

PROTECTIVE ORDER MATERIAL
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Filed on behalf of: Wiz, Inc.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WIZ, INC.,
Petitioner,

v.

ORCA SECURITY LTD.,
Patent Owner.

IPR2024-00863
Patent No. 11,663,031

**PETITIONER’S MOTION TO EXCLUDE EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64(c)**

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I. STATEMENT OF PRECISE RELIEF REQUESTED

Petitioner Wiz, Inc. moves to exclude Patent Owner’s (“PO’s”) Exhibits 2134-2137, 2148, 2400-2422, and 2425-2428 for failing to meet the admissibility requirements of the Federal Rules of Evidence (“F.R.E.”). *See* 37 C.F.R. § 42.64(c). Wiz has previously preserved these objections. Paper 33, 3-6.

II. STATEMENT OF REASONS FOR THE RELIEF REQUESTED

Exhibits 2134-2137, 2148, 2400-2422, and 2425-2428 are relied upon in the Patent Owner Response (POR) to support secondary-considerations arguments. Many are relied upon for the purported truth of their assertions and should be excluded as hearsay. What’s more, PO misused its knowledge of confidential Wiz information gained through the related district court information, poisoning its IPR discovery efforts to obtain the same information. The resulting exhibits present unfair prejudice, risk confusion, and waste time, and they should be excluded.

A. Exhibits 2134-2137, 2148, 2406, 2412, 2414, and 2416 Should be Excluded Based on F.R.E. 801-805

1. The Exhibits are Inadmissible Hearsay

Exhibits 2134-2137, 2148, 2406, 2412, 2414, and 2416 should be excluded as inadmissible hearsay. Each of these documents is being relied on for the truth of its assertions and does not qualify as a hearsay exception. F.R.E. 801-805.

Statements by out-of-court declarants offered as evidence to prove the truth of the matter asserted therein constitute inadmissible hearsay. F.R.E. 801-02; *see*

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also, e.g., Unified Patents Inc. v. Sound View Innovations, LLC, IPR2018-00599, Paper 50, 50-51 (F.R.E. applies). Information in an IPR exhibit may be inadmissible hearsay even if the full exhibit is not deemed inadmissible. *Standard Innovation Corp. v. Lelo, Inc.*, IPR2014-00148, Paper 41, 13-17 (dates in exhibit inadmissible hearsay where relied upon to establish date of creation/publication).

The POR relies upon the exhibits in question as follows:

Exhibit	POR page(s)	Reliance
2134	37	Long-felt need
2135	38-39	Long-felt need
2136	38, 39	Long-felt need
2137	39	Long-felt need
2148	39-40	Long-felt need
2406	43-44, 50, 60	[REDACTED]
2412	5, 41-42, 43-44, 47	[REDACTED]
2414	5, 33, 39, 41-42, 47-49, 58	[REDACTED]
2416	58	[REDACTED]

Exhibit 2134: Exhibit 2134 appears to be an article identifying as its author someone named Vikki Davis, who is not a witness here. Addressing alleged long-felt need, the POR cites exhibit 2134 to support PO’s allegation that, as public cloud services developed, many organizations “increasingly adapted their applications to be run from multiple cloud computing platforms.” POR, 37 (citing

EX2134, 2). The POR relies on as truthful exhibit 2134’s assertion that in 2012 “[c]loud adoption t[ook] off.” EX2134, 2.

Exhibit 2135: Exhibit 2135 appears to be a printout from a blog entry obtained from paloaltonetworks.com, written by someone named Ankur Shah. Like Vikki Davis, Ankur Shah has not been offered as a witness in this proceeding.

Still addressing long-felt need, the POR cites exhibit 2135 in arguing that “[p]rior methods for protecting cloud computing infrastructures failed to adequately address the security of VMs at rest.” POR, 38-39 (citing EX2135, 3). To support this allegation, the POR quotes exhibit 2135 as establishing that agentless scanning “extends coverage to both active and dormant virtual machines in the public cloud.” EX2135, 3.

Exhibit 2136: PO cites this exhibit twice in arguing long-felt need. POR, 37, 39. First, PO cites it to support the allegation that “virtualization technologies” were “vulnerable to cyber threats.” POR, 37 (citing EX2136, 2). There, the POR relies on as truthful exhibit 2136’s assertion that “[a]s more workloads are shifting to the cloud, cybersecurity professionals remain concerned about security of data, systems, and services in the cloud.” *Id.* Second, PO cites it to support the allegation that there was a long-felt need to address evolving threats and undetected vulnerabilities. POR, 39 (citing EX2136, 2, 14). Specifically, the POR quotes and relies on as truthful exhibit 2136’s assertions that “traditional security

tools are often not suited for the challenges of dynamic, virtual and distributed cloud environments” and that “traditional security solutions either don’t work at all in cloud environments or have only limited functionality.” *Id.*

Exhibit 2137: Still addressing long-felt need, PO cites exhibit 2137 as further demonstrating industry concerns regarding security of data, systems, and services in the cloud. POR, 39. After citing the challenged ’031 patent and exhibit 2136, PO goes on to quote a statement in exhibit 2137 that the “journey to obtain the right level of visibility and control over the cloud workloads is still a challenge.” *Id.*, (citing EX2137, 1). PO thus relies on this statement as truthful when attempting to establish long-felt need. The exhibit states that it is by “Yuri Diogenes” (EX2137, 1), who is not a witness in this proceeding.

Exhibit 2148: This exhibit appears to be version 2 of a web article entitled “GigaOm Radar for Cloud Workload Security” and is cited in support of PO’s long-felt need argument. POR, 39-40; EX2148, 1. In support of an assertion that named inventor Avi Shua recognized the purported need and developed an approach that “redefined the industry,” PO cites a string of declaration paragraphs and other exhibits, including page 15 of exhibit 2148. POR, 39-40. PO’s reliance is confirmed by the corresponding testimony, which quotes the exhibit’s “Solution Overview,” including its assertion that PO’s “innovative SideScanning technology enables deep workload inspection without requiring agent deployment.” EX2074,

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Exhibits 2412, 2414, and 2416: [REDACTED]

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2. The Exhibits Remain Inadmissible Hearsay under F.R.E 602 and 701-703

PO’s witness testimony does not negate the above hearsay issues. First, PO frequently fails to cite to witness testimony addressing the inadmissible hearsay. What witness testimony PO does cite does not remedy the hearsay problems evident in the POR. Mr. Shua addresses almost none of the exhibits. While he does address one of the exhibits challenged in this motion (exhibit 2148), he does

not claim to have personal knowledge of the assertions relied upon therein, nor is he proffered as an expert witness such that F.R.E. 703 might apply. As for Dr. Kaeli, to the extent he cites the challenged exhibits in his testimony it, too, fails to overcome the hearsay issue because he does nothing more than recite the inadmissible hearsay as though it were his own opinion. F.R.E. 703.

First, the POR cites no relevant witness testimony with its reliance on exhibits 2134-2137. *See*, POR, 37 (citing EX2134; Shua, ¶¶79-85 (no discussion of EX2134)), 37 (citing EX2136; Shua, ¶¶79-85 (no discussion of EX2136)), 38-39 (citing EX2135, 3 but no expert citation), 39 (citing EX2136 but no expert citation), 39 (citing EX2137 but no expert citation).

Furthermore, while the POR does point to testimony from Mr. Shua citing exhibit 2148, that does not remedy the hearsay concern. *See* POR, 39 (citing EX2148; Shua, ¶188 (discussing EX2148); Kaeli, ¶182 (no discussion). PO does not assert that Mr. Shua is being relied on as an expert nor does Mr. Shua propose that he is providing expert opinion testimony. EX1402, 234:20-235:8 (“I can’t say that I’m an expert”). As a lay witness, Mr. Shua’s testimony is “not admissible” if based “on the truth of the facts asserted within [a] statement” unless he has “first-hand knowledge” of those statements. *Taxinet Corp. v. Leon*, 114 F.4th 1212, 1225 (11th Cir. 2024); F.R.E. 602 (prevents “testifying to the subject matter of the hearsay statement” without personal knowledge); *supra*, §II.A.1. Mr. Shua never

asserts he has “first-hand knowledge” of the inadmissible hearsay of exhibit 2148, discussed above. Shua, ¶88; F.R.E 701; *supra*, §II.A.1.

Similarly, Dr. Kaeli’s testimony likewise fails to remedy the identified hearsay issues. The POR cites Dr. Kaeli as relying on exhibits 2406, 2412, 2414, and 2416. *See, e.g.*, POR, 41-42 (citing Kaeli, ¶¶187 (EX2414), 192 (EX2412)), 43-44 (citing Kaeli, ¶196 (EX2406, EX2412)), 50 (citing Kaeli, ¶204 (EX2406)). However, that testimony reveals that Dr. Kaeli does not properly rely on these exhibits to form his technical opinions in areas of his expertise. F.R.E 703. Rather, Dr. Kaeli’s cited testimony provides little, if any, analysis and instead acts as “mouthpiece” for the inadmissible hearsay, taking the assertions in the exhibits as fact. *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1375; *United States v. Mejia*, 545 F.3d 179, 198 (2d Cir. 2008) (testimony improper because expert “did not analyze his source materials so much as repeat their contents”).

B. Wiz Confidential Documents Should Be Excluded per F.R.E. 403

PO’s use of exhibits 2400-2422 and 2425-2428 (“Wiz Confidential Documents”) contrary to its prior agreements unfairly prejudices Wiz, confuses the issues, and wastes time. These non-probative documents should be excluded.

This unfair prejudice stems from PO’s disregard for prior agreements regarding how it would use Wiz Confidential Documents. Before receiving the documents in district-court litigation, PO agreed that it would not use them for

“any other purpose” beyond that litigation. EX2057, ¶7. In negotiating the stay order following institution of these IPRs, PO further agreed that the district court was the appropriate venue to resolve disputes over using the other party’s protected information in the IPRs. EX2058; *see also* EX1112, ¶4 (PO proposing language for that purpose). Contrary to these agreements, PO sought and obtained discovery of these documents here, and Wiz continues to suffer unfair prejudice due to PO’s ongoing use of the fruits of this poisonous tree.

Fairness is a fundamental concern of F.R.E. 403, which states that evidence may be excluded “if its probative value is substantially outweighed by a danger of ... unfair prejudice....” F.R.E. 403; *United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001) (F.R.E. 403 safeguards fair trial). A party suffers “unfair” prejudice when an opposing party uses evidence from a prior proceeding in a manner inconsistent with the opposing party’s prior agreements regarding that evidence. *See Meyer v. Ten Mile Island Condo. Ass’n*, 2024 WL 1932891 at *1-3 (D. Colo. May 2, 2024). Exclusion is an appropriate remedy for this type of unfair prejudice. *Id.*; *see also Burkette v. Waring*, 2010 WL 3419463 at *6 (E.D. Mich. Aug. 27, 2010) (precluding plaintiff from using “fruits of his counsel’s discovery violation”); *Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 326 (S.D.N.Y. 1997) (precluding use of “wrongfully obtained” information “ameliorate[s] any prejudice”); *Faison v. Thornton*, 863 F. Supp. 1204, 1216 (D. Nev. 1992). As

explained below, Wiz’s Confidential Documents present unfair prejudice because PO obtained and continues to use them contrary to PO’s prior agreements, and the documents should be excluded because this unfair prejudice substantially outweighs the documents’ minimal probative value.

PO’s efforts to obtain Wiz Confidential Documents and its ongoing use of these ill-gotten documents present unfair prejudice. When a party agrees not to use confidential documents outside the proceeding in which the documents were obtained, using knowledge of those documents to seek their production in a separate IPR is improper. *Jazz Pharms. Inc. v. Amneal Pharms. LLC*, 2016 U.S. Dist. LEXIS 61373 at *2-7 (D.N.J. Jan. 22, 2016); *see also id.*, *10 (barring use of confidential documents “in any way” in IPR discovery requests); *Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research*, 2017 U.S. Dist. LEXIS 85962 at *7-10 (S.D.N.Y. June 5, 2017) (improper use of protected information to file separate lawsuit). Moreover, using evidence in a manner contrary to representations made in a different proceeding presents “unfair” prejudice under F.R.E. 403. *Meyer*, 2024 WL 1932891 at *1-4. In *Meyer*, the plaintiff’s attempt to introduce evidence related to a prior proceeding was contrary to the plaintiff’s prior settlement agreement. *Id.* The court excluded the evidence under F.R.E. 403 in part because the plaintiff’s use of evidence contrary to their prior agreement “risk[ed] unfair prejudice to Defendants.” *Id.*, at *3-4.

PO’s use of Wiz Confidential Documents presents the same type of unfair prejudice recognized in these cases. PO agreed not use the documents for “any other purpose” beyond the district court litigation (EX2057, ¶7), and it agreed that disputes over the use of these documents in the IPR were properly resolved before the district court. EX2058 (“[W]e want to ensure that if disputes over [confidential or AEO] information arise, there is a mechanism in place for the district court to evaluate them notwithstanding a stay.”); EX1112, ¶4 (stay-order provision proposed by PO for this purpose). Similar to *Jazz*, PO then violated its agreements by using the documents to craft discovery requests outside that litigation without using the agreed-upon process. See EX2053 (listing protected documents). As recognized in *Meyer*, PO’s use of these documents in a manner contrary to PO’s prior agreements subjects Wiz to unfair prejudice.

These documents should be excluded. Exclusion is appropriate when the evidence’s probative value is “substantially outweighed” by the dangers of, *inter alia*, unfair prejudice, confusing the issues, or wasting time. F.R.E. 403; *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 78 (Fed. Cir. 2012) (excluding evidence because its probative value was “dubious”). The dangers are significant. Forcing Wiz to respond to arguments based on illegitimate document use unfairly prejudices Wiz, as explained above. This is exacerbated by PO’s use of the documents to advance misplaced infringement allegations. POR, 54-56

(arguing Wiz “practices” the claims), 61 (infringement accusation). PO’s attempt to pre-emptively litigate infringement also confuses the issues and wastes time.

These significant dangers substantially outweigh any probative value the documents might have. This is not a close call since the documents have little to no probative value. PO relies on them for secondary considerations without proving nexus. *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373-74 (Fed. Cir. 2019) (no meaningful weight absent nexus); *E.g.*, EX1400, ¶¶68-74 (no presumption), 75-86 (evidence directed to known features). The probative value of exhibits 2406, 2412, 2414, and 2416 is further undercut by the hearsay problems explained above. That the improper infringement arguments are presented under the guise of “access + substantial similarity” copying arguments does not outweigh the significant dangers discussed above. Indeed, the documents have no probative value for copying since [REDACTED]

[REDACTED] refutes PO’s copying inference. EX1400, ¶¶105-20; EX1414.

III. CONCLUSION

Thus, each of the above exhibits should be excluded. If not excluded, they should be restricted and given no weight to minimize prejudice. F.R.E. 105.

Respectfully submitted,

Dated: August 21, 2025

/ Matthew A. Argenti /
Matthew A. Argenti, Lead Counsel
Reg. No. 61,836

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Petitioner’s Motion to Exclude
was served on August 21, 2025, at the following electronic service addresses:

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Dated: August 21, 2025

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