

# **Exhibit 10**

# KING & SPALDING

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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.

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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

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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>.

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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.").

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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

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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.

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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