UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-CV-2142-NYW

CRUSOE ENERGY SYSTEMS, LLC,

Plaintiff,

v.

ALKANE MIDSTREAM, LLC,

Defendant.

REPORTER'S TRANSCRIPT
(Motions Hearing)

Proceedings before the HONORABLE NINA Y. WANG, Judge, United States District Court, for the District of Colorado, commencing at 1:05 p.m. on the 8th day of September, 2022, Alfred A. Arraj United States Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFF: (Telephonically)
BRETT C. GOVETT, Norton Rose Fulbright US LLP, 2200 Ross Avenue, Suite 3600, Dallas, TX 75201

STEPHANIE NICOLE DEBROW and DANIEL S. SHUMINER, Norton Rose Fulbright US LLP, 98 San Jacinto Boulevard, Suite 1100, Austin, TX 78756

FOR THE DEFENDANT: (Telephonically)
RYAN MATTHEW SUGDEN and JOHN SCHROEDER, Stinson LLP, 1144 Fifteenth Street, Suite 2400, Denver, CO 80202

SEPTEMBER 8, 2022

(Proceedings commence at 1:05 p.m.)

THE COURT: Good afternoon. We are on the record in 22-cv-2142-NYW, Crusoe Energy Systems, LLC v. Alkane, et al.

Could I have appearances of counsel, please.

MR. GOVETT: Your Honor, this is Brett Govett. And joining me on the phone today is Stephanie DeBrow and Daniel Shuminer, our General Counsel, Jamie Seely, and our Assistant General Counsel, Kyle Zeller. Ms. DeBrow will be handling the hearing today, and we are ready to proceed. Thank you.

THE COURT: Thank you.

MR. SUGDEN: Good afternoon, Your Honor, Ryan Sugden and John Schroeder, of Stinson, LLP, on behalf of the defendant.

THE COURT: Good afternoon, counsel.

We are here for the telephonic conference that we set the last time we were together with respect to resolving some of the outstanding motions that have been filed in this case. Specifically I am focused on Docket Entry No. 11, the Motion to Expedite Discovery, and then Docket No. 13, the Motion for Leave to Restrict.

So let's begin with Docket No. 13 before we dive into the various discovery disputes in this case which, if

I am not mistaken, will allow the Court to resolve Docket Entry No. 11, which is the Motion to Expedite Discovery. Is that counsel's understanding?

MR. SUGDEN: This is Ryan Sugden. Yes, Your Honor, I believe we can resolve the discovery disputes today, which would then resolve the motions.

MS. DEBROW: Your Honor, this is Ms. DeBrow. I also agree with that.

THE COURT: Okay. So let's first look at the Motion to Restrict, because the Motion for Expedited Discovery and then the attendant discovery issues I think will take us a little bit of time to work through.

So, as I understand it, based on the various pleadings -- I am sorry, various papers filed in conjunction with the Motion to Restrict, I have reviewed the Response and then the Reply to the Motion to Restrict, those are Docket Entry No. 25 and Docket Entry No. 31.

My understanding, first off, is that there is no dispute that the Court can unrestrict Docket Entry No. 12, Docket Entry No. 12-2, and Docket Entry 12-3, which are the discovery requests in the case, and also Docket Entry No. 12-1; is that correct?

MS. DEBROW: Your Honor, I believe that is correct, with one exception. As we've made clear in our Reply, the confidentiality provision in the agreement between Crusoe

and Modiin/Gondola restricts our disclosure of the existence of that agreement and the names of the parties. And Docket Entry 12-1 makes reference to that agreement.

And so our view is that based on the confidentiality restriction in the agreement, we can't voluntarily agree to make that document public. However, as we said in our Reply, we don't oppose Alkane's request for an order from the Court requiring that that document be made publicly available.

THE COURT: All right. So the Court will order that -- well, let's take it in pieces. As I understand it, Document No. 8 is the Digital Flare Purchase Agreement that you are concerned with, Ms. DeBrow; is that correct, the underlying agreement?

MS. DEBROW: That is correct, Your Honor.

THE COURT: So, pursuant to Rule 26, I find that the agreement is relevant and proportional to the needs of this case. So I am going to order under Rule 26 that Docket Entry No. 8 be produced to the other side.

Now, Docket Entry No. 12-1, which is the Request for Admissions, refers to that underlying agreement. I am also going to order that Docket Entry No. 12-1 be publicly available.

We do have some issues as to what version of Docket Entry No. 8 will be publicly available. There have been

some proposals, as I have seen, to redact certain information. So I think we'll next turn to the parties' various positions with respect to the redactions that are proposed for Docket No. 8.

So, as I understand it, Docket No. 8 is the agreement between the plaintiff and the third parties that has the site at issue and the services that were proposed to be provided by the plaintiff and now are, as I understand it, not going to be provided by the plaintiff; is that correct?

MS. DEBROW: That's correct, Your Honor.

THE COURT: And when I am looking at the various proposed redactions, it looks to me like you all are proposing redacting certain specific information with respect to fees or costs, as well as certain volumes. There is one proposed redaction that seems to be Alkane's proprietary information and not Crusoe's.

So if you want to address that first, Ms. DeBrow, I would appreciate that.

MS. DEBROW: Your Honor, I am assuming you are referring to one of the proposed redactions in the declaration of Mr. Cavness, they are referencing potentially Alkane's proprietary information; is that right?

THE COURT: Well, I think it appears both in the

agreement, as well as referenced in the declaration.

MS. DEBROW: I am not aware that there is any Alkane confidential information in the agreement. The agreement is between Crusoe and Gondola/Modiin. So the information that we proposed redacting in that agreement consists of financial deal terms; Crusoe's pricing information, in terms of the price it would pay to purchase the gas from Gondola/Modiin; the volumes that Crusoe would require; and then the identities of Crusoe's lenders.

And in Mr. Cavness declaration, I believe we also did propose redaction of the price that -- our understanding is that Alkane had agreed to pay. Out of an abundance of caution, we treated that information as confidential because we regard Crusoe's own pricing information as confidential.

THE COURT: Okay. Let me just take a pause there, because I don't have those two proposed redactions in front of me, so let me grab those, or have my staff put them in my electronic folder so that I have them accessible here on the bench. All right. So my staff is doing that right now. I apologize for the delay.

Let's move on briefly, while my law clerk does that, my understanding also is that there is no argument that Document Entry No. 8-2 can be publicly available; is

that correct?

MS. DEBROW: That's correct, Your Honor. That document also discloses the existence of the agreement. So, to the extent that the Court is ordering other documents that acknowledge the existence of that agreement and the parties thereto to be made publicly available, we don't object to that. That one does not disclose competitively sensitive or financially sensitive information that are in the other two that we seek to redact.

THE COURT: Okay, great. So then I have them now. I apologize again.

So, in Docket Entry No. 8, it looks like the proposed redactions are not related to Alkane. I apologize for that mistake of confusing the agreement with the declaration.

So let me hear from defense counsel as to why you believe it is critical for these specific figures to be in the public record, as opposed to simply the more complete substantive provisions with the specific amounts available to you and not generally publicly available.

MR. SUGDEN: Thank you, Your Honor, this is Ryan Sugden. Alkane's position is that Crusoe has made a pricing issue a central pillar of their claims against Alkane. They have publicly assailed Alkane for improper

pricing tactics, alleging that it is poaching customers because of more favorable financial terms.

Frankly, and as we put in our Response brief, they have put a pricing dispute in the public eye, and they have done it repeatedly and in the numerous pleadings. Given that, we believe there is a heightened public interest in the pricing information that Crusoe seeks to redact.

We don't seek to have the documents in their entirety made public. We are okay with some of the redactions, it's the pricing terms that we believe should be made public.

A related issue is that they have been designated as "attorney eyes only," as well. That is an issue that we have indicated hampers our ability to defend the claims by not being able to share the information with inside counsel or our client representative. But I understand that is not the subject of the Motion to Restrict, which is merely whether it should get a Level 1 restriction or not.

THE COURT: All right. So I want you to focus on the causes of action that have been asserted in the Amended Complaint, which is Docket Entry No. 27. So I respectfully disagree that any pricing information or volume information is at issue with respect to the alleged

infringement of these three asserted patents, which makes up Counts 1, 2, and 3.

So I want to focus you on Count 4, which is tortious interference with contract. And then Count 5, which is tortious interference with prospective business advantage. The tortious interference with prospective business advantage seems not to be related to the underlying agreement, but the tortious interference with contract could be related and seems to arise from the alleged Digital Flare Purchase Agreement.

So explain to me again why it is pertinent for the public to know the specific amounts as opposed to the general allegations.

MR. SUGDEN: Well, Your Honor, as I have indicated, in their motion pleadings for their preliminary injunction, which I agree is entirely on their infringement claims, they have raised this pricing issue in that context. I understand the Court indicating that that is just simply not relevant. And if that is the case, then I think we should proceed accordingly in these preliminary injunctive proceedings.

With respect to the tortious interference claim, Crusoe has alleged that Alkane's solicitation of the Colorado producers was improper and wrongful. I make the connection between the pricing allegations; that there was

poaching of customers with more favorable financial terms, with the allegations that there was a wrongful and an improper solicitation of the Colorado producers.

THE COURT: Okay. Does the plaintiff want to address that?

MS. DEBROW: Yes, Your Honor. This case seems to be almost squarely on all fours with the *Western Convenience* Opinion that we cited in our Reply, in that the specific details of the pricing that Crusoe offers to its customers is not necessary to allow the public to understand adequately the issues that are going on in this case, nor even the Court's basis for any subsequent decisions.

In that case, there was a specific issue about pricing, and the Court held that, you know, including the details of that were unnecessary to allow the public to appreciate the issues and to allow the Court to adequately address them in any written orders.

And given the competitively sensitive nature of the pricing information in this instance, you know, we submit that it should be treated accordingly. The public certainly doesn't need to have the specific details of that to appreciate the issues. We were able to, you know, make the case in our pleadings without divulging those, and the same could continue to be true going forward in

the case.

THE COURT: All right. So I respectfully agree with the plaintiff in this matter, that I do not believe that the redactions of the specific pricing and volume information compromises the public's ability to respond or understand the allegations in this case.

Now, that being said, to the extent that this case develops and this particular pricing becomes at issue, and particularly if the particular pricing and/or volumes become at issue for a dispositive ruling from the Court, then this Court will always reserve its right to unrestrict that information at that time in light of the Tenth Circuit case law that reminds district courts that restricting information from the public docket should not be done reflexively and should, in particular, be carefully scrutinized when it underlies a substantive decision of the court.

So at this point I will grant the Motion to Restrict with respect to Docket Entry No. 8, which is the unredacted Digital Flare Purchase Agreement. I will order that the plaintiff file on the docket the proposed redacted version.

When you do file on the docket the proposed redacted version, you should make light or make reference to what the unredacted version is. So, for instance, when

you file it on the record, the docket entry should say "redacted version of Docket Entry No. 8." Does that make sense?

MS. DEBROW: Yes, Your Honor, it does.

THE COURT: All right. And that allows the public to follow what the Court is doing and cross reference what they cannot see with a redacted version.

Now let's turn to the declaration of Charles Cavness. Again, I believe that is both Docket Entry No. 8-1 and Docket Entry No. 10; is that correct?

MS. DEBROW: That's correct, Your Honor.

THE COURT: And then again, the proposed redactions appear to relate to those specific costs, as well as some volume information. And then the issue that I raised was that there was a redaction in paragraph No. 16 to what Alkane's information might be.

Mr. Sugden, am I understanding correctly that Alkane does not believe that that redaction should be made?

MR. SUGDEN: Alkane's position is with respect to all pricing information concerning both Alkane's and Crusoe's prices.

THE COURT: All right. So I have already made a ruling with respect to the plaintiff's pricing. So is it your position, then, that the Alkane pricing is available

for public consumption and should not be redacted?

MR. SUGDEN: This is Ryan Sugden. Your Honor, to be perfectly frank with you, I haven't had that conversation with my client about one-sided redactions. It was -- the discussion that we had was whether all pricing information should be made public, and our position was that it should be.

Understanding the Court's ruling that it should not be, I am going to take a cautious approach, because I haven't had the conversation yet, that all pricing information should then be redacted, consistent with the Court's ruling from a few minutes ago, subject to revision, if necessary, following the conversation.

THE COURT: All right. So what I am going to do is, Ms. DeBrow, Mr. Sugden, if you can meet and confer with respect to the proposed redactions, I am going to keep restricted as Level 1 restricted, Docket Entry Nos. 8, 8-1, and 10. With respect to Docket Entry 8-1 and Docket Entry No. 10, which are the declarations of Charles Cavness, I am going to have you file a redacted version no later than the close of business tomorrow, September 9, 2022.

To the extent that Alkane also wants its information redacted, the Court finds that it is consistent with its ruling that it does not compromise the

public's ability to assess what the parties' positions are or any court rulings with that information redacted at this point, and that it could be commercially sensitive to the respective companies.

If Alkane doesn't mind it being public, then you all can simply submit a proposed redaction -- a redacted version that only has Crusoe's information. Does that make sense to everybody?

MS. DEBROW: Yes, Your Honor.

MR. SUGDEN: This is Ryan Sugden. Yes, it does.

THE COURT: Yes, Ms. DeBrow?

MS. DEBROW: I was going to raise one other issue, if I may, related to Docket Entry 8, which is the agreement. It came to our attention, or was brought to our attention during the meet-and-confer process that the version that was filed has a formatting error with DocuSign that is causing the signatures not to display properly. So, with the Court's permission, we would file as the redacted version a copy of that document in which the signatures display properly.

THE COURT: That is fine. So why don't you get that done and, again, make the appropriate reference to the restricted document, no later than the close of business tomorrow, okay.

MS. DEBROW: Yes, Your Honor.

THE COURT: All right. So consistent with the rulings on the record, the Court grants in part and denies in part Plaintiff's Motion to Restrict, which is Docket Entry No. 13. Docket Entry Nos. 12, 12-1, 12-2, 12-3, and 8-2 will be unrestricted from the public record.

Docket Entry No. 8, Docket Entry No. 8-1 and Docket Entry No. 10 will remain as Level 1 restricted. In addition, the plaintiff will file a redacted versions of Docket Entry No. 8 and Docket Entry 8-1/10 no later than the close of business September 9, 2022, consistent with the ruling made by the Court on the record today.

I think that takes care of the Motion to Restrict, and so then we can turn, unless anyone else has something on the Motion to Restrict, to the Motion to Expedite Discovery, which is Docket Entry No. 11. Is everyone prepared to turn to that?

MS. DEBROW: Yes, Your Honor.

MR. SUGDEN: This is Ryan Sugden. Yes, Your Honor.

THE COURT: So let's turn -- I am using the chart that you all submitted as my guide here. I have had an opportunity to preliminarily look at the asserted patents, which are found at Docket Entry Nos. 1-1, 1-2, and 28-1; the 307, 309, and 821 patents. I will admit to you that I have not examined those in-depth, nor have I had an opportunity to carefully look at the prosecution histories

of any of those respective patents.

But this proceeding is very much focused on what kind of expedited discovery you all need to proceed to the preliminary injunction hearing, as well as setting briefing with respect to the preliminary injunction and the TRO.

I note, as a framework before we start, that in the Motion to Expedite Discovery, on page 1, the plaintiff says, "At this stage, the plaintiff is not seeking broad discovery on the full merits of the claims and defenses."

That is the framework that I am using because, again, I am not attempting to try to figure out what discovery may or may not be allowed in this case in general. My focus is on what good cause there is to permit expedited discovery in order to have an efficient and complete preliminary injunction hearing.

So, with that in mind, let's turn to the first issue, which is the request for inspection. So there is a request for inspection: "Inspect, survey, videotape and photograph Alkane's site layout and operations at each location where Alkane has at any time or is currently performing bitcoin mining operations, including but not limited to the Surprise 4 Pad."

Ms. DeBrow, are you going to be handling these issues for the plaintiff?

MS. DEBROW: Yes, Your Honor.

THE COURT: All right. So, Ms. DeBrow, given the fact that the Motion for Preliminary Injunction is focused on the Surprise 4 Pad, located in Jackson County, Colorado, and is associated with one or two particular entities, why, at this point, in anticipation of the preliminary injunction hearing, should the Court require an inspection, survey, videotaping, photograph of any site layout, regardless of location?

MS. DEBROW: Well, Your Honor, respectfully, our request for relief on the Motion for Temporary Restraining Order and Preliminary Injunction is not so limited. We have asked for injunctive relief against continued infringement. And we believe that defendant is infringing at the Jackson County, Colorado, site, or will soon be. And then we have reason to believe that they are doing so at other sites.

The materials that we cited in our infringement chart in the pleadings relate to some other sites where Alkane has operations, in addition to the more general marketing and system capability materials. So the request for inspection is tied to the belief that there is ongoing infringement at multiple sites.

And we understand the need to have specificity in any sort of injunction, and so the request to inspect and

have documents related to site layouts where the accused products are, is necessary to allow both the plaintiff and the Court to understand specifically where infringement is ongoing and which sites should be enjoined.

THE COURT: And where are those sites other than Surprise 4 Pad?

MS. DEBROW: We believe that there is infringement potentially in North Dakota and in Texas based on publicly available information that we have obtained. Given the marketing-type materials that we also cited in our pleadings, there is the possibility that the accused products have been deployed at other sites, of which we are not yet aware.

THE COURT: Okay. Mr. Sugden, are you going to be speaking for the defendant?

MR. SUGDEN: Yes, I will, Your Honor.

THE COURT: All right. You can proceed.

MR. SUGDEN: Thank you, Your Honor. I think Your Honor's question to Ms. DeBrow was right on point, which is why is any site inspection necessary given that the focus of the motion is on the Colorado site, and we will not have any equipment on the site until, at the earliest, November 1st.

The remaining request for an inspection at each location is a classical fishing expedition. The

plaintiff, it would appear, is looking for information that it doesn't yet have about actual infringement. And we are in an expedited discovery posture, where the discovery needs to be narrowly tailored to the issues that will be before the Court.

I don't believe that an inspection at each location that they are speaking, which is unspecified, is necessary for this Court to enter the relief that would be necessary in this case should plaintiff prevail, which, of course, we do not agree with but, nevertheless, an inspection would not be necessary.

THE COURT: Okay. Ms. DeBrow, anything further?

MS. DEBROW: Your Honor, respectfully, this is the same type of injunction that a patent plaintiff would ordinarily seek, which is to enjoin infringing conduct or the further use of infringing products. And we are aware of at least one site where products will be deployed that we believe to infringe, and a couple of other sites where we believe infringement is already ongoing.

The fact that we are unable at this time to identify with specificity all of the sites at which Alkane has put its infringing product, should not bar injunctive relief against ongoing infringement, in the same way that a patent plaintiff would be entitled to get if it satisfies the requirements for a preliminary injunction

against different types of products.

You know, Mr. Sugden continues to assert that this should be so burdensome, and yet he has not said how many sites are potentially at issue for this inspection. It may be just the three that we believe exist, it may be far more than that. Because they have not given us any sort of indication as to how many sites we would be talking about, it is difficult to, you know, understand these kind of conclusory allegations of this being overly burdensome and inappropriate.

THE COURT: All right. Isn't that really at the core of the question of infringement? So you have asserted and argued that a patentholder would be able to get injunctive relief to prevent ongoing infringement. But the Court isn't going to simply enter injunctive relief on speculation that things are occurring, and nor have you brought a specific allegation of infringement as to those particular sites.

So why would you be permitted, on an expedited basis, to get inspection? Why wouldn't you have to first identify and have a good-faith basis of there being infringing systems at these other sites before you would get access or discovery to them? The Tenth Circuit case law is clear that discovery is not meant to find claims, discovery is meant to flush out claims that parties

already have.

MS. DEBROW: Understood, Your Honor. And, respectfully, we have alleged specifically that Alkane's systems, as described in its publicly available marketing materials, infringe, regardless of where they are installed, whether that is at a site in Colorado, a site in Texas, a site in North Dakota, or elsewhere.

We have been able to identify sites where we believe those products are set up and operating, and we are requesting injunctive relief to bar further use of the accused products at any site. The simple fact that we cannot obtain through public information the location of all of those accused systems, does not change the fact that we have pled specifically that the systems, themselves, infringe, regardless of the site that they are set up on.

In other words, infringement is not site specific. So this request for inspection was intended to identify with specificity the sites that would need to be enjoined. The inspection is not necessary to demonstrate infringement, per se, we have done that through our pleadings, but it is helpful to confirm that the systems operate in the way that the materials say that they do and to allow us to the test the veracity of, you know, defenses to infringement that Alkane may raise.

THE COURT: All right. So tell me where on the docket you are referring to in terms of identification of these sites.

MS. DEBROW: That will take me just a moment, Your Honor.

Docket 9, page 4, we reference sites in North Dakota and Texas. I believe there is also a reference to sites in North Dakota and Texas, in addition to Colorado, in the Complaint, so I don't have that citation handy at the moment. And then in our expert's declaration, he also cites materials that Alkane made generally available to -- about its systems, and then cites some photographs, which we believe were from a site in Texas, based on publicly available information, but I have seen in some of Alkane's more recent filings that they have identified those as corresponding to a site in North Dakota.

THE COURT: Okay. So when I look at Docket Entry No. 9, on page 4, which is ECF page 10, I believe, you indicate "Alkane has sites in North Carolina and Texas and now has expanded to Colorado." Is that what you are referring to?

MS. DEBROW: Yes. That is the reference to that that I was able to find quickly. We can further review the documents, and I will continue to do so to find other references to those.

THE COURT: And then when I go to Docket Entry No. 9-10, which is Exhibit K, Alkane's website, I don't see anything that suggests that these specific things are deployed at specific places in North Dakota or Texas. Frankly, the way that the website is printed in the pdf, it is difficult to read, at all.

MR. GOVETT: Your Honor, this is Brett Govett. If I might just help out, just to speed things along a little bit, if that is okay.

THE COURT: All right.

MR. GOVETT: If we look at 9-15, this is Dr. Hilbert's declaration, and the materials considered, there is citation to the Google Maps images of the Seminole, Texas, site.

THE COURT: What page are you on?

MR. GOVETT: I am on 21 of 78. It is the third entry, through about the sixth entry, on page 1, "Materials Considered."

THE COURT: So you are looking for inspection of the Seminole, Texas, site; is that correct?

MR. GOVETT: Yes, Your Honor, that is one of the sites, yes. And then that is carried over to the infringement charts, which are attached to Dr. Hilbert's declaration. For example, on 26, 9-15, page 26 of 78, there is the Seminole, Texas, site there.

There was a paper filed today by Alkane which says, no, that is not in Seminole, it is in North Dakota, which, for us, further, you know, reinforces the fact that we do need a site inspection, because this was just pulled off the internet. That is all we were able to do is use Google Earth, Google Maps, that sort of thing, and we provide the URL there.

And that is cited throughout -- that Seminole site is what we were able to find, and it is cited throughout our claim charts. So the real crux of what you are asking, I believe, is in the claim charts.

THE COURT: Okay. So do you have a quick reference to the North Dakota site in these claim charts?

MR. GOVETT: The North Dakota site is basically, we were not -- if my memory is correct, we were not able to find anything other than that they were operating sites in North Dakota. The public record did not reveal anything other than, if you look at Exhibit L -- sorry, 9-11, there is testimony before the North Dakota Energy, Development, and Transmission Committee that we cite and we discuss, and it is coming from Alkane, and we talk about that.

MS. DEBROW: Your Honor, this is Ms. DeBrow again. I would also point to, now having had a chance to look back at the version of Alkane's website that you pointed to -- apologies that that is hard to read, you are

right -- but at the very bottom of that, where it talks about "Contact Alkane," it lists that they are operating in the Williston Basin, which is in North Dakota, and Permian Basin, which is in Texas.

And so that additionally forms the basis for our belief that they have infringing sites in both of those locations.

THE COURT: All right. Mr. Sugden?

MR. SUGDEN: Thank you, Your Honor. I think what this illustrates is that this is a fishing expedition. The plaintiff does not have an understanding of what information it actually seeks, what sites it actually intends or wants to inspect. And pointing to the fact that our website indicates what basins we operate in is not sufficient to identify inspection sites. And it indicates, it appears, plaintiff is seeking an inspection of every single site where we operate, because their allegation is apparently that every single site where we operate infringes, though our response that was filed yesterday, demonstrates that Alkane doesn't do any bitcoin mining, at all, third parties do.

So I think that this request remains not proportional, remains overbroad, and it doesn't seem narrowly tailored that -- that it is a narrowly tailored request that is required for expedited discovery. I think

that is what is being missed here, not by Your Honor, but just being missed by plaintiff's indication that they want inspections everywhere, is that this is narrowly tailored to the preliminary injunction hearing.

There may be requests that are appropriate as part of broader discovery, but not as part of expedited discovery. Thank you.

THE COURT: All right. So pending before the Court is this first issue with respect to the request for inspection. My understanding is that the Surprise 4 Pad, the equipment has not been deployed yet; is that correct?

MR. SUGDEN: This is Ryan Sugden. Yes, that is correct.

THE COURT: All right. So based on what I see in front of me, as well as the declaration of Dr. Hilbert and the associated claim charts, I am going to permit inspection of only the Surprise 4 Pad. To the extent that it has equipment or doesn't have equipment, that will be left to be seen, as well as the identified Seminole, Texas, site.

Now, that is focused, again, and this ruling is focused on what we need with respect to the preliminary injunction hearing. Let me be very clear, however, to the extent that you all are going to be taking other kind of discovery that may lead to a conclusion that substantially

similar or identical systems are being deployed at other defendant sites, and if the Court were to find that injunctive relief was necessary for certain sites that have been inspected, I don't necessarily think that the lack of an inspection precludes the Court, so long as it has evidence, to extend the injunction to other sites that are established to have the same operating systems.

But I am not going to require Alkane to identify all of the sites and operations that it has -- mining operations. To the extent that their position is that none of their current mining operations perform bitcoin operations; so neither the Seminole, Texas, site nor the Surprise 4 Pad, located in Jackson County, Colorado, that is going to be another issue because it looks like the request for inspection is only targeted at those locations that at any time or currently are performing bitcoin mining operations. That is how I read this.

Am I construing that correctly, Ms. DeBrow?

MS. DEBROW: Your Honor, that is how it is written. We have some other discovery requests that are more broadly directed to how we define the accused system, which is, you know, flare gas mitigation systems that are used to power distributed computing systems. And as we talked about at the last hearing, the claims are not limited to bitcoin mining operations.

And so our contention is that if they are using the flare gas mitigation system, as described in the claim, to power distributed computing systems, as described in the claims, that that would infringe, even if the distributed computing system is not conducting bitcoin mining.

THE COURT: I understand that, and I also don't read most of these claims. There is a dependent claim, the 821 patent, that appears to be limiting it to bitcoin mining. But, in general, the larger independent claims do not seem to be limiting it to a particular purpose.

All right. So let's talk about the next one, interrogatory --

MS. DEBROW: One additional quick point, Your Honor, if I may, is that the Seminole, Texas, site photos that are cited in our infringement chart that are attached to the expert declaration, we obtained those from the internet, and based on that information, we believed that setup to be in the Seminole, Texas. Alkane filed a declaration today in which one of its employees attests that those photographs are actually from a site in North Dakota.

And so for that reason, we would request that we be permitted to also inspect that site in North Dakota. Or, I suppose to say it another way, to inspect the site that corresponds to those photographs. And if that is not

Seminole, Texas, then, you know, inspect the North Dakota site.

THE COURT: So I am a little bit troubled by that, because what we are arguing about today, or at least what I am understanding you are arguing about, is that you have a claim chart that I am relying on to make these determinations as to the expedited basis of discovery.

I am certainly not trying to figure out what the entirety of the scope of discovery might be. Again, I go back to the plaintiff's own statement that right now, "broad discovery on the full merits of the claims and defenses are not being contemplated."

What I am trying to contemplate is what I need to get to you all before we proceed on a preliminary injunction hearing. And so I am troubled by the fact that they are identified as being in Seminole, Texas, but now they are not in Seminole, Texas, which then raises the question of why you all would have concluded that they were in Seminole, Texas, to begin with.

MS. DEBROW: Your Honor, we concluded that because that was the information that was available to us on the internet. And I wish that it was not imperfect. But the plaintiff has now said that that site is not in Seminole, Texas. And so I would assume that they have more accurate information than what we were able to obtain online.

But our factual allegations, you know, we found these photos of their system and used that to help build our infringement contention chart, and it seems like perhaps the internet pointed us to an incorrect site. But, importantly, Alkane has not denied that that is their system, but they say that it is operating at a different location.

THE COURT: All right. Mr. Sugden?

MR. SUGDEN: Your Honor, this site is in North Dakota, it is not in Seminole, Texas. I would agree with the concern over the inaccuracies in the claim chart. I would oppose inspections of locations that the plaintiff has not identified. They haven't identified North Dakota, we just corrected the record.

THE COURT: Well, I don't know that that is entirely accurate, either. I mean --

MR. SUGDEN: Your Honor, this is Ryan Sugden. What I was intending to say is, we corrected the record that this is not the site in Seminole, Texas, it is in North Dakota. Giving inspections at both sites when they -- they had to have evidence towards North Dakota, the photos, or to Seminole, Texas, which is what they've identified incorrectly. If the location that they want to see it is in North Dakota, and the Court has ordered them to see a location, like the one they identified in the

claim chart, the correct location would be North Dakota.

THE COURT: All right. So I will allow inspection at the Tioga, North Dakota, operation and not the Seminole, Texas, site, based on paragraph No. 18 of Docket Entry No. 36, but the inspections will be limited at this juncture to the Jackson County location and the Tioga, North Dakota, location that is depicted in the photograph.

All right. Let's move on to Interrogatories 2 through 10: "Request to identify all Documents and Communications by Bates label is separate interrogatory, overbroad, unduly burdensome."

So I do think it is a separate interrogatory. There is no requirement by Rule 33(a) of the Federal Rules of Civil Procedure for you all to identify documents by Bates number unless the responding party is using Rule 33(d) to respond.

Having not seen any substantive responses, because I'm assuming none have been propounded yet, why would the plaintiff be entitled to identification by Bates number of the documents that are correlated in addition to any sort of response to the interrogatories?

MS. DEBROW: Your Honor, respectfully, we included that as part of the interrogatory, not as a separate interrogatory, but as a subpart that is typically just employed in discovery requests to help the parties

identify the documents relevant to the responses and deal with each side's production efficiently. And we would expect that we would likely end up on the receiving end of similar requests.

So we do not view that as a separate interrogatory, but instead, you know, part of the question of seeking relevant information for each of these inquiries.

THE COURT: But you would agree, Ms. DeBrow, wouldn't you, that it is not required by Rule 33(a) for the parties to do so, and there is no information, at least at this point, that the defendant is intending to invoke Rule 33(d) to respond.

MS. DEBROW: I agree with that, Your Honor, and it is not strictly required, and we don't have reason to believe that they are going to invoke 33(d) in response to any of these at this point.

THE COURT: All right. Mr. Sugden?

MR. SUGDEN: Your Honor, I don't have much to substantively add. I agree with your statements, and I agree that if we do invoke the business record subpart of Rule 33, we will identify those business records.

THE COURT: All right. Particularly given the expedited nature of this, I am not going to require a further identification by Bates name label in response to the documents that are associated with each substantive

interrogatory response.

To the extent that the interrogatory responses do invoke Rule 33(d), I would expect that the party invoking Rule 33(d) would be familiar with and comply with the requirements that the Tenth Circuit in this District have set out with respect to responding pursuant to Rule 33(d).

But, otherwise, particularly given the expedited nature and the lack of information that the production is going to be so voluminous that it is difficult for the receiving party to ascertain what documents support the responses to each of the interrogatories, I am not going to order that at this time.

So then let's turn to Interrogatory No. 2: "Identify each offer for sale or sale of the accused product, including the nature of each offer or sale, dates of each offer or sale, the products offered or sold, the buyer, distributor, and the individuals at Alkane involved in each offer or sale. Your identification should also identify by Bates number all Documents and Communications related to Your response." We dealt with the last request or portion of that interrogatory.

So let me ask you, it looks to me, Mr. Sugden, that you all do not have an objection to identifying the actual sale; is that right?

MR. SUGDEN: This is Ryan Sugden. The actual sale

with respect to the Colorado -- the Jackson County location?

THE COURT: No, actual sale. I don't read Interrogatory No. 2 to be limited to just Jackson County, Colorado. I read Interrogatory No. 2 as the plaintiff seeking information as to where these alleged accused products may be.

MR. SUGDEN: Our position with respect to Interrogatory 2, is that by seeking past sale information, it is a backwards looking interrogatory, which is not focused on the issues before the Court for the preliminary injunction.

The *Qwest Communications v. Worldquest Networks* decision is applicable here. I didn't cite it in the chart, but it indicates that conduct that has already occurred is not relevant to the pending injunctive relief. And so that is our position; is that past sales just aren't relevant to the PI hearing.

THE COURT: All right. Ms. DeBrow?

MS. DEBROW: Your Honor, past sales would identify the site at which that accused product is currently deployed and operating. And so we have asked for this information to identify where the accused products are and where their ongoing use is a continuing act of infringement, where those products are located.

And so it is not true that that is backward looking. The fact that a sale may have occurred in the past certainly doesn't mean that the continued use of those products, by whoever they have been sold to or at whatever site they are deployed, is in the past.

THE COURT: I agree. So let's focus on the offer for sale. So I agree that any sale, if you want to term it "past," but that is currently existing, would be information that is relevant to the preliminary injunction hearing to the extent that the plaintiff is seeking information as to where the accused systems may be deployed. And those deployed systems may be, although I'm not obviously substantively ruling that they are, encompassed by the preliminary injunction hearing.

But what about offers for sale that have not been consummated?

MS. DEBROW: Your Honor, we included that to get at the fact that merely because, you know, everybody hasn't signed on the dotted line as of this date, if there are contemplated or planned deployment of a product, particularly one that is going to be deployed in the near future, that should be included in the response to this interrogatory.

And so we did not want to narrowly limit it to sales and, you know, open up the opportunity for mischief

in not disclosing a sale that is soon to be consummated.

THE COURT: Well, isn't it logical to conclude, if they are going to deploy these systems, that the sale would have already been consummated? The term "offer for sale," putting aside the fact that it has a particular meaning in the context of patent litigation, it seems fairly broad. It seems like it could encompass any sort of marketing that they are doing of these accused products anywhere.

MS. DEBROW: I agree, Your Honor, that it could be interpreted that broadly. And without knowing exactly how Alkane structures its deals, I am not equipped to comment on whether, you know, an offer for sale would have happened, you know, far in the past compared to when the equipment would be deployed or whether, you know, the sale would become final only closer to deployment. I just don't have firsthand knowledge as to how they structure their sale agreement or deployment agreement.

THE COURT: All right. Mr. Sugden?

MR. SUGDEN: Thank you, Your Honor. My concern was also looking backwards; that any offer for sale in the past at any time would be responsive to this interrogatory. And if that sale was never consummated into any sort of deal that never resulted in any deployment, that wouldn't be relevant, it wouldn't be

proportional, and it would be very burdensome to identify.

So if this is focused on pending offers for sale that have not been consummated, that is the narrowing that I think is useful to us. I question its relevance to the PI hearing, but that narrowing would be helpful.

THE COURT: All right. So with respect to Interrogatory No. 2, I am going to require a response for all consummated sales of the accused products, as well as pending sales of the accused products. That means that I am not looking for Alkane to produce information or respond with respect to any offers for sale that have in the past been attempted but not consummated or that are simply marketing.

Does that make sense to both sides?

MS. DEBROW: Yes, it does, Your Honor.

MR. SUGDEN: It does.

THE COURT: All right. So then let's move on to Interrogatory No. 4. So interrogatory No. 4 reads: "Describe in detail (1) the creation and development of the Accused Product and (2) any use of -- or reference made to -- Plaintiff's products in the creation or development of the Accused Products, including any efforts to reverse engineer or replicate Plaintiff's products or distinguish the Accused Products."

Now, Ms. DeBrow, let me understand what the

plaintiff's perspective is. Certainly the design and development of the accused products and the knowledge of any sort of plaintiff's products might go to willfulness, but how does it go to a preliminary injunction, where you are seeking to enjoin infringement?

MS. DEBROW: Your Honor, the design and development of the product, including whether they were designed and developed with reference to Crusoe's products and systems, does go to the likelihood of Crusoe's success in proving Alkane's infringement.

For example, if Alkane has documents that demonstrate that it was designing a layout or some aspect of its product with reference to Crusoe's products and systems, that evidence would certainly bear on the question of how likely it is to be established that Alkane is infringing.

To put it another way, if there is evidence that copying was going on, that certainly bears on the likelihood of success in proving infringement.

THE COURT: So I respectfully disagree about that, because doesn't the federal circuit case law tell me that when I determine infringement, I am not comparing the accused product to the patentholder's product, I am comparing the accused's products to the claims at issue and the different limitations in the claim.

So even if the plaintiff's product does not actually embody the claims of the patents-in-suit, the defendant could still be infringing. And so if I am comparing your product to their product or they are comparing your product to their product, wouldn't you then have to establish that your product embodies the limitations to the patents-in-suit?

Again, please correct me if I am wrong, but I believe the relevant analysis is the comparison of the accused products to the limitations of the claims of the patents-in-suit; that the patent is a right of exclusion, as opposed to a property right that is reflected inherently by Crusoe's products.

MS. DEBROW: Your Honor, I don't disagree with you on your understanding of patent law, but I would say that in this instance, our products do practice the asserted claims of the patent, and so in that situation, whether or not the plaintiff -- or the defendant was copying aspects of our patented products, does have relevance to the question of infringement.

THE COURT: All right. Mr. Sugden?

MR. SUGDEN: Your Honor, this is Ryan Sugden. The only piece I would add to the Court's record analysis is that this is also the sort of information that may be appropriate or one would expect in ordinary discovery.

But, again, we are in a much more expedited posture where the request needs to be narrowly tailored to what the Court is going to be decided. Given that this is not what the Court is going to be deciding, we don't think it is appropriate.

THE COURT: All right. So based on my understanding of what I need to do to make a determination if there is a substantial likelihood of success on the merits with respect to infringement, as opposed to willful infringement, I am not going to permit Interrogatory No. 4 on an expedited basis.

Let me be very clear, however, that that does not mean that I believe Interrogatory No. 4 is not proper for more broad discovery on the claims and defenses of this case, it is simply because, again, what I am trying to get you all to and the Court to is an expedited proceeding on the preliminary injunction, and so that entails a more limited scope of discovery.

In my own independent research, I found no preliminary injunction in which the district court looked at factors with respect to willfulness, nor do they discuss design or development of the accused products in making any determination with respect to the infringement at issue or the substantial likelihood of success on infringement. And I don't see any authority in this chart

to suggest otherwise. So I am not going to permit Interrogatory No. 4 at this time.

Interrogatory No. 5 looks like it has been withdrawn with respect to the preliminary proceeding.

So let's turn to interrogatory No. 7: "Describe in detail when and under what circumstance You became aware of the existence of the Asserted Patents and what actions You took upon becoming aware of the Asserted Patents, including any efforts by You or any other Person or entity to assess the validity, infringement or enforceability of the Asserted Patents or to design around or avoid infringement of the Asserted Patents, and any efforts by You to gather information and download Documents and Communications from Crusoe's website, the identity of all Persons with knowledge of such facts and circumstances, and the dates of such awareness."

Putting aside the fact that this interrogatory may or may not have numerous discrete subparts, and it seems like it could be construed as two or more interrogatories, what is defendant's objection to the substance of Interrogatory No. 7?

MR. SUGDEN: Well, Your Honor, given your prior ruling on Interrogatory No. 4, I think the same analysis applies here to Interrogatory No. 7; that I would assume the information that is being sought for Interrogatory No.

7 would go to willfulness and not to infringement, which is not part of the Court's analysis.

THE COURT: All right. Ms. DeBrow?

MS. DEBROW: Your Honor, our basis for including this interrogatory is very similar to the one that we just discussed in Interrogatory No. 4, so being respectful of the Court's ruling on that, we overlap here. You know, I think that your decision on that issue applies here, as well, and so we would be willing to withdraw that one at this time, to be re-raised later in discovery.

THE COURT: All right. So Interrogatory No. 7 will be deemed withdrawn at this time. Again, this is not a substantive ruling about the propriety of the discovery request in general discovery, we are simply focused on what expedited discovery will be permitted in advance of the preliminary injunction hearing.

So, Interrogatory No. 8: "Separately for each Asserted Claim of the Asserted Patents, identify all legal and factual bases for your contention that such claim is not infringed by the Accused Products, including a chart that sets forth each claim element that you contend is not satisfied by the Accused Products along with a substantive, particularized description of why you contend that element is not satisfied, including citation to specific components and functionality of the Accused

Products."

So, Mr. Sugden, I don't understand how this could be an unduly burdensome request for a claim chart, particularly given that infringement and the analysis of infringement is at the very core of Counts 1 through 3 of the Amended Complaint and certainly at the core of the preliminary injunction and plaintiff's request for preliminary relief.

MR. SUGDEN: This is Ryan Sugden. Your Honor, you are correct, this information is relevant and it is going to be addressed by the Court in its ruling on the preliminary injunction. In part, this objection is that it is seeking a claim chart at an early part of this case, as part of written discovery. However many days we have to respond to written discovery, which is an issue to be addressed, is when we have to produce a claim chart.

In conferral upon this dispute, plaintiff's counsel raised, well, this is information that would, under the patent rules, needs to be disclosed, and we don't disagree. But just because it is information in the form that has been requested that would ordinarily be part of discovery doesn't mean it is part of expedited discovery.

So this information may come out in the form of a declaration but perhaps not a claim chart. This is really about the front loading of information that is part of

written discovery and in the manner that they requested it.

THE COURT: So I guess my response to you, Mr. Sugden, is very practical, which is this District and this Court uses the claim chart to guide its analysis. I would say that to the extent that you want to be most persuasive to this Court, you are going to need a claim chart. That is the way the patent local rules anticipate it being done. And, for better or worse, we are in a preliminary injunction proceeding.

It would be one thing if your argument with respect to the lack of likelihood of success on the merits is noninfringement. So, for instance, you could argue that the plaintiff failed to come forward with sufficient evidence that each and every element of the patent limitations are met, and then decide that you want to rely on a declaration to do so. I, frankly, think that is to your peril.

So I am going to require a claim chart. I don't necessarily expect that the claim chart will not be amended or it would be exhaustive or would supplant what we have to do under the local patent rules should this proceed past a preliminary injunction stage, but I am going to require a claim chart, mostly for my own use, because we are all going to be doing this in an expedited

fashion, and the easier for me to process the information, I think the better it is for everyone, and the more optimism I have that I will be able to come to an appropriate conclusion in an efficient manner.

MR. SUGDEN: Understood, Your Honor.

THE COURT: All right. So then moving on to Request for Production No. 1, let's look at Crusoe's reduced request, which is it seeks documents sufficient to show the design and operation of the accused product.

Mr. Sugden, can you tell me what is improper about the reduced request?

MR. SUGDEN: Your Honor, we do agree with that request. Both RFP 1 and RFP 2 have been resolved through that modification of plaintiff's request for production.

THE COURT: All right. So RFP 1 and RFP 2 will be allowed with respect to the narrowed proposition that is reflected in the column indicated by Crusoe's position.

Let's move to RFP No. 3: "All Documents and Communications evidencing, regarding, reflecting, or relating to Your building process, site design, or set-up of equipment comprising the Accused Product." Then, let's again limit this to the Surprise 4 Pad and the Tioga, North Dakota, pad.

So, with those limitations, Mr. Sugden, what would the objection be from defendant?

MR. SUGDEN: This is Ryan Sugden. We can accept those modifications, Your Honor.

THE COURT: Okay. RFP No. 4: "All Documents and Communications evidencing, regarding, reflecting, or relating to any agreement between You and Gondola and/or Modiin."

So, Ms. DeBrow, this is certainly relevant to the claims in the Amended Complaint with respect to tortious interference, but how is it relevant to what we need to do at the preliminary injunction stage?

MS. DEBROW: Your Honor, during the meet and confer process, we agreed to revise this one to limit it to agreements "relating to deployment or installation of the Accused Products at any site operated by Gondola and/or Modiin." It is often the case that agreements between parties of this type will reflect specifics of the equipment that should be installed and other technical information that would bear on the question of infringement.

And so, yes, I agree with you that other aspects or other documents may be responsive to this and certainly come into play with some of the other claims, but the documents concerning the agreement are likely also to contain information that is relevant to infringement.

THE COURT: All right. So, Mr. Sugden, have you

all agreed to produce the narrowed request: "All Documents and Communications evidencing, regarding, reflecting, or relating to any agreement between You and Gondola and/or Modiin relating to deployment or installation of the Accused Products at any site operated by Gondola and/or Modiin"?

MR. SUGDEN: Bear with me, Your Honor, I am re-reading that as you were reading it.

Our objection remains what Your Honor has identified, is that this seems to be going towards tortious interference and not towards what the Court needs to decide with regard to infringement.

THE COURT: Ms. DeBrow's argument is that some of the agreements may include parameters of how to set up these systems that may pertain to the limitations of the patents-in-suit.

So putting aside whether or not there are other documents or communications that may underlie, for instance, the negotiations between these entities, what is the objection to producing the documents or communications relating to the agreement arising from the deployment or information of the accused products?

MR. SUGDEN: We have no objection to producing the agreement, itself, if that is what is going to contain the specifications, we can produce that agreement.

THE COURT: But what about the communications around the agreement, which could contain information about how the system is going to be set up?

MR. SUGDEN: If limited in that way, we can search for those communications.

THE COURT: All right. Any objection to that, plaintiff's counsel?

MS. DEBROW: Your Honor, no, we don't object to that scope.

THE COURT: All right. So, we will limit Request for Production No. 4 to "All Documents and Communications evidencing, reflecting, or relating to the agreement between the defendant and Gondola and/or Modiin relating to the deployment or installation --" I am going to say -- "or specifications of the deployment or installation of the accused product at any site operated by Gondola and/or Modiin."

Then, moving on to Request for Production No. 5, Ms. DeBrow, do you have any additional arguments with respect to Request for Production No. 5, because from my perspective, you are getting what you need for the preliminary injunction hearing with respect to Request for Production No. 4?

MS. DEBROW: Your Honor, Request for Production 5, I agree with you, in the way that 4 has been modified in

terms of the specification of the system, we are getting a lot of what we need.

There is one additional issue that Request for Production 5 would cover that we set forth in the chart, which is that one of the issues that will be relevant at the PI hearing is causal nexus between the harm to Crusoe and Alkane's infringement. And to the extent that, you know, any of these communications go to discussion of Crusoe's systems, that might be separate from or a precursor to justifying what is going to be set up at the site. If it is part of that same conversation between these parties, it would be relevant to the causal nexus element.

THE COURT: So I guess I am struggling a little bit on that. That certainly might be true in terms of the tortious interference claim. I am having trouble, again, understanding what the relevance of the causal nexus is between the harm to Crusoe and Alkane vis-à-vis patent infringement.

So isn't it true that once they meet the limitation of the patents-in-suit, it doesn't matter what their intent is, they infringe the patents-in-suit. And as the valid patentholder, as long as the patent is valid and infringed, there is harm. Whether or not there are damages may be a different issue, but that is not

necessarily what we are looking at in terms of a preliminary injunction to enjoin the acts of infringement, is it?

MS. DEBROW: Your Honor, I think that causal nexus can have, you know, several different permutations. But your point is well taken. And given the Court's view on this one, I think that this is one that we would be willing to set aside at this time.

THE COURT: All right. So we will set aside Request for Production No. 5. Again, this is not a substantive ruling as to the propriety of that request in the broader context of discovery.

Let's move to Request for Production No. 6: "All Documents and Communications between You and any third party, including but not limited to Gondola and/or Modiin regarding the Asserted Patents." Again, I have concerns about this as to the PI as opposed to its relevance to any sort of willfulness or damages analysis.

So, Ms. DeBrow, if you want to address that, that would be helpful.

MS. DEBROW: Your Honor, the basis for the propriety of this one is the same as RFP 5. So given the Court's views that you have already expressed on that one, we would treat this one the same.

THE COURT: All right. So we will deem that one

withdrawn as of now.

RFP No. 7: "All Documents and Communications evidencing, regarding, reflecting, or relating to the Accused Product's use or employment of natural gas to generate electricity."

It seems, Mr. Sugden, that your concern about the tailoring of it as "overbroad" and "not tailored to the PI," isn't the plaintiff, with respect to this RFP, simply seeking to capture documents or communications that reflect how the system is used and the role of the natural gas or the capturing of the natural gas flare to generate electricity?

MR. SUGDEN: Your Honor, we have resolved RFP 7. The shading is what we used to try to indicate that. So kind of upon further reflection, I think I agree with your analysis. And I do think even RFP 7 is probably captured within other RFPs that were not objected to.

THE COURT: All right. So we will allow RFP 7.

And then I believe that the next one we get to is RFP 8, where there is an objection to the word "used" as being ambiguous. Crusoe has proposed a narrowing. So let me understand if you all still have an issue with respect to RFP 8.

MR. SUGDEN: This is Ryan Sugden, Your Honor. We do, because the ambiguity arises from the fact that Alkane

doesn't conduct the computing activity; the powering -- the mining for cryptocurrency, third parties do that. So the information that is being sought is how do third parties use the electricity that Alkane provides to them? It is information not within or custody or control.

We can deal with that in terms of responding in such manner, but we thought it was more appropriate to raise that with respect to this objection, raising it now.

THE COURT: Ms. DeBrow?

MS. DEBROW: Your Honor, this is the first that I am hearing that that is the basis of the objection, and so, you know, I think that simply saying that you are unlikely to have sort of the full picture in terms of responsive information for this RFP is not a basis to say that you shouldn't be obligated to look for what documents you have and respond.

And, you know, this is squarely directed to how the accused products operate in relation to the technical aspects that are required by the claim. And so it goes directly to the question of infringement. And if it turns out that Alkane has no documents that relate to this issue, then that is what their response will be. But I don't think that speculating that they are not likely to have documents should absolve the obligation to investigate that.

THE COURT: So I am going to require RFP 8 in its narrowed form, which is in Crusoe's column, which reads: "Documents sufficient to show how electricity generated by the Accused Products is used to power computing equipment, including but not limited to computing equipment used to conduct financial transactions and/or mine for cryptocurrency."

Again, under the Federal Rule of Civil Procedure, any party is only obligated to produce what is within its custody or control. "Custody and control" has been well described in the case law, and so I would suspect that you all can get to that information fairly soon and, obviously, are not required to necessarily do your own discovery of third parties, but are required to produce what is in your custody and control.

Looks like you all have resolved Request for Production No. 9.

I am assuming that you all, since you have shaded Request for Admission No. 2, have come to an agreement on that; is that right?

MS. DEBROW: That is my understanding, Your Honor.

MR. SUGDEN: This is Ryan Sugden. Yes, it is.

THE COURT: All right. Deposition Topic No. 3, consistent with the Court's other rulings, I am going to limit this to Surprise 4 Pad and then the Tioga, North

Dakota, site at this point.

Now, let me be clear, you are seeking some additional information through discovery, Ms. DeBrow. And so to the extent that you need to come back to the Court with respect to Deposition Topic No. 3, and you have a good-faith basis to do so and it is articulated with specificity, I may leave Topic No. 3 open.

I am assuming that you all are proceeding with written discovery before you proceed with these depositions, but given the fact that this is all expedited, I am not sure. But, again, what I am going to do is first limit it to these two locations we have discussed, with the caveat that if discovery yields some basis for some other sites, you all can meet and confer about that, and then we can take it up if there is a disagreement.

Does that make sense to everybody?

MS. DEBROW: Yes, understood, Your Honor.

THE COURT: All right. Then Depo Topic No. 5: "Knowledge of Documents and Communications between You and any third party, including but not limited to Gondola and/or Modiin, regarding Crusoe." Is this taken care of by my prior rulings, or do we still need to talk about this?

MS. DEBROW: Your Honor, these deposition topics

are mirrors of RFP 5 and 6. So I believe your rulings on those would apply to these topics.

THE COURT: So we won't proceed with Topic No. 5 at this juncture.

Topic No. 6 I think is also taken care of.

Topic No. 9 looks like it has been withdrawn.

And then Topic No. 10: "Knowledge of the pricing and/or cost of Alkane's flare gas mitigation services." So, again, my concern about this is its relation to the preliminary injunction as opposed to, obviously, its relevance to other issues in the broader case.

Is this a topic that you all are still seeking to pursue in the context of getting ready for the preliminary injunction hearing?

MS. DEBROW: Your Honor, we believe that the topic is relevant to the irreparable harms, but appreciating, you know, Your Honor's guidance on the issues that the Court will be focused on, and specifically related to infringement, if you -- if it is your position, with the others, that this one does not go squarely to the issues you are interested in for the preliminary injunction hearing, we would be willing to withdraw that for the time being.

THE COURT: All right. So my -- so I will just give you some guidance with respect to irreparable harm.

My understanding is when I am looking at irreparable harm, I am looking at harm that can't be, again, resolved through damages; either lost profits or reasonable royalties later on, in terms of patent infringement.

I don't see that the pricing information at this juncture is particularly relevant to my assessment that there will be irreparable harm as opposed to any assessments later in the case about damages, again, through reasonable royalties or lost profits. So I am not going to permit that at this time.

Again, to the extent that this develops differently as you are taking this preliminary discovery and you need me to revisit this deposition topic, you should meet and confer, and I am willing to revisit it. I just don't see how the pricing at this point goes to what my analysis is limited to in terms of irreparable harm. All right.

MS. DEBROW: Understood, Your Honor.

THE COURT: Okay. And then lastly it looks like, although it is not shaded, that Crusoe has withdrawn any request to depose fact witnesses outside of perhaps a 30(b)(6). I guess the question really is, is that -- I am not sure what the dispute actually is. It seems like Crusoe wants to limit those fact witness depositions to the topics we talked about, and then Alkane has a general objection to fact witness depositions.

MR. GOVETT: Your Honor, it is Brett Govett. At the time that these papers were filed, we didn't know who the fact witnesses were going to be. We could guess. But since that time, Mr. Woods and Mr. Blavey have filed declarations on some of the issues in dispute. Probably one or both of them will be the 30(b)(6) witnesses, but we would like to depose the two deponents that put declarations in for the TRO opposition, as I am sure you can appreciate.

THE COURT: That seems reasonable to me. Any objection?

MR. SUGDEN: Your Honor, will the depositions be limited to the contents of the declarations? The concern with this objection here, as laid out in our response to the Motion for Expedited Discovery, is that we are using every single discovery tool at our disposal, in an expedited fashion, in a very short period of time. And the case law in this District has indicated that early witness depositions are something to be cautious about because the witnesses don't have an opportunity, counsel doesn't have an opportunity, to have discovered all of the facts in the case yet.

So if they are limited to their declarations, I think that would be one thing, as opposed to just broad facts depositions.

THE COURT: Mr. Govett?

MR. GOVETT: It is hard to say. We are going to dispose them about the facts at issue. We have the Court's guidance on what you want to hear with respect to the preliminary injunction hearing. To say that they are limited to what is in the declarations, then we wouldn't need the deposition. But we will be deposing them on the facts that are at issue in the case that they have discussed in their declarations and that we have pleadings on.

So I hope that responds to your question, Your Honor. But to say that we, oh, we are going to limit it to the declarations. No. If that were they case, we wouldn't need the depositions. I hope that answers your questions, Your Honor.

THE COURT: Well, let me ask you this. Are you planning on one day of 7 hours?

MR. GOVETT: No. No. We put in our papers that any deposition we took would be a short deposition. We propose 3 hours. And, you know, if we use if all, great. If we don't, we won't. But we don't have any reason to get in there and just waste time. We are going to get in, cut to the chase, and get on with it.

THE COURT: Well, I appreciate that. In my own experience, when attorneys are given a certain amount of

time to take depositions, few are the attorneys that finish before that time is up.

Mr. Sugden, with the limitation of one day of 3 hours for two fact witnesses, any objection to that?

MR. SUGDEN: Your Honor, I think the 30(b)(6) depositions would be sufficient. And we haven't discussed the length -- a time limitation on that, but I believe that one should be imposed on the 30(b)(6). But I do believe the 30(b)(6) would be sufficient for the Court to have adequate information for the parties to be prepared for the preliminary injunction hearing.

THE COURT: All right. Let me take a better look.

MR. GOVETT: May I respond on that, please, Your Honor?

THE COURT: Go ahead, Mr. Govett.

MR. GOVETT: The only thing is they can't have it both ways. They can't offer evidence from a declarant and then say, oh, you can't depose the declarant. That's the issue on that. So if they want to withdraw some of that, we can consider that. But the cat's out of the bag, so to speak, on -- you know, they put in declarations from both of these people, one would think they would be more than willing to offer them up for a deposition.

And, you know, I don't see how we can agree to any sort of limitation about what is being asked of them. You

know, we know the federal rules and we will follow them, but that is kind of what happens when you put somebody up for -- when you get them to sign a declaration under oath; we are entitled to go in and question them about that.

THE COURT: Well, I don't think there is a question, if I am understanding defense counsel, about whether or not you are able to inquire about what is in the declaration and potentially why they say what they say in the declaration.

I think the issue here is whether or not you are permitted to have a more free ranging deposition; for instance, to ask these individuals about pricing information, which this Court does not necessarily believe is relevant to the preliminary injunction or their knowledge of the accused patents.

MR. GOVETT: They address that, I believe, in their declarations, as one of the issues, Your Honor, on the knowledge point.

THE COURT: All right. So, again, let me take a closer look at the declarations. Given the fact that they were filed earlier today, I have not had an opportunity to look at those, and then in conjunction with a separate minute order, I will make a ruling on the depositions, the fact depositions.

MR. GOVETT: Thank you, Your Honor.

THE COURT: All right. Anything else with respect to the discovery requests as they stand now?

MS. DEBROW: Your Honor, this is Stephanie DeBrow. One other housekeeping issue, just so that the parties are all on the same page and not coming back to you for clarity, our understanding is that the interrogatories, our fees, and deposition topics that were not included in this dispute table submitted to the Court are issues that the plaintiff or the defendant has not objected to and so plans to respond to.

And so I just want to make sure that the record reflects that in addition to those discovery requests you specifically ordered responses on today, that the ones that have not been addressed in the table as disputed will also be responded to, and those are Interogs 1, 3, 9 through 10, RFP 10, and Deposition Topics 1, 2, 4, 7, and 8.

THE COURT: Well, that is certainly my expectation, Ms. DeBrow, but why don't I get confirmation from Mr. Sugden.

MR. SUGDEN: This is Ryan Sugden. We will respond, Your Honor. Correct.

THE COURT: Okay. So pending before the Court is the Motion to Expedite Discovery, Docket Entry No. 11. The Motion is granted in part and denied in part

consistent with the rulings on the record today and the instructions to the parties with respect to all disputed issues except for the issue of fact witnesses.

The Court will review the declarations submitted and then issue a separate minute order addressing the availability of a fact witness deposition in addition to the Court's assumption that a Rule 30(b)(6) deposition will move forward, as tailored by the topics that we discussed today.

Now let's talk about the schedule for briefing.

MR. SUGDEN: Your Honor, this is Ryan Sugden. May I interject? I do have two issues on the motions that we would just like some clarity on and potentially a ruling.

THE COURT: All right.

MR. SUGDEN: One of those issues is the timing of our responses. We would like at least 21 days to respond to written discovery, and for depositions to not begin for 35 days. That is a part of the schedule discussions, happy to have it then.

The second issue that we raised in our Response to the Motion for Expedited Discovery was that Alkane would, likewise, be able to propound discovery in the same manner that Crusoe has been permitted.

THE COURT: So this ruling is not intended to preclude Alkane from propounding its own expedited

discovery. However, the only reason that we have been able to move so quickly forward with Crusoe's request is because the Court has the specific requests in front of me.

So it doesn't really help, Mr. Sugden, for me to make any preemptive determinations as to what will or not be permitted. You all are certainly free to serve those discovery requests. And then to the extent that there are objections, we will engage in a very similar process as we did today.

My rulings today were in no way to suggest that the defendant was precluded from seeking any sort of discovery, particularly given the fact that one of the elements that the Court will consider is whether or not there has been any substantial showing of invalidity of these patents or the claims asserted.

And so, again, you all obviously need to proceed how you see fit, but it is most helpful for me to actually be working with actual requests and actual objections.

MR. SUGDEN: Understood, Your Honor.

THE COURT: All right. So then let's talk about the timing. Last time you all were in front of me, we were working from a notice of the parties' proposals regarding briefing and a hearing schedule for Crusoe's Motion for Temporary Restraining Order and/or Preliminary

Injunction.

The concern voiced by the plaintiff -- or, I am sorry, the defendant at that time was that the scope of discovery was such that it would be difficult to comply with the proposals that the plaintiff sought with respect to the discovery.

We have now narrowed written discovery, and it is September 8th, so my sense is that even if you need 21 days to respond, that would still get us to about September 30th and October 7th for depositions. My caveat to that, though, is again based on my own trial schedule in November and early December. It may be challenging to get you all to a preliminary injunction hearing by that time.

Given that, would it then mean that it would be more beneficial to give you all a little bit more time, particularly in light of our last conversation with respect to Alkane serving discovery and the potential that Crusoe might object to the scope of some of the requests?

MR. GOVETT: Your Honor, this is Brett Govett. I think that obviously we would like the hearing to be as soon as possible, but I understand the Court's restrictions, and I appreciate the time that you have spent on this today, as well.

Perhaps the most expeditious way to get through

this is, you are the Judge, you just tell us, here is the first date I can give you a hearing and, you know, this is the date, and based on that date you go work out the discovery, similar to what we would do in a, you know, normal case where we had a trial date, wanting a date, all of that sort of thing, and we filled in the dates around it, and if there is a dispute, come and tell me, in terms of timing.

But I think that realistically we are very reasonable. If, you know, if the hearing is not going to be until X date, as long as there is time for briefing and so forth, exhibits, you know, to get the Court what it needs to make an informed decision on the preliminary injunction hearing, we want to do what is the easiest and what is best for the Court, and we have to understand and appreciate the Court's restrictions. I think that is really going to be the easiest way to get through all of it.

THE COURT: So remind you, did you all think you needed two days for the evidentiary hearing or one?

MR. GOVETT: We said one day, the defendant said two days. Given the limitations and everything that we just went through, I would be hopeful that everybody understands -- there is no reason we couldn't get through this in a single day given the briefing and so forth.

That is our position on it.

THE COURT: All right. Mr. Sugden?

MR. SUGDEN: Your Honor, I am still cautious about only scheduling a one-day hearing and not having a scheduled second day hearing that we could dispense with if we didn't need it. We are talking about, they want to depose at lease two fact witnesses. There is an expert. So we are talking potentially six witnesses with two experts and argument in addition. That just feels to me like asking for trouble if we only schedule one day.

THE COURT: All right. So what I am going do is in conjunction with the minutes of this proceeding, I will identify a few two-day openings on my calendar. I want to go back and look at my docket holistically given the fact that I have a number of trials coming up this fall and through the winter. I will give you some options, and you can then call into my chambers and tell them which option you would like, and then we will get you slated in.

Does that make sense to everyone?

MR. GOVETT: This is Brett Govett. Yes, Your Honor.

MR. SUGDEN: This is Ryan Sugden. Yes, definitely.

THE COURT: All right. So then after you pick those dates, then you all can move backward. It is helpful for me for you then to file a stipulation about

the deadlines. And then if you cannot stipulate to the deadlines in the interim, such as when you are going to close the discovery, depositions, and finish briefing, then we can take it up then.

Just note that, again, given the fact that you are going to be competing with various other trials of cases that I have not lived with very long, the more time that I have with these papers, the better. Obviously I have some experience with patent litigation, but these are not patents that I've had a lot of time with, and I want to make sure that we are using our time as efficiently as possible during the preliminary injunction hearing, okay.

MR. GOVETT: Yes, Your Honor.

THE COURT: All right. Anything else that would be helpful today, counsel?

MR. GOVETT: From the plaintiff's side, no, Your Honor, I don't believe so. Thank you for your time and all of your prep on this, and that of your staff, of course.

MR. SUGDEN: For defendant, we have nothing further. Thank you, Your Honor.

THE COURT: All right. Thank you so much. We will be in recess.

(Proceedings conclude at 2:47 p.m.)

R E P O R T E R ' S C E R T I F I C A T E

I, Darlene M. Martinez, Official Certified Shorthand Reporter for the United States District Court, District of Colorado, do hereby certify that the foregoing is a true and accurate transcript of the proceedings had as taken stenographically by me at the time and place aforementioned.

Dated this 20th day of September, 2022.

_____
s/Darlene M. Martinez
RMR, CRR