint. (*See* Commercial Division Part 48 Rules and Procedures, Hon. Andrea Masley, J.S.C. at § 9(A).) After the Court's decision on April 6, 2022, the parties commenced discovery, with EarthLink serving fifty-one separate document requests on Charter, divided between two separate requests for production. EarthLink's First Set of Document Requests to Defendant ("First RFPs") was issued on April 8, 2022. The First RFP was an amendment to the initial request for production issued by EarthLink to Charter on September 9, 2020, the responses to which were stayed during the pendency of the motion to dismiss. Any suggestion that Charter's response has been "long delayed" by virtue of the September 9, 2020 request for production is disingenuous at best. EarthLink then issued a Second Set of Document Requests to Charter on May 27, 2022 ("Second RFPs"). Charter timely submitted its objections and responses to EarthLink's First and Second Requests for Production on June 24, 2022.

Immediately upon receiving the First RFPs in April, Charter commenced the laborious task of identifying sources of responsive data, including relevant custodians, in a company of more than 93,000 employees. Those efforts were disrupted by the receipt of the Second RFPs, which expanded both the scope of subjects requested by EarthLink, as well as the relevant custodians.

Upon identifying the universe of potential custodians, Charter proceeded to commence custodial interviews to ensure the proper documents were collected. Charter migrated the custodial data to its data and processing vendor and also engaged in document collection from more targeted sources, including its official guidance and policies for call center representatives concerning how to communicate with Service Subscribers, which were pulled from a database referred to as Co-Pilot. Charter believes that these guidance and policy documents are among the most relevant documents in this case, and they were collected independent of Charter's use of search terms across custodians.

Furthermore, as discussed earlier, Charter conducted an inquiry to determine what, if any communications with EarthLink service subscribers had been preserved. While Charter ultimately determined that call recordings with customers from the relevant period had been overwritten, Charter also confirmed that it had retained customer notes in its billing platforms, referred to as ICOMS East and CSG.

These efforts were well under way when, from out of the blue, on June 23, 2022, EarthLink sent a letter to Charter proposing search terms "for Charter's document collection, review and production," and also proposing a list of custodians. (*See* Ltr. from Shaila Diwan to Saul Shapiro dated June 23, 2022 at 1.) This was not a formal request made under the CPLR, Justice Masley's rules, or under any other applicable rules that Charter is aware of. It was

July 19, 2022

Page 6

request made purely based on EarthLink's own volition and one with which Charter was under no obligation to comply. Nevertheless, in an effort to reach a compromise over the extensive discovery sought by EarthLink, Charter proceeded to collect documents from the list of custodians identified by EarthLink (excluding Richard Dykhouse) and run EarthLink's proposed search terms.<sup>2</sup>

Given that Charter only received EarthLink's list of custodians on June 23, 2022, in an effort to accommodate EarthLink's requests to apply its proposed search terms and review documents from the custodians designated by EarthLink, on July 7, 2022, Charter informed the Court that it would not be able to meet the July 15, 2022 production deadline, as set forth in the parties' Preliminary Conference Order ("PCO"). (*See Email from Greg Baker to Victoria Corbo dated July 7, 2022.*) Charter requested a six-week extension to the production deadline given the volume of data involved and the anticipated disputes between the parties over the scope of production. (*Id.*) In an email dated July 8, 2022, Charter further explained to the Court that EarthLink's requests required Charter to collect and process millions of documents from numerous custodians—all of which needed to occur before Charter could begin to run search terms and undertake a document review. (*See Email from Greg Baker to Victoria Corbo dated July 8, 2022 re: RE: Joint Status Update – EarthLink, LLC v. Charter, 654332/2020.*) The Court subsequently granted a three-week extension of the PCO, setting the deadline for production at August 5, 2022. (*See Email from Victoria Corbo to Counsel for EarthLink and Counsel for Charter dated July 11, 2022 re: RE: Joint Status Update - EarthLink, LLC v. Charter, 654332/2020.*) EarthLink, for its part, declined to consent to a longer production deadline, suggesting that if one was to be granted, it should only be "brief." (*See Email from Shaila Diwan to Victoria Corbo dated July 7, 2022 re: RE: Joint Status Update – EarthLink, LLC v. Charter, 654332/2020.*) EarthLink then indicated it would *consider* consenting to a longer extension, but only conditioned on Charter answering a list of questions posed by EarthLink. (*See Email from Shaila Diwan to Greg Baker dated July 8, 2022 re: RE:Call*)

On July 13, 2022, in advance of the parties meet and confer, Charter shared its initial hit counts based on EarthLink's search terms. This yielded 102,601 documents (with families, the number was 235,440). In addition, in the meet and confer, Charter explained that it was not willing to review and produce Windstream-related documents because Charter's internal analysis showed that the searches, in large measure, were yielding documents that were not relevant to

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<sup>2</sup> EarthLink's list of custodians included five additional custodians beyond those who Charter had already identified: David E. O'Hayre, Chris Czekaj, Kathleen Griffin, Richard Dykhouse, and Happy Marino. (*See Ltr. from Shaila Diwan to Saul Shapiro dated June 23, 2022 at Ex. A.*) Charter had already included Michael G. Locke, Jonathan Hargis and Cody Harrison as custodians, and added four additional individuals, Patricia Eliason, Charlotte Field, David Gray and Sharon Peters. For reasons previously discussed, Charter has not agreed to collect documents from or search the documents of Richard Dykhouse, Charter's General Counsel.

July 19, 2022

Page 7

this litigation and instead concerned a separate litigation that previously occurred between Charter and Windstream. Charter agreed to, and subsequently did, share the Windstream hit counts with EarthLink, which exceeded 150,000 documents (more than 280,000 with families).

At the meet and confer, Charter reiterated that because it was committed to meeting the August 5, 2022 production deadline, it would need to narrow EarthLink's search terms to make the review feasible. Charter informed EarthLink that, as an example, searching the term "el" or "EL" yielded tens of thousands of irrelevant documents (hundreds of thousands with families).<sup>3</sup> Charter also stated that EarthLink's search term related to call center compensation and bonus/payment without qualification yielded around 26,000 documents (around 100,000 with families), many of them simply irrelevant to EarthLink's document requests or the issues in this litigation. Consequently, at the meet and confer, Charter requested that EarthLink propose additional search term limitations to narrow the universe of documents that Charter would need to review by the August 5 deadline, which was just over three weeks away. EarthLink refused and suggested that Charter come back to EarthLink with its own proposed limitations. Charter responded that it was running out of time to commence its review: the documents collected from custodians had not been processed into Charter's vendor's review platform, which could only occur after Charter had settled on search terms.

Given the limited time to conduct and complete its review, after the July 13 meet confer, Charter made modifications to EarthLink's list of search terms, and proceeded to run those terms across the list of custodians identified by EarthLink, plus the additional custodians identified by Charter. That list includes:

- Sharon Peters
- David O'Hayre
- Happy Marino
- Michael Locke
- Cody Harrison
- Jonathan Hargis
- Kathleen Griffin
- David Gray
- Charlotte Field
- Patricia Eliason
- Chris Czekaj
- Zachary Reming
- Steve Lottman

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<sup>3</sup> These search terms were bringing up unrelated places names such as "El Segundo" and "El Paso."

July 19, 2022

Page 8

The only omission from this list was Richard Dykhouse, Charter's General Counsel. And, as discussed, we have agreed to review only the third party communications of Cody Harrison, who is also an attorney.

In a letter sent to EarthLink dated July 15, 2022, Charter provided EarthLink with a modified list of search terms that it planned to run in order to generate documents that would be reviewed. (*See Ltr. from Greg Baker to Alex Noble dated July 15, 2022 (the "July 15 Charter Letter").*) With respect to the search terms, Charter's modifications were made with the competing objectives of narrowing the universe of documents to be reviewed and produced in a three-week time period, against the need to target documents responsive to EarthLink's requests. To meet that August 5 deadline, however, which the Court has indicated it is not willing to extend further without good cause, Charter cannot continue to have a back and forth debate with EarthLink about which search terms should be applied.

## V. Other Issues Raised by EarthLink Related to Search Terms and Custodians

### A. Search Terms Related to Windstream

The July 15 EarthLink Letter mistakenly suggests that Charter has "not provided us the hit counts for" Windstream related documents to evaluate whether they represent a "substantial" volume. (*See July 15 EarthLink Letter at 5.*) In fact, the email from Greg Margolis to you, dated July 15, 2022, includes an excel spreadsheet attachment with hit counts for Windstream-related documents. (*See Email from Greg Margolis to Alex Noble dated July 15, 2022 re: EarthLink v. Charter – correspondence from G. Baker to A. Noble 7.15.22 with attachments.*)

EarthLink issued only two Requests for Production that concern documents related to Windstream: Request No. 18 from EarthLink's First RFPs, and Request No. 3 from EarthLink's Second RFPs. In its objections and responses to both of these requests, Charter expressly objected on the grounds that the requests were "overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, and disproportionate to the needs of the case." (*See Charter's Responses and Objections to EarthLink's First RFPs at Request No. 18 and Second RFPs at Request No. 3.*) Charter submits that its objection to reviewing 282,030 Windstream related documents, which were generated from EarthLink's Windstream related search terms, falls squarely within these objections.

You also mistakenly assert that Charter has "already conceded the relevancy of Windstream documents in the Discovery Responses when [Charter] agreed to search for and produce these documents." (*See July 15 EarthLink Letter at 4-5.*) You plainly ignore Charter's objections and responses to both the First RFP and Second RFP, where Charter writes that "[i]n providing these responses and asserting these objections, Charter does not intend to waive any objections as to *relevancy*, materiality, or admissibility of evidence in this matter or any other matter or proceeding." (*Charter's Responses and Objections to EarthLink's First RFPs at at 3*

July 19, 2022  
Page 9

(emphasis added); Charter' Responses and Objections to EarthLink's Second RFPs at 3 (emphasis added).)

Request No. 3 from EarthLink's Second RFPs expressly seeks: "All documents and communications concerning potential claims by Charter and/or Spectrum against Windstream Holdings, Inc. and/or Windstream Services, LLC (collectively, Windstream), in connection with the EarthLink IP Addresses, including, without limitation, proofs of claim against Windstream and/or its bankruptcy estate and/or claims to any potential insurers." This request, by its express terms, plainly seeks Charter's internal legal analysis concerning claims or potential claims. Charter objected to each request to the extent that "they seek documents and information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other applicable privileged that makes such information non-discoverable." (Charter's Responses and Objections to First RFPs at 1; Charter's Responses and Objections to Second RFPs at 1.) This objection serves as further grounds on which Charter refuses to review and log some 280,000 documents that likely contain internal legal communications.

B. Custodian Cody Harrison

The July 15 EarthLink Letter requests information concerning the number of hits that would be excluded from the review of Mr. Harrison's emails, if Charter only reviews his third party communications. The total number of hits for Mr. Harrison, based on our latest search, is 4,379 (including families), which includes 1,153 third-party communications (including families) and 3,226 internal communications (including families). We are proposing that, for purposes of responding to EarthLink's document requests, we would only produce the relevant, non-privileged documents resulting from a review of the 1,153 hits of Mr. Harrison's that concern third parties.

C. Sources of Custodial Data

In response to the question in the July 15 EarthLink Letter concerning the sources of Charter's custodial data, Charter confirms that the search terms run over Charter's email data were also run over Charter's instant messaging system and hard drive data.

Charter adds that it collected documents from the custodians from places where relevant documents would reasonably be expected to be found. EarthLink has no basis to demand additional information from Charter on the specific locations of this data within Charter's internal systems, and Charter refuses to provide additional information beyond what it has already stated. If EarthLink is relying on specific authorities which show that a party may compel—through a series of informal letters—a detailed explanation of custodial data sources, prior to the actual production of any documents, we ask that you share those authorities with us immediately. Such requests by EarthLink are plainly beyond the proper scope of the parties' meet and confer.

July 19, 2022

Page 10

**D. Cable Act Disclosures**

Your July 15 Letter mistakenly suggests that Charter failed to raise an objection to providing Service Subscriber information to EarthLink based on the Cable Act, 47 U.S.C. § 551. Charter objected to all requests to the extent they seek information protected from disclosure by “any other applicable privilege that makes such information non-discoverable.” (Charter Responses and Objections to First RFPs at 1; Charter Responses and Objections to Second RFPs at 1.) Moreover, Charter is prevented by law from violating the Cable Act.<sup>4</sup>

Absent an order from the Court requiring Charter to disclose subscribers’ personally identifiable information, Charter will not disclose such information. And if EarthLink requests such an order from the Court, Charter will insist that EarthLink bear the cost of providing notice to the service subscribers, as required under the Cable Act.

**VI. Charter’s Further Responses to Open Issues Regarding EarthLink’s First and Second RFPs**

Charter addresses below the open issues stemming from its Responses and Objections to EarthLink’s First and Second FRPs and the parties’ subsequent correspondence: the June 29 EarthLink Letter; the letter from Greg Baker to Shaila Diwan dated July 7, 2022 (the “July 7 Charter Letter”); the July 12 EarthLink Letter; the July 15 Charter Letter; and the July 15 EarthLink Letter.

Charter notes for the record that EarthLink sent its July 15 Letter at 11:17 pm on a Friday night, and that you have demanded answers to several questions by Monday, July 18, 2022. Charter has endeavored to respond to as many questions as possible by the date of this letter, but notes that will require additional time to respond to other questions. If EarthLink proceeds to raise certain discovery issues with the Court without providing Charter an adequate time to respond, we will make sure the Court is aware of that fact.

**A. First RFPs No. 1**

As previously indicated in the July 7 Charter Letter, subject to its general and specific objections, Charter agrees to produce copies of responsive and non-privileged documents and communications, if any exist, concerning “policies and procedures” related to “the Agreement and/or Service Subscribers” and “policies and procedures” related to “communications with

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<sup>4</sup> The fact that Charter previously may have disclosed subscriber information to EarthLink during the pendency of the HSSA does not *ipso facto* mean that Charter may now disclose personally identifiable information of these customers—most of whom are now former EarthLink customers—to EarthLink.

July 19, 2022  
Page 11

Service Subscribers.” (*See* July 7 Charter Letter at 1-2.) Charter does not see this as an actual dispute between the parties.

B. First RFPs No. 8

In this Request, EarthLink seeks documents and communications between Charter’s call center representatives and Service Subscribers. In your July 12 Letter, EarthLink asks what systems and file formats Charter used to store its communications with Service Subscribers and whether Charter was able to run search terms over those data locations. (*See* July 12 EarthLink Letter at 3.) Charter refers EarthLink to the July 15 Charter Letter, in which Charter identified the systems in which Charter maintains communications between Service Subscribers and Charter. (*See* July 15 Charter Letter at 3.) In addition, Charter is running the following searches across the customer notes referenced during the meet and confer, and will report the hit counts to EarthLink:

- EarthLink
- Earth Link
- EL
- ELNK
- @elnk.com

C. First RFPs Nos. 9 and 11

First RFPs No. 9 seeks “document and communications relating to any instructions or guidance provided to the Call Centers and their employees concerning communications with Service Subscribers.” Likewise, First RFPs No. 11 seeks “documents and communications relating to any feedback” provided by Charter to call center representatives concerning Service Subscribers.

In your July 15 Letter, EarthLink states that it had “requested that Charter specifically identify the sources of data to be searched for document and communications responsive to these requests.” (*See* July 15 EarthLink Letter at 9; *see also* June 29 EarthLink Letter at 2-3; July 12 EarthLink Letter at 3-4.) EarthLink further seeks details “concerning how Charter’s employees self-selected their non-email documents from their data drives.” (*See* July 15 EarthLink Letter at 9; *see also* June 29 EarthLink Letter at 2-3; July 12 EarthLink Letter at 3-4.)

As it stated in its responses and objections and in the July 7 Charter Letter, Charter reiterates that, subject to its general and specific objections, it will produce documents responsive to these Requests, if any. Charter will undertake reasonably diligent efforts to search readily accessible files where responsive documents would reasonably be expected to be found. Charter will apply search terms across the relevant custodians. Furthermore, as previously discussed, Charter is producing relevant documents from its Co-Pilot database.

July 19, 2022  
Page 12

EarthLink has no basis to seek additional information, such as the sources of data, and Charter does not intend to provide it.

**D. First RFPs No. 21 and Second RFPs Nos. 2**

First RFPs No. 21 seeks documents and communications “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.” Second RFPs No. 2 seeks all “documents and communications concerning all Network Architecture and the usage of EarthLink IP addresses during the term of the Agreement.”

Charter stands by its objections and responses to these requests, and further refers EarthLink to page three of the July 7 Charter Letter.<sup>5</sup>

**E. Second RFPs No. 6**

This Request seeks all “agreements transferring registration of IP Addresses or conveying rights, title or interest in IP Addresses to any Person.” Charter reiterates its objections to this Request, which seeks documents related to IP addresses having nothing whatsoever to do with this lawsuit or the IP addresses at issue here (the “IP Addresses”). In the July 12 Letter, EarthLink states that it “merely seeks, as the request states, a targeted collection” of certain documents related to IP addresses. (*See* July 12 EarthLink Letter at 5.) To the contrary, there is nothing targeted about this Request. EarthLink is not entitled to unhindered discovery into Charter’s practices related to IP addresses. Charter states that it has agreed to produce documents responsive to other Requests more appropriately tied to the IP Addresses and the issues relevant to this case. (*See*, e.g., Charter’s responses to First RFPs Nos. 18, 19, 20, and 22, and Second RFPs Nos. 1, 10, and 19.)

**F. Second RFPs No. 7**

This Request seeks “[a]ll documents or communications defining the term ‘IP Addresses.’” Charter reiterates its objections to this Request, as set forth out in its Responses and Objections to EarthLink’s Second RFPs, and as further explained in the July 7 Charter Letter. (*See* July 7 Charter Letter at 4.) Charter stands by its refusal to produce documents responsive to this Request.

**VII. EarthLink’s First Set of Interrogatories**

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<sup>5</sup> Subject to our objections, we are still investigating whether it is even *possible* to provide this information.

July 19, 2022  
Page 13

A. Individuals Identified in Response to Interrogatories 4-9, 11, 15, and 22

EarthLink seeks additional information about individuals Charter has identified in response to Interrogatories 4-9, 11, 15, at 22, including whether they are current or former employees and whether Charter has possession, custody, or control over their documents and communications. (*See* June 29 EarthLink Letter at 5; *see also* July 12 EarthLink Letter at 5-6; July 15 EarthLink Letter at 10.) EarthLink also inquires whether Charter will accept service of notices of depositions for its current and former employees. (*See* July 12 EarthLink Letter at 5.)

As Charter stated in the meet and confer, Charter has possession, custody, or control over documents and communications of the individuals identified in response to these Interrogatories, subject to Charter's document retention and destruction policies.

Charter further states that the employment status of these individuals is as follows:

<u>Current Employees</u>	<u>Former Employees</u>
Zachary Reming	Jeffrey Mollett
Loretta Rhoades	Christopher Kidwell
Kim Grose	Krista Clark
Christopher Squeri	Aurora Provencher
Dexter Crapps	Lawrence Clermont

Charter agrees to accept service of deposition notices for its current employees. With respect to former employees, Charter will need to confer with those employees as to whether it is authorized to accept service on their behalf.

B. Interrogatory No. 2

EarthLink requests that Charter identify documents and other materials detailing which IP addresses Charter alleges were conveyed pursuant to Section 1.5 of the HSSA. In its Responses and Objections to this Interrogatory, Charter states that it will produce documents responsive to overlapping Requests from EarthLink's First and Second RFPs. In the July 15 EarthLink Letter, EarthLink reiterates a request from the meet and confer for "sources of custodial data [that Charter] is searching so EarthLink can evaluate the reasonableness of Charter's proposal to search for and produce documents" responsive to this Interrogatory. (*See* July 15 EarthLink Letter at 11.) EarthLink further states that Charter has "omit[ted] key details" concerning Charter's data collection process. (*Id.*) Charter stands by its responses and objections to this request. Charter will undertake reasonably diligent efforts to search readily accessible files where responsive documents would reasonably be expected to be found. Charter will apply search terms across the relevant custodians. EarthLink has no basis to seek additional information, such as the sources of data, and Charter does not intend to provide it.

C. Interrogatory No. 19

July 19, 2022  
Page 14

EarthLink raises a number of separate follow-up questions concerning Charter's response to Interrogatory No. 19.<sup>6</sup> That interrogatory asked "If 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."

Charter stands by its response to Interrogatory No. 19, and further relies on its statement in the July 7 Charter concerning this issue. (*See* July 7 Charter Letter at 11.) Furthermore, Charter considers the questions in your July 15 Letter to be untimely, separate interrogatories for which no response is required.

Sincerely,



H. Gregory Baker

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<sup>6</sup> Your July 15 Letter poses the following follow-up questions to Charter: Are there now, or were there ever, any insurance agreements that related 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? 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 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? (*See* July 15 EarthLink Letter at 11.)

# **Exhibit 14**

# KING & SPALDING

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July 15, 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:

I write on behalf of EarthLink LLC (“EarthLink” or “Plaintiff”) to memorialize our meet and confer discussion on Wednesday July 13, 2022 concerning 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”).

### **I. Charter's Destruction of Documents**

During our call, counsel to Charter disclosed that Charter has failed to preserve *any* audio recordings of calls between Charter and the EarthLink Service Subscribers. As you are aware, this as a gravely serious issue. *See Warner Recs. Inc. v. Charter Commc'ns, Inc.*, No. 19-CV-00874-RBJ-MEH, 2022 WL 1567142, at \*3 (D. Colo. May 18, 2022) (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). Charter’s destruction of relevant documents is particularly troubling given the fact that Charter has been on notice of these claims and the relevance of the calls for years. For example:

- In August 2019, EarthLink employees directly communicated concerns to Charter management related to Charter’s efforts to poach EarthLink’s Service Subscribers through call center conduct;

July 15, 2022

Page 2

- On July 27, 2020, Charter’s General Counsel received EarthLink’s Document Preservation Notice (“Notice”), which specifically states that “recordings of Spectrum’s sales and service calls with EarthLink Service Subscribers” are at issue and must be preserved, (Notice at 1);
- On September 9, 2020, EarthLink filed the Complaint in this action, which clearly put the contents of the calls at issue;
- On September 15, 2020, EarthLink served its First Requests for Production of Documents, which specifically requested, “[a]ll documents relating to communications between Call Center employees and Service Subscribers, including all recordings or transcriptions of those communications.” (EarthLink Sept. 15, 2020 Requests No. 8).

Despite this fulsome notice, you informed us that Charter did not preserve a single audio recording of calls between Charter and the EarthLink Service Subscribers. Indeed, it is not the case that recordings of these calls never existed. You have confirmed that the calls were in fact recorded. Instead, rather than preserving these recordings, Charter deleted evidence that is directly relevant to the claims and defenses in this litigation.

Just as concerning as the destruction of the recordings is the lack of candor regarding this conduct that has been displayed.

- In our June 23, 2022 letter, which attached the Notice, we asked you to “please confirm that no materials relating to the allegations and issues in this case have been deleted or lost, including any audio files or recordings, after the July 27, 2020 date.” In your June 24, 2022 letter, you responded, “Charter confirms that a legal hold was implemented shortly after the receipt of the letter from Mr. Dykhouse. Charter’s document collection and review is ongoing. If we learn that any documents, including audio files, were deleted or lost, we will update EarthLink accordingly.” Your June 24 letter states the hold was implemented and gave no indication that you knew or had reason to know recordings of Charter’s audio calls had been deleted.
- Charter’s discovery responses indicate not only that recordings of the calls exist, but that Charter would not respond to the discovery requests because of the volume of information and the burden associated with the collection and search of the recordings. Indeed, rather than stating that the information requested was not available because Charter had destroyed the call recordings, Charter’s *verified* interrogatory response to EarthLink Interrogatory No. 13 states:

Charter is unable to respond to this Interrogatory on the grounds that a response is neither practical nor feasible. Charter employs or works with third-party contractors to staff its call centers. Depending on the nature of their issues, EarthLink Service Subscribers may have been routed to Charter’s Inbound Sales and Retention (“IBS&R”) group, or to its Customer Service representatives. IBS&R had 6,883 employees as of year-end 2019, and 7,892 employees as of year-end 2020. In addition, there were 18,674 customer service agents as of year-end 2019 and 20,044 customer service

July 15, 2022

Page 3

agents as of year-end 2020. During the period of January 1, 2019 to January 1, 2021, those call centers fielded an average of around 20 million calls per month. Accordingly, Charter cannot respond to this Interrogatory.<sup>1</sup>

- In our June 29 letter, EarthLink attempted to address your burden objections, stating, “Charter has confirmed it has not deleted these calls and these calls are easily searchable for metadata as well as search terms. For this reason, please detail how many calls from Service Subscribers Charter has during the time period of this interrogatory.” Given our understanding at that time, we were surprised to receive your July 7 letter stating that Charter had not, in fact, confirmed it had not deleted the audio calls. However, the letter also suggested precisely the opposite when you offered to search for communications between Charter and the sixteen Service Subscribers identified in EarthLink’s responses to Charter’s interrogatories. We are bewildered that Charter would make such an offer knowing that these call recordings were destroyed.

Given the above, please confirm the earliest date on which you were aware Charter destroyed these call recordings. We also ask that Charter identify what date, if any, it issued a written litigation hold to its employees after receiving EarthLink’s Notice on July 27, 2020, and to provide a copy of any such hold to determine what documents specifically Charter instructed its employees to preserve and what steps Charter instructed them to take to carry out preservation. Or, alternatively, after being put on notice of litigation, please confirm when Charter: (1) assessed the burden of turning off the call recording auto-deletion; (2) assessed the burden of searching for and saving EarthLink customers’ calls; and (3) assessed whether to communicate any of the above to EarthLink.

We are currently evaluating what relief to seek to redress Charter’s destruction of evidence. Your transparency at this juncture is appreciated.

## **II. Charter’s Long-Delayed and Non-Committal Provision of Hit Counts and Custodians**

Despite EarthLink providing proposed search terms and custodians for Charter’s documents on June 23, 2022 and making multiple requests for hit counts to be provided meaningfully in advance of the parties’ meet and confer, we received Charter’s hit count report for the first time on July 13, 2022. Moreover, despite having nearly three weeks to evaluate and run

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<sup>1</sup> See also Charter’s responses to Interrogatories 15, 16, 17, 18. Similarly, Charter’s responses to EarthLink’s Document Requests misleadingly indicated that the audio calls had not been deleted. For example, in response to EarthLink’s First Set of Document Requests No. 8 seeking “[a]ll documents relating to communications between Call Center employees and Service Subscribers, including all recordings or transcriptions of those communications” (emphasis added), Charter stated that “transcriptions” of the requested recordings “have not been created or do not currently exist,” but did not similarly deny the existence of the call recordings or give any indication whatsoever they had been deleted. And Charter even bolstered its suggestion that the audio recordings existed when, in concluding its responses to First Request for Documents No. 8, Charter “add[ed] that during the period requested, from January 1, 2017 to present, Charter’s call centers received hundreds of millions of calls from subscribers, including both EarthLink and non-EarthLink subscribers.” This was clearly calculated to reinforce the misleading impression that its audio recordings had not been deleted.

July 15, 2022

Page 4

these hit counts, we were disappointed to learn on the call that Charter had not run the complete searches and custodians EarthLink requested in the first instance on June 23, 2022.

**A. Charter's Willful Failure to Run Hit Counts on Search Strings and Custodian**

1. Charter's Failure to Run Hits for Windstream Related Search Terms

Although neither the hit count report itself nor the cover correspondence contains any indication of this, Charter excluded the following search term strings in EarthLink's June 23, 2022 request:

Search Term No. in EarthLink June 23, 2022 Letter	Proposed Search Term
12	Bankruptcy AND (Windstream OR "Wind Stream" or windstream.com OR WIN OR WIND)
13	claim w/15 (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)
14	Address! w/15 (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)
15	Insurer AND (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)
16	(EarthLink OR EL OR earthlink OR EarthLink OR "Earth Link" OR el OR "ELNK" OR @elnk.com) AND (Windstream OR "Wind Stream" or @windstream.com OR WIN OR WIND)

Charter does not and cannot contest that Windstream is a key player in this litigation whose course of dealing with Charter is critical to, among other things, the parties' respective claims and counterclaims of ownership over the IP addresses. EarthLink propounded two requests for documents concerning Windstream, for which Charter agreed to search for and produce documents responsive to these requests:

- First Set of Document Requests No. 18: "All documents and communications concerning Charter's alleged 'ownership' of the EarthLink IP Addresses, including without limitation any communications with Windstream Holdings, Inc. and Windstream Services, LLC, at any time, regarding the EarthLink IP Addresses."
- Second Set of Document Requests No. 3: "All documents and communications concerning potential claims by Charter and/or Spectrum against ... Windstream, in connection with the EarthLink IP Addresses."

Despite agreeing to search for and produce these documents, you stated during the call that Charter did not run any of EarthLink's Windstream-related searches based on your belief that (1) the searches would yield irrelevant hits, (2) the volume of hits is substantial, and (3) you do not believe sufficient time exists to review these hits before the August 5 production deadline. None of these are valid grounds to exclude Windstream documents from your search. You (a) have already conceded the relevancy of Windstream documents in the Discovery Responses when you

July 15, 2022

Page 5

agreed to search for and produce these documents, (b) have not provided us the hit counts for these documents to evaluate whether they represent a “substantial” volume, and (c) have ample time and resources to conduct document review between now and the August 5 deadline. On the call, we requested that you provide Charter’s hit counts for these excluded Windstream search strings. Today, we received your July 15, 2022 letter providing these hit counts and stating that Charter refuses to review any amount of them. EarthLink believes that all hit counts in the report attached to your July 15, 2022 letter should be reviewed, and reiterates its request for Charter to review these documents.

We also note that Charter’s revised hit count report provided today showing hits for the rest of the search terms does not include hits for the Windstream searches, which prevents EarthLink from seeing how many of the hits in the Windstream report are already included in the rest of the document hits. No later than Monday, July 18, please provide us the number of unique documents generated from the Windstream related strings in comparison to the rest of the search strings.

**2. Charter’s Failure to Run Hit Counts for Custodian Richard Dykhouse.**

During the call, you advised us that Charter had, again deliberately and unilaterally, decided to exclude EarthLink’s proposed custodian Richard Dykhouse from its hit count report. While we understand Mr. Dykhouse’s seniority, given Charter’s destruction of documents, he is a key custodian as he is the initial recipient of the Notice. On the call, while reserving all rights to include Mr. Dykhouse as a custodian, we requested that you provide us hit counts for Mr. Dykhouse no later than today so we evaluate Charter’s proposed exclusion. We received your letter today stating that you will not agree to even provide a hit count report for Mr. Dykhouse’s documents. This refusal is unreasonable, and deprives EarthLink of any ability to assess whether Mr. Dykhouse’s hits on EarthLink’s search terms are reasonable and proportional to review.

**3. Charter’s Proposal to Severely Restrict Scope of Documents Reviewed for Custodian Cody Harrison**

During the call, you proposed for Charter to exclude from review all hits for custodian Cody Harrison except for communications with parties external to Charter. While we are cognizant of Charter’s desire to reduce its review population and potentially avoid having to log privileged communications to which Mr. Harrison is party, Charter has not provided the number of Mr. Harrison’s hits that would be excluded from review as a result of Charter’s proposal. We received your letter indicating that Charter’s proposal would reduce Mr. Harrison’s hits to “1,153.” However, you did not clarify whether this refers to hits or hits with families. Please clarify this no later than Monday, July 18 so we can evaluate the reasonableness of your proposal.

**B. Charter’s Failure to Commit to Begin Reviewing Hits**

We were further surprised to learn on the call that, in addition to failing to run all of the search terms and custodians EarthLink proposed on June 23, 2022 and delaying providing a hit report until July 13, 2022, Charter refused to commit to beginning its review any of the hits identified in its July 13, 2022 report. Moreover, when we requested during the call that Charter begin reviewing hits immediately, you informed us that Charter had not, and would not, begin

July 15, 2022

Page 6

reviewing until these hits were further reduced, although you refused to identify what number of hit counts you would consider reasonable.

During the call, we expressed that Charter's total hit counts set forth in its July 13 report (102,601 documents and 235,440 families) was not unreasonable or disproportional to this case. Among the 35 individuals Charter identified in its responses to EarthLink's Interrogatories, Charter has proposed to review 11 of these individuals' custodial documents. Charter's total hits in the July 13 report for these 11 individuals average approximately 21,400 documents per custodian—that is far below any unreasonable or disproportionate number given the size of Charter's company, the quantum of EarthLink's damages, and the scope of the factual issues involved in this litigation.

On the call, you asked EarthLink to modify several search strings in the July 13 report to reduce the overall number of hits. As we informed you during the call, however, we have no visibility into Charter's documents producing these hit counts, and therefore only Charter was in a position to sample and propose any modifications to the searches. On the call, we requested that, if Charter does not agree to review the full number of hits identified in the July 13 report, that Charter provide any proposed modifications and resulting changes in hit counts no later than today. However, we have not received them at the time of this letter. Accordingly, request that you provide this information no later than this Monday, July 18.

We also asked whether Charter had applied software that automatically excludes lesser-included email chains from its production as suggested in our July 13, 2022 email to you attaching the proposed ESI Stipulation, which typically results in a 15% reduction in hit counts. You represented you were unsure whether this exclusion had been applied to the hits in the July 13 report, and agreed to ascertain and advise us of this information by today.

We received your letter today attaching a revised hit count report that would reduce Charter's hits to 39,179 documents and 102,623 families. We note that you have excluded the following search strings set forth in EarthLink's June 23 proposal:

- "Call Center" AND (compensation OR bonus OR payment)
- EarthLink OR earthlink OR "Earth Link" OR "ELNK" OR @elnk.com
- (Customer OR offer OR mov\* OR new OR transfer OR report) AND (EarthLink OR earthlink OR EarthLink OR "Earth Link" OR "ELNK" OR @elnk.com)

Charter has failed to provide any details to justify these exclusions. For example, your letter does not identify what sampling, if any, Charter conducted to determine that the hit counts produced by these search strings were producing non-responsive hits. To evaluate your proposed exclusion of these terms, please provide details concerning how you determined to exclude these search strings.

Additionally, we note that with respect to the following search strings, you proposed to replace the AND connector with a w/25 limiter:

July 15, 2022

Page 7

- (“High-Speed Service Agreement” OR HSAA OR Agreement OR contract OR “Service Agreement” OR “High-Speed Agreement”) AND (EarthLink OR earthlink OR EarthLink OR “Earth Link” OR “ELNK” OR @elnk.com)
- (EarthLink OR earthlink OR EarthLink OR “Earth Link” OR “ELNK” OR @elnk.com) AND (diligence OR title OR own OR interest)
- EarthLink OR earthlink OR EarthLink OR “Earth Link” OR “ELNK” OR @elnk.com) AND (misappropriate OR sale OR sell OR sold OR block)
- (EarthLink OR earthlink OR EarthLink OR “Earth Link” OR “ELNK” OR @elnk.com) AND (polic\* OR proc\*)
- (IP Address\*) AND (polic\* OR proced\* OR ownership)
- (Retent\* OR Preserv\* OR Hold\* OR Retain\* OR Delet\*) AND (EarthLink OR earthlink OR “Earth Link” OR “ELNK” OR @elnk.com)

Charter provides no explanation for why the hits produced by EarthLink’s original string were unreasonable, particularly given the string is highly specific to EarthLink and the name of the parties’ relevant contractual agreement. EarthLink request that, no later than July 18, Charter explain why it believes and how it determined that the original search string disproportionately produced non-responsive hits.

#### **C. EarthLink Inquiries as to Existing and Additional Potential Charter Custodians**

As we noted on the call, Charter’s hit count report identified several additional custodians: Patricia Eliason, Charlotte Field, David Gray, and Sharon Peters. We asked how and why you selected these individuals as Charter document custodians, to which you responded that you believed these individuals were the primary Charter employees involved in the events at issue in this action. With respect to the dozens of other individuals Charter identified in its responses to EarthLink’s Interrogatories as having knowledge of the issues involved in this case, you confirmed that Charter has possession, custody, or control of their custodial documents. As stated during the call, we reserve all rights to add these individuals as Charter custodians pending a review of Charter’s document production of the custodians identified in the July 13 hit count report.

Additionally, with respect to the 10 other Charter employees listed in our July 12 letter who were not identified in Charter’s responses to EarthLink’s Interrogatories, you represented that Charter is investigating whether it has custodial documents for these individuals. On the call, we requested that you confirm no later than today whether Charter has custodial documents for Zachary Remming, Lorretta Rhoades, Jeffrey Mollett, Christopher Kidwell, Krista Clark, Kim Grose, Aurora Provencher, Lawrence Clermont, Christopher Squeri and Dexter Crapps, but we have not received your confirmation at the time of this letter. Accordingly, request that you provide this information no later than this Monday, July 18.

July 15, 2022

Page 8

#### **D. Sources of Custodial Data**

During the call, we asked you to identify, with specificity, what sources of custodial data were collected to generate the hits in Charter's July 12 hit count report. You stated that you believed "all" sources of each custodian's email and non-email documents were included in the collection producing these hits, but needed to confirm this understanding with your client. Accordingly, we requested that Charter specifically identify all sources of data from which Charter collected documents and communications for its custodians no later than today. We received your July 15, 2022 letter stating that your custodial data "contain[s] email messages and instant messages." Your July 15 letter further states that, "[t]he collection also includes relevant documents identified by custodians that have been collected from the custodians' hard drives."

This is not a sufficiently detailed explanation of Charter's custodial data sources. For instance, Charter has failed to clarify whether the search terms run over Charter's email data were also run over Charter's instant messages. Additionally, Charter provides no detail concerning how its custodians purported to identify "relevant documents" from their "hard drives." EarthLink requests detail concerning how its custodians determined which documents were "relevant," and identification of which issues Charter's custodians considered "relevant." Please further clarify whether Charter ran EarthLink's search terms over its custodians hard drive data, and if not, why Charter failed to run search terms to locate responsive documents in its custodians non-email data.

#### **E. Charter's Request to Avoid Human Review of Documents Using Technology Assist Review ("TAR")**

During the call, you asked whether EarthLink would permit Charter to use TAR. We responded that we believe TAR is inappropriate for the volume of documents in Charter's hit counts, which are not near the millions of documents for which TAR is typically permitted. We further advised that EarthLink is completing all of its document review without the use of TAR.

Still, as we stated on the call, EarthLink is willing to consider Charter's proposed use of TAR if Charter provides a TAR protocol that gives EarthLink sufficient confidence that Charter's use of TAR will not result in the exclusion of responsive materials from its productions. We requested, and you agreed to provide, a proposed TAR protocol that sets forth the specific protocols Charter will use to apply TAR in its document review. We reiterate our position on the call that EarthLink will only consider Charter's use of TAR 1.0, not TAR 2.0, and that any proposed TAR protocol will provide a recall percentage of at least 85%. On the call, we requested that you provide us with this proposed TAR protocol by today so that the parties can finalize and execute the ESI Stipulation by your proposed date of July 20. We received your proposed TAR protocol this evening and are currently reviewing.

### **III. Categories of Relevant Documents**

Despite Charter agreeing to a meet and confer to discuss the deficiencies EarthLink identified in Charter's Discovery Responses beginning on June 29, 2022, you informed us that you were not prepared to discuss numerous Document Requests and Interrogatories and would not engage in oral meet and confer on these topics, even though you have had our deficiency letter since June 29, 2022. You advised us that Charter's positions on the deficiencies identified by

July 15, 2022

Page 9

EarthLink would be provided in a forthcoming letter. We ask that Charter provide this letter with its final positions on any of the requests remaining in dispute below no later than this Monday, July 18, as we intend to move for relief expediently.

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

During the call, you clarified that Charter intends to search for and produce both (1) Charter's policies and procedures relating to the High-Speed Services Agreement and/or Service Subscribers; and (2) Charter's policies and procedures relating to Charter's communications with the Service Subscribers.

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

As noted above, you shared with us for the first time that Charter deleted its audio calls with the Service Subscribers pursuant to a 120-day auto-deletion policy, despite receiving EarthLink's Document Preservation Notice on July 27, 2020. If Charter had properly implemented the Document Preservation Notice, Charter should have audio calls going back at least as far as March 29, 2020. However, Charter failed to preserve any such calls, preventing EarthLink from obtaining this discovery.

You further stated during the call that Charter maintains additional records of its communications with the Service Subscribers in the form of "customer notes." We asked you to identify (1) on what systems and in what file format are these customer notes maintained, and (2) is Charter able to run search terms over the data location where the customer notes are stored? You were not able to identify the systems and file types requested, but agreed to find this information and endeavor to provide it to us by today. You further advised us that Charter is able to run search terms over the customer note files to isolate customer notes hitting on the search terms, and agreed to confirm with us by today whether you would agree to run the search term "EarthLink" over the customer note files to identify responsive communications. We received your July 15, 2022 letter proposed search terms to run over Charter's customer notes and are currently reviewing your proposal.

Lastly, we note that you did not raise objection to provider Service Subscriber information to EarthLink based on the Cable Act, 47 U.S.C. § 551. Accordingly, we consider Charter's meritless objections against providing documents that identify the Service Subscribers, who identities Charter has already routinely disclosed to EarthLink, withdrawn.

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

We requested that Charter specifically identify the sources of data to be searched for documents and communications responsive to these requests. You agreed that Charter would identify the same by today, but your July 15 letter omits key details concerning how Charter's employees self-selected their non-email documents from their data drives. Accordingly, request that you provide this information no later than this Monday, July 18.

July 15, 2022

Page 10

**D. First Set of Document Requests No. 21 and Second Set of Document Requests Nos. 2, 6, and 7**

During the call, you stated that you were not prepared to discuss these requests, and that Charter would set forth its positions in a forthcoming letter responding to our July 12 letter. While your July 15 letter addresses a number of issues as noted herein, it does not provide Charter's positions on the bulk of issues, which are outlined below. We expect to receive Charter's positions on the remaining issues no later than Monday, July 18 to evaluate whether Court intervention is necessary to compel Charter's responses to these requests.

**IV. 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.**

As discussed above, you stated during the call that Charter is continuing to investigate whether it has custodial data for the following Charter employees:

- 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).

We received your July 15, 2022 letter stating you will run Zachary Remming as a custodian. Charter's letter also states it will run Steve Lottman as a custodian. However, Charter has failed to identify whether it has custodial data for any of the other individuals identified in its Interrogatory responses or herein.

Further, Charter did not answer the question raised in our July 12 letter whether Charter will accept service of notices of deposition for both its current and former employees. Please confirm the same no later than this Monday, July 18.

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

As discussed above in Section I, please advise us when you first became aware that Charter failed to preserve its audio calls with the Service Subscribers so we can evaluate the appropriate relief from the Court to redress this spoliation issue.

July 15, 2022

Page 11

1. Interrogatory No. 2

As discussed on the call, we asked that Charter identify the sources of custodial data it is searching so EarthLink can evaluate the reasonableness of Charter's proposal to search for and produce documents providing information responsive this Interrogatory. Your July 15 letter omits key details concerning how Charter's employees self-selected their non-email documents from their data drives. Please provide this information by Monday, July 18.

2. Interrogatory No. 19

During the call, you stated that you were not prepared to discuss this Interrogatory, but would address it in a forthcoming letter setting forth Charter's position. Please provide the same no later than Monday, July 18, including answers to the following questions set forth in EarthLink's July 12 letter:

- 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?

**V. Privilege Log**

During the call, we agreed that the parties will follow Commercial Division guidance favoring categorical privilege logs over traditional document-by-document logs. We proposed that the parties provide metadata privilege logs, which we believe will be the most efficient means of logging in this case. We received your July 15, 2022 letter agreeing to the provision of metadata privilege logs with proposed fields and are currently reviewing.

**VI. Charter's July 12, 2022 Letter Purporting to Identify Deficiencies in EarthLink's Interrogatory Responses.**

During the call, you made no mention or attempt to follow-up in response to our July 12 letter demonstrating that Charter's purported "deficiencies" in EarthLink's Interrogatory responses were baseless. Accordingly, we consider these purported issues raised in Charter's July 12 letter withdrawn.

July 15, 2022

Page 12

**VII. Date to Seek Court Intervention**

Finally, on the call you asked whether we would like to set a date for Court intervention if EarthLink determines that Charter's deficiencies herein are not sufficiently addressed. This is a premature request, as Charter has failed to provide the basic information we requested concerning hits and search terms and could not even promise to provide that basic information by today. Suffice it to say that given Charter's delay and egregious conduct to date, we intend to move quickly on all issues. If Charter fails to respond to any outstanding issues after Monday, July 18, given the narrow discovery window, we will consider the issue joined. We further reserve all rights to seek additional relief from the Court, including with respect to spoliation sanctions relating to Charter's deletion of the audio calls responsive to the Discovery Requests.

Sincerely,

/s/ Alexander M. Noble

Alexander M. Noble

# **Exhibit 15**

# KING & SPALDING

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July 25, 2022

## VIA E-MAIL

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Re: *EarthLink LLC v. Charter Communications Operating, LLC*, 654332/2020

Dear Greg:

I write on behalf of EarthLink in response to your letter dated July 19, 2022 (the “July 19, 2022 Letter”) relating to certain discovery disputes in this matter.

### **I. Charter’s Deletion of Call Recordings.**

In EarthLink’s July 15, 2022 letter to Charter, EarthLink asked Charter to provide the following information related to Charter’s destruction of documents:

- The earliest date on which you were aware Charter destroyed the call recordings between Charter and EarthLink subscribers.
- What date, if any, Charter issued a written litigation hold to its employees after receiving EarthLink’s hold notice on July 27, 2020, and a copy of any such hold to determine what documents specifically Charter instructed its employees to preserve and what steps Charter instructed them to take to carry out preservation.
- Alternatively, EarthLink requested that Charter confirm when Charter assessed: (1) the burden of turning off the call recording auto-deletion; (2) the burden of searching for and saving EarthLink customers’ calls; and (3) whether to communicate any of the above to EarthLink or the Court.

In the ensuing week, EarthLink has received multiple communications from Charter, but it has not received a response to the questions above.

We reiterate our request for this basic information. The repeated attempts to gather this information exacerbates the expense and prejudice to EarthLink.

Additionally, at the parties' July 13 meet and confer, you informed us that the calls between Charter and the Service Subscribers were "not saved," but your July 19, 2022 Letter, stated that the calls were "automatically overwritten." Please state what efforts, if any, Charter has made to forensically recover the calls and the outcome of that investigation.

**II. Purported Deficiencies in EarthLink's Responses to Charter's First Set of Interrogatories.**

A. Charter Interrogatory No. 4.

EarthLink maintains its position that it is not in possession, custody, or control of information related to when Charter's representatives made misstatements to the Service Subscribers. As a result, EarthLink confirms that it is unable to identify the dates and times of the at issue statements by searching documents in its possession, custody, or control. EarthLink remains willing to identify the dates and times when Charter's made the at-issue misstatements upon review of Charter's production. To the extent Charter has not answered the basic questions above concerning its attempts to preserve or restore its calls, EarthLink will seek the Court's guidance on this issue. Forcing EarthLink to spend further time and expense on discovery letters in response to Charter's requests to information regarding its own employees from records **Charter has destroyed** is absurd.

B. Charter Interrogatories Nos. 13 and 14.

EarthLink maintains its position that the information Charter seeks in interrogatories Nos. 13 and 14 is outside EarthLink's possession, custody, or control. EarthLink cannot provide further information beyond the contact information it has already provided from documents in its possession, custody, or control. Moreover, EarthLink maintains that Charter's requests for additional information related to EarthLink's litigation strategy and efforts far exceed the limited scope of interrogatory topics under Commercial Division Rule 11-a. To the extent Charter can provide any legal authority to support such an obligation, EarthLink is willing to consider it and further confer.

**III. Charter's Request for Information Related to EarthLink's Audio Recordings of EarthLink Calls with Service Subscribers.**

EarthLink is under no obligation to provide this information to Charter, where EarthLink has stated in its responses to your discovery requests that, subject to its objections, EarthLink will produce all non-privileged, responsive audio recordings. EarthLink will certainly not provide this information without some explanation of the basis for Charter's requests. Particularly where Charter gave conflicting statements as to whether the calls EarthLink requested **exist** while simultaneously refusing to produce those calls, purposely destroyed that evidence, and now refuses to provide even basic information to EarthLink regarding its preservation efforts.

**IV. Charter's Failure to Begin Reviewing Hits.**

On May 17, 2022, the Court ordered the parties to complete all requests for production by May 27, 2022 and complete their respective productions in full by July 15, 2022. On July 11, 2022, Charter received a three-week extension from the court. Charter's contention that EarthLink caused Charter's inability to meet the original court-ordered deadline or has in any way caused Charter to delay its ability to timely begin its review of documents is meritless.

**V. Other Issues Raised by EarthLink Related to Search Terms and Custodians.**

A. Hits produced by EarthLink's Original String.

To date, Charter has not explained why it believes and how it determined that the original search string proposed by EarthLink disproportionately produced non-responsive hits. Please confirm that Charter does not agree to provide this explanation. EarthLink reserves all rights pending a review of Charter's document production.

B. 10 Employees Listed in EarthLink's July 12, 2022 Letter.

On July 13 and July 15, 2022, EarthLink asked Charter to confirm whether Charter had custodial documents for the following ten Charter employees: Zachary Remming, Lorretta Rhoades, Jeffrey Mollett, Christopher Kidwell, Krista Clark, Kim Grose, Aurora Provencher, Lawrence Clermont, Christopher Squeri, and Dexter Crapps. To date, EarthLink has not received confirmation whether Charter will produce custodial documents for any of these custodians except Zachary Remming. Please confirm whether Charter is willing to provide EarthLink with this information.

1. Windstream-Related Documents in EarthLink Requests No. 3 and No. 18.

EarthLink maintains its position that the Windstream-related documents EarthLink asked Charter to produce in EarthLink's Requests No. 3 and No. 18 are relevant to this case because they are relevant to EarthLink's ownership of the IP Addresses. EarthLink considers this issue joined.

2. Custodian Cody Harrison.

EarthLink accepts Charter's offer to produce relevant, non-privileged documents resulting from a review of the 1,153 hits of Mr. Harrison's communications with any parties external to Charter. However, EarthLink maintains its objections that all responsive, non-privileged documents should be produced as well as from the remaining 3,226 internal communications and the remainder logged. Please confirm Charter is doing so.

3. Custodian Richard Dykhouse.

In EarthLink's July 15, 2022 letter to Charter, EarthLink requested that Charter provide EarthLink with hit counts for Mr. Dykhouse so EarthLink can properly evaluate Charter's proposed exclusion of Mr. Dykhouse as a custodian. To date, EarthLink has not received these hit counts. Charter fails to respond to the issue and once again demurs that it will provide Cody Harrison's communications with "third parties." Please confirm whether Charter will provide Mr. Dykhouse's hit counts to EarthLink. We will interpret your repeated failure to respond as issue being joined.

#### 4. Cable Act Disclosures.

EarthLink maintains its position that the Cable Act, 47 U.S.C. § 551, does not preclude Charter from collecting, searching for or producing documents that identify the Service Subscribers in the context of this litigation where a confidentiality order is in place. EarthLink considers this issue joined and will seek the Court's intervention.

### **VI. EarthLink's Responses to Charter's Further Responses to Open Issues Regarding EarthLink's First and Second RFPs.**

EarthLink considers issues joined as to First RFPs No. 21 and Second RFPs No. 2

#### A. First RFP No. 8.

Charter has yet to provide the hit counts it offered to gather on the terms identified in its July 19, 2020 Letter at 11. Please provide the date on which those results will be provided.

#### B. Second RFP No. 6.

EarthLink maintains its position that Charter is obligated to produce the information EarthLink requests in its Second RFP No. 6. We are willing to collect a sampling of agreements sufficient to show Charter's "agreements transferring registration of IP Addresses or conveying rights, title or interest in IP Addresses to any Person" including IP transfer agreements with third parties, IP address brokers, and RSA agreements. The relevance is clear, as Charter's course of conduct and standard IP transfer agreements for an ARIN registrant are highly probative in this case. EarthLink is willing to meet and confer regarding this RFP and reserves its right to seek court intervention to compel Charter's response to this request.

#### C. Second RFP No. 7.

EarthLink maintains its position that Charter is obligated to produce the information EarthLink requests in its Second RFP No. 7. EarthLink is willing to meet and confer regarding narrowing this RFP (e.g., agreements with third parties defining IP addresses, internal and external policies and procedures defining IP Addresses) but this requires Charter provide examples of the data it has available. EarthLink and reserves its right to seek court intervention to compel Charter's response to this request.

### **VII. EarthLink's First Set of Interrogatories.**

#### A. Individuals Identified in Response to Interrogatories 4-9, 11, 15, and 22.

Charter stated in the meet and confer that "Charter has possession, custody, or control over documents and communications of the individuals identified in response to these Interrogatories, *subject to Charter's document retention and destruction policies.*" Given Charter's recent admission it did not cease autodeletion of its calls, please confirm Charter *currently has*

possession, custody, or control over documents and communications of the individuals identified in response to these Interrogatories.

With respect to former employees, please either confirm Charter will accept service or provide their contact information no later than August 5, given the upcoming deposition notice deadlines.

B. Interrogatory No. 2.

EarthLink considers issues joined, particularly where Charter is flatly refusing to search for documents detailing the 1,000,000 IP Addresses it alleges were conveyed to it by EarthLink and now refuses to identify those documents.

C. Interrogatory No. 19.

Your position that Charter now “considers the questions in [EarthLink’s] July 15 Letter to be untimely, separate interrogatories for which on response is required” is puzzling. EarthLink provided these questions in response to *your request* for clarification in your July 7 letter, where you stated it was “unclear” what information EarthLink was requesting in Interrogatory No. 19. We obliged, providing you detailed questions to clarify the information EarthLink seeks through its timely served Interrogatory No. 19. We consider this issue joined.

**VIII. Privilege Logs.**

We are in receipt of Charter’s proposed fields for the parties’ metadata privilege logs. Please confirm that Charter agrees to include subject lines as a required field in its metadata privilege log.

Sincerely,

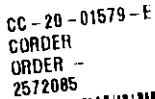


# **Exhibit 16**

**CAUSE NO. CC-20-01579-E**

WILLIAM GOFF as Personal Representative of BETTY JO MCCLAIN THOMAS, deceased; CHRISTOPHER THOMAS, as Guardian of CHARLES THOMAS; CINDY RINGNESS; CHERYL GOFF; and CHARLOTTE GLOVER, §  
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Plaintiffs, §  
v. §  
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ROY JAMES HOLDEN, JR.; and §  
CHARTER COMMUNICATIONS, LLC, §  
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Defendants. §

IN THE COUNTY COURT  
CC - 20 - 01579 - E  
CORDER  
ORDER -  
2572085  
  
AT LAW NO. 5  
DALLAS COUNTY, TEXAS



**ORDER GRANTING PLAINTIFFS' MOTION FOR  
SPOILATION JURY INSTRUCTION AND SANCTIONS**

On the 6th day of June, 2022, Plaintiffs' Motion for Spoliation Jury Instruction and Sanctions against Charter Communications, LLC ("Charter").

After considering Motion, Response, Reply, arguments of counsel, and evidence presented, the Court finds the following:

1. Charter had a duty to preserve its video surveillance footage of the Spectrum parking lot for the 24-hour period of December 12, 2019. Its duty arose on December 13, 2019, the date that the Irving Police Department contacted Charter regarding Roy Holden's suspected involvement in the murder of Betty Thomas. On December 13, 2019, Charter's local investigator

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**ORDER GRANTING PLAINTIFFS' MOTION FOR  
SPOILATION JURY INSTRUCTION AND SANCTIONS**

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Page 1 of 5

advised its Senior Vice President of Corporate Security that he would pull the December 12, 2019 video and preserve anything of value.

2. On December 18, 2019, the Irving Police Department served and emailed Charter a search warrant for its surveillance and tracking information pertaining to Roy Holden, including any video surveillance footage on December 12, 2019.

3. On December 23, 2019, Plaintiffs' counsel sent Charter a preservation letter putting Charter on notice of potential litigation and its obligation to preserve documents and information, including any videos relating to the incident. Charter received the letter no later than December 26, 2019.

4. Also on December 26, 2019, a member of Charter's Legal Response Operations Center requested that the local investigator provide any surveillance footage of Roy Holden on December 12, 2019 for the search warrant.

5. Charter has a retention policy that purges and deletes video surveillance from its system 30-31 days after the footage is recorded. The evidence shows that Charter employees and officers were aware of this policy and knew that it should be suspended in the event of a legal demand or litigation hold.

6. Charter knew that the video surveillance footage was relevant to the law enforcement investigation and potential litigation and knew that it would be deleted no later than January 12, 2020 if not saved.

7. Charter allowed all but eight minutes of the footage to be purged from Charter's video surveillance system on or about January 12, 2020.

8. On January 30, 2020, Charter provided the eight minutes of video surveillance footage to the Irving Police Department and an incomplete badge swipe history report that did not indicate to police that Roy Holden entered and exited the Spectrum lot on several occasions the day of Ms. Thomas's murder. It did not tell the Irving Police Department that the remaining video surveillance footage was purged after it received the search warrant. Charter's investigator and its attorney represented to the Irving Police Department that they confirmed no one was with Roy Holden on the day of the murder.

9. Charter's investigator testified in his deposition that he took no steps to preserve the video surveillance footage and that he only reviewed about three hours of the footage before allowing it to be deleted. He also admitted that he did not know if anyone was with Roy Holden because he did not review all of the footage.

10. Charter breached its duty to preserve the video surveillance footage, which constitutes spoliation of evidence.

11. Charter's spoliation of the video surveillance footage was intentional under *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 24 and n.17 (Tex. 2014) based on its willful blindness. Charter had exclusive control of the video surveillance footage and the system where it was located; Charter knew the footage had been expressly requested by evidentiary search warrant and preservation letter; Charter knew the footage would be deleted if not saved; but it nonetheless allowed for its destruction. *See id.*

12. Under *Aldridge*, Plaintiffs are not required to prove that they are prejudiced by Charter's intentional spoliation. 438 S.W.3d at 22 (quoting *Trevino v. Ortega*, 969 S.W.2d 950, 958 (Tex. 1998) (Baker, J., concurring)). However, the Court finds that the video surveillance footage was relevant to Plaintiffs' negligent supervision and monitoring claims and to Charter's defense of new and intervening cause. The evidence is not cumulative. Charter's intentional deletion of the evidence prejudices Plaintiffs' ability to carry their burden on these issues, warranting sanctions under Texas Rule of Civil Procedure 215.2.

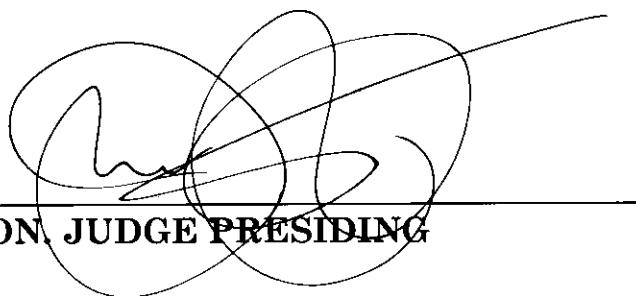
13. On May 6, 2022, this Court entered an order finding Charter in contempt for its refusal to comply with the May 7, 2021 compel order, including failure to produce video footage and badge swipe logs. Charter violated several discovery orders in this case and failed to timely and fully produce relevant

and discoverable evidence. Its conduct constitutes discovery abuse, warranting sanctions under Texas Rule of Civil Procedure 215.2. It is therefore,

**ORDERED**, that Plaintiffs' Motion for Spoliation Jury Instruction and Sanctions is GRANTED. It is further,

**ORDERED**, that the Court shall submit a spoliation presumption instruction to the jury with the language set forth in Exhibits A and B, attached to this Order.

SIGNED ON THIS, THE 7 DAY OF JUNE, 2022.

  
**HON. JUDGE PRESIDING**

## **EXHIBIT A**

CAUSE NO. CC-20-01579-E

WILLIAM GOFF as Personal § IN THE COUNTY COURT  
Representative of BETTY JO MCCLAIN §  
THOMAS, deceased; CHRISTOPHER §  
THOMAS, as Guardian of CHARLES §  
THOMAS; CINDY RINGNESS; §  
CHERYL GOFF; and CHARLOTTE §  
GLOVER, §  
Plaintiffs, §  
v. § AT LAW NO. 5  
ROY JAMES HOLDEN, JR.; and §  
CHARTER COMMUNICATIONS, LLC, §  
Defendants. § DALLAS COUNTY, TEXAS

## **SPOLIATION JURY INSTRUCTION PHASE 1**

Charter Communications, LLC failed to preserve video surveillance footage of the parking lot where Roy Holden accessed a company van several times before and after the murder of Betty Jo Thomas on December 12, 2019. You must consider that this evidence would have been unfavorable to Charter Communications, LLC on the following issues:

- a) whether the negligence of Charter Communications, LLC proximately caused the death of Betty Jo Thomas; and
  - b) whether the death of Betty Jo Thomas resulted from gross negligence by Charter Communications, LLC<sup>1</sup>

<sup>1</sup> Texas Pattern Jury Charge 1.13.

## **EXHIBIT B**

CAUSE NO. CC-20-01579-E

WILLIAM GOFF as Personal § IN THE COUNTY COURT  
Representative of BETTY JO MCCLAIN §  
THOMAS, deceased; CHRISTOPHER §  
THOMAS, as Guardian of CHARLES §  
THOMAS; CINDY RINGNESS; §  
CHERYL GOFF; and CHARLOTTE §  
GLOVER, §  
Plaintiffs, §  
v. § AT LAW NO. 5  
ROY JAMES HOLDEN, JR.; and §  
CHARTER COMMUNICATIONS, LLC, §  
Defendants. § DALLAS COUNTY, TEXAS

## **SPOLIATION JURY INSTRUCTION PHASE 2**

Charter Communications, LLC failed to preserve video surveillance footage of the parking lot where Roy Holden accessed a company van several times before and after the murder of Betty Jo Thomas on December 12, 2019. You must consider that this evidence would have been unfavorable to Charter Communications, LLC on the following issues:

1. The nature of the wrong;
  2. The character of the conduct involved;
  3. The degree of culpability of the wrongdoer;
  4. The situation and sensibilities of the parties concerned; and

5. The extent to which such conduct offends a public sense of justice and propriety.<sup>1</sup>

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<sup>1</sup> Texas Pattern Jury Charge 1.13.

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

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

Index No. 654332/2020

Motion Sequence No. 004

Judge Andrea Masley

**AFFIRMATION OF DAMIEN MARSHALL**

I, Damien Marshall, an attorney admitted to the practice of law before the courts of the State of New York, affirm the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am a Partner in the law firm King & Spalding LLP, counsel for Plaintiff EarthLink, LLC (“EarthLink”). I am fully familiar with the facts and circumstances set forth herein. I submit this affirmation in support of EarthLink’s proposed order to show cause for spoliation sanctions against defendant Charter Communications Operating, LLC (“Charter”).

2. On July 27, 2020, King & Spalding sent Charter’s General Counsel a Document Preservation Notice (the “Preservation Notice”) requesting preservation of, among other things, recordings of Spectrum’s sales and service calls with EarthLink Service Subscribers.

3. On August 10, 2020, I received an email from Charter’s Associate General Counsel, Cody Harrison, in which he acknowledged receipt of the Preservation Notice and requested to have a telephone call with me to discuss preservation of the relevant materials.

4. On or about August 10, 2020, I had a call with Mr. Harrison in which Mr. Harrison asked for guidance beyond the Preservation Notice as to the scope of EarthLink’s claims. I

responded that the Preservation Notice was comprehensive as to EarthLink's potential claims and Charter should take all steps necessary to fulfill its preservation obligation.

Dated: New York, New York  
July 28, 2022

**KING & SPALDING LLP**

By: /s/ Damien Marshall  
Damien Marshall  
1185 Avenue of the Americas  
New York, New York 10036  
Tel: (212) 556-2100  
Fax: (212) 556-2222

*Attorneys for Plaintiff EarthLink, LLC*

**CERTIFICATE OF LENGTH OF PAPERS**  
**COMPLIANCE**

The foregoing affirmation complies with Rule 17 of Section 202.70 of the Uniform Rules for the Supreme Court and County Court because it is less than 7,000 words.

Dated: July 28, 2022  
New York, New York

**KING & SPALDING LLP**

By: /s/ Damien Marshall