IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ORCA SECURITY LTD.,	)	
Plaintiff and Counterclaim-Defendant,	)	
v.	)	C.A. No. 23-758 (JLH)
WIZ, INC.,	)	
Defendant and Counterclaim-Plaintiff.	)	

JOINT CLAIM CONSTRUCTION BRIEF FOR ORCA ASSERTED PATENTS

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TABLE OF ABBREVIATIONS

Short Cite	Description
OOBr.	Orca Security Ltd.'s Opening Claim Construction Brief
WABr.	Wiz, Inc.'s Answering Claim Construction Brief
ORBr.	Orca Security Ltd.'s Reply Claim Construction Brief
WSBr.	Wiz, Inc.'s Sur-Reply Claim Construction Brief

I. INTRODUCTION

A. Plaintiff's Opening Position

Orca's patented technology revolutionized cloud security. Before Orca's inventions conventional wisdom led those in the field to adapt for the cloud environment traditional security tools designed for on-premise physical computers. In particular, these earlier efforts at cloud security used agents or network scanners extensively, leading to more expensive, less efficient, and less effective security in the cloud. Orca's inventions introduced a new, ingenious approach that analyzed virtual cloud assets using their snapshots, which vastly improved visibility into a cloud environment, provided deeper and better results, and improved speed.

After learning about Orca's innovative new approach to cloud security, Wiz aggressively copied it. Unsurprisingly, Wiz's copycat products infringe upon at least Orca's six asserted patents in this action: U.S. Patent Numbers 11,663,031 (Ex. 1), 11,663,032 (Ex. 2), 11,693,685 (Ex. 3), 11,726,809 (Ex. 4), 11,740,926 (Ex. 5), 11,775,326 (Ex. 6) ("Orca's Asserted Patents"). Orca's Asserted Patents each claim priority to the same provisional patent application filed in January 2019, and share substantially similar specifications.

Orca's asserted claims[1] use terminology with well-accepted meanings in the context of cloud security. Orca's proposed constructions reflect those plain and ordinary meanings in the context of the specification and the prosecution history. Wiz, by contrast, attempts to contort the claims, interpreting them inconsistently with the intrinsic record to manufacture indefiniteness and transparent noninfringement positions in an effort to escape the consequences of infringing Orca's patented inventions. The Court should reject Wiz's constructions and adopt Orca's.

[1] Orca asserts the following claims in this action: '031 patent, cls. 1-16; '032 patent, cls. 1-25; '685 patent, cls. 1-22; '809 patent, cls. 1-23; '926 patent, cls. 1-15; '326 patent, cls. 1-28.

B. Defendant's Answering Position

Orca Security Ltd. ("Orca") claims infringement of U.S. Patent Nos. 11,663,031 (the "'031 Patent"), 11,663,032 (the "'032 Patent"), 11,693,685 (the "'685 Patent"), 11,726,809 (the "'809 Patent"), 11,740,926 (the "'926 Patent"), and 11,775,326 (the "'326 Patent") (collectively, the "Orca Asserted Patents"). All patents claim priority to the same application and are in the same patent family.[2] Wiz Inc.'s ("Wiz") clear, common-sense constructions should be adopted as they are anchored firmly in the intrinsic record, including the claim language itself.

By contrast, Orca's proposals are contrary to the understanding of one of ordinary skill and the intrinsic record. Moreover, all of Orca Asserted Patents are subject to petitions for *inter partes* review (IPR) at the PTO. In its recent preliminary patent owner responses (POPRs) to three IPR petitions, Orca has staked out fundamentally different views from those it asserts in this litigation. Put simply, Orca is attempting to have it both ways. Orca's attempt to argue one thing to the Patent Office while arguing the opposite to this Court should be rejected. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) ("A patent may not, like a 'nose of wax,' be twisted one way [for validity] and another to find infringement.").[3]

1. Recent IPR History of the Orca Asserted Patents

Wiz has filed IPRs against each of the Orca Asserted Patents. *See* D.I. 80 (IPR2024-00863, IPR2024-00864, and IPR2024-00865), D.I. 110 (IPR2024-01109), D.I. 126 (IPR2024-01190 and IPR2024-01191). Because it informs many of the parties' claim construction disputes, it is helpful

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[2] While all of the Orca Asserted Patents claim priority to the same US Provisional Application 62/797,718, there are two different base patent applications within the family. The '031 Patent is a continuation of abandoned Application No. 16/750,556, while all the other Asserted Patents are continuations of Application No. 16/585,967. Therefore, the '031 Patent has additional content in its specification than the other Orca Asserted Patents, which share a common specification.

[3] Unless otherwise noted, emphasis is added and internal quotations and citations are omitted.

to review representations that Orca has affirmatively made as the Patent Owner to the Patent Office regarding the same terms of the Orca Asserted Patents at issue here.

Wiz filed IPRs that included as a primary prior art reference a patent assigned to Amazon, filed on May 19, 2017 with the first named inventor Veselov (U.S. Patent No. 11,216,563 (hereafter "Veselov")). The petition explained how Veselov disclosed the same "agentless" security solution as that described in Orca's Asserted Patents. Ex. 27. Faced with this invalidating prior art, which directly contradicts Orca's narrative in this litigation, Orca filed POPRs arguing the scope of its claims narrowly. Orca made three arguments that are directly relevant to pending claim construction disputes.

First, Orca argues at length as to what is—and is not—a snapshot in the context of the claims. *E.g.*, Ex. 28 at 13 (an "instantiated VM is not a 'snapshot'[.]"); *see also id*. at 44 ("POSAs would have known that VM images and VM snapshots are not the same"). All of Orca's statements support Wiz's proposed construction for "snapshot." By contrast, Orca argues before this Court that snapshot is simply a "a copy of data," which contradicts it prior arguments.

Second, Orca argued that Veselov does not teach "analysis of snapshots." This is a critical phrase that appears in every asserted claim in some form. Orca repeatedly argued that "'analyzing the at least one snapshot' encompass[es] ***analyzing the snapshot itself, but not VMs instantiated from a snapshot***." *See* Ex. 28 at 13 (citing to Kaeli Decl. (Ex. 29), ¶¶ 29-30); *see also id*. at 45 ("analysis of a VM instantiated from a snapshot is not an analysis of a snapshot"). This directly supports Wiz's proposed construction, which quotes Orca's own statement to the PTO. But Orca now argues to this Court that the phrase can cover indirectly analyzing any "data about the snapshot," again contrary to its own arguments. *See infra* at 64-65 (OOBr.).

Third, certain claims require reporting results as alerts. Orca, in its POPRs, argued that reporting results and alerts are different. "[R]eporting results and reporting results 'as alerts' are different." Ex. 28 at 47; *see also id.* ("reporting 'assessment results' and reporting detected vulnerabilities 'as alerts'" are not equivalent). Orca now argues here that an "alert" can simply be a "report"—*i.e.*, that reports and alerts are not different. *See infra* at 37 (OOBr.) (arguing "alerts" includes "***reporting*** detected vulnerabilities to SIEM").

C. Plaintiff's Reply Position

Wiz proposes constructions for terms in Orca's asserted patents that deviate from the meanings persons of ordinary skill in the art would ascribe, improperly attempting to rewrite the claims to conjure non-infringement and indefiniteness positions and inviting legal error. Orca, in contrast, proposes constructions that are supported by the plain language of the asserted claims, consistent with the intrinsic and extrinsic records, and faithful to the meanings skilled artisans would attribute to them. Orca respectfully requests that the Court adopt its proposed constructions.

1. Recent IPR Proceedings Fail to Support Wiz's Arguments and Proposed Constructions

In much of its responsive brief, including its lead argument, Wiz eschews proper claim construction analysis. Instead, Wiz incorrectly characterizes statements Orca made to the USPTO while opposing Wiz's petitions for *inter partes* review of Orca's asserted patents, and then attacks those mischaracterizations. *See, e.g.*, *supra* at 2-4 (WABr.); *infra* at 25-26, 38-39, 65-67 (WABr.). But Wiz's assertions that Orca "staked out fundamentally different views" before the USPTO and thus is "attempting to have it both ways" are meritless.

Specifically, Orca has not "contradict[ed] it[s] prior arguments" by "argu[ing] before this Court that [a] snapshot is simply [] 'a copy of data.'" *Supra* at 3 (WABr.). That is not Orca's position. As the asserted patents' claims and specifications demonstrate, a "snapshot" is "a copy

of data on a virtual disk (or disk file) at a given point in time." *Infra* at 18-21 (OOBr.); *infra* Section II.B.3 (ORBr.). Similarly, there is no inconsistency between (i) Orca's correct explanation in the IPR proceedings that skilled artisans would know an evaluation of a *virtual machine* is not an analysis of a *snapshot* just because that virtual machine was instantiated from a snapshot and (ii) Orca's equally correct explanation that "indirect analysis of a snapshot," for example, the analysis of "a copy of the snapshot or data about the snapshot," may be an analysis of a snapshot. *Infra* at 64-65 (OOBr.). Indeed, the latter point comes directly from the claims. *Id.*; *see also, e.g.*, '809 patent at cl. 23 ("analyzing the snapshot … comprises analyzing the copy of the snapshot"); *infra* Section II.H.3 (ORBr.). And, Orca has not taken inconsistent positions on what constitutes an "alert"; it does not "now argue[] that an 'alert' can simply be a 'report.'" *Supra* at 4 (WABr.). Rather, as Orca explained in IPR proceedings, and maintains here, "reporting results and reporting results 'as alerts' are different." Ex. 28 (Orca's Preliminary Response) at 47; *Infra* at 34-37 (OOBr.); *infra* Section II.C.3 (ORBr.). The Court should reject Wiz's attempts to manufacture inconsistencies in Orca's positions before the USPTO and this Court where none exist.

D. Defendant's Sur-Reply Position

Wiz demonstrated in its Answering Brief why its clear, common-sense constructions, which are anchored firmly in the intrinsic record, should be adopted. Orca's Reply Brief, on the other hand, is notable for what it omits. In its Answering Brief, Wiz identified how Orca's own cited evidence supported Wiz's construction of "snapshot." *See infra* at 22-23 (WABr.) (citing Exs. 10-12). Orca's response in Reply: Silence. *Compare infra* at 22-23 *with infra* at 27-31 (ORBr.) (no reference to Exs. 10-12). Wiz identified how Orca's own technical expert supported its construction for "alerts." *See infra* at 38-39 (WABr.) (discussing Orca's expert testimony). Orca's response referred to the evidence quoted by its own expert as "a third-party patent," while omitting its own expert's reliance on this same evidence in IPR, making it intrinsic evidence. *See*

infra at 41 (ORBr.); *Artec Eur. S.À.R.L. v. Shenzhen Creality 3D Tech. Co.*, No. 22-cv-1676, 2024 WL 4479810, at *8-10 (E.D.N.Y. Oct. 11, 2024).

The reason for Orca's silence and obfuscation is readily discernable. All the Orca Asserted Patents are subject to petitions for *inter partes* review (IPR) at the PTO. In its recent preliminary patent owner responses (POPRs) to three IPR petitions, Orca has staked out fundamentally different views from those it asserts in this litigation: Before the Patent Office, to infringe, one must the analyze the "snapshot itself." Ex. 25 at 13. Before this Court, one can analyze data about the snapshot "indirectly." *See infra* at 64 (OOBr.). Before the Patent Office, a "snapshot" and an "image" of a disk are different. Before this Court, a "snapshot" can be any "data" copied at a point in time, which includes "images" according to Orca's own logic. Put simply, Orca is attempting to have it both ways. Orca's attempts to argue one thing to the Patent Office while arguing the opposite to this Court should be rejected. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) ("A patent may not, like a 'nose of wax,' be twisted one way [for validity] and another to find infringement.").

II. DISPUTED CONSTRUCTIONS[4]

A. "(i) Taking at Least One Snapshot, and (ii) Requesting Taking at Least One Snapshot of the Virtual Machine at Rest" ('031 Patent, claims 1, 9, 16)

Plaintiff's Proposed Construction	Defendant's Proposed Construction
the clause "of the virtual machine at rest" applies to "(i) taking at least one snapshot" and "(ii) requesting taking at least one snapshot."	Plain reading of the term as written. The clause "of the virtual machine at rest" applies only to "(ii) requesting taking at least one snapshot"

1. Plaintiff's Opening Position

The dispute with respect to this term is unusual in that it does not ask the Court to define

[4] At the time of filing this Joint Brief, the parties had no agreed-upon constructions for Orca patent terms.

specific words in the claims, but asks the Court instead to resolve the parties' dispute over whether the phrase "of the virtual machine at rest" modifies both of two listed clauses—"(i) taking at least one snapshot" and "(ii) requesting taking at least one snapshot"—as Orca contends, or only the second "requesting taking" clause, as Wiz contends. This dispute arose in IPR proceedings brought by Wiz, in which it alleges that the claims of the '031 patent do not require the claimed snapshot to be taken of a "virtual machine at rest." This attempt to broaden the claims should be rejected, and Orca's construction adopted.

The claim language establishes "of the virtual machine at rest" applies to both "(i) taking at least one snapshot" and "(ii) requesting taking at least one snapshot." For one, both clauses are in the same limitation which ends by requiring "wherein ***the*** at least one snapshot represents a copy of the virtual disks of the virtual machine at a point of time." This last clause referring to "***the***" snapshot tells a POSA that there is only one snapshot, not two different ones of two different datasets. Subsequent limitations then refer back to the singular "at least one snapshot" without differentiating between the "taking" and "requesting taking" clauses or whether one is of a virtual machine at rest and the other is not. *See, e.g.,* '031 patent at cl. 1 ("analyze **the at least one snapshot** to detect vulnerabilities, wherein … the virtual machine is inactive"), cl. 5 ("The system of claim 1, wherein **the at least one snapshot** includes…"), cls. 6-7 (same). Given that there is only "the" snapshot, the requirement that it be of "the virtual machine at rest" must apply to the snapshot regardless of whether it is taken or requested. Read as Wiz does, the claims would incoherently permit one snapshot to be taken of something other than the virtual machine at rest, while the requested snapshot must only be of the virtual machine at rest. This makes no sense. Wiz's attempt to broaden the claims to permit two different snapshots—one of a virtual machine at rest and the other not—cannot be squared with the clear claim language.

Moreover, the snapshot of the claims must be of something. The only something set forth in the claims is "the virtual machine at rest," which logically applies to both "(i) taking at least one snapshot" and "(ii) requesting taking at least one snapshot." *See Paroline v. United States*, 572 U.S. 434, 447 (2014) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.").

The '031 patent's written description repeatedly emphasizes that the claimed invention is applied to virtual machines "at rest." The title of the '031 patent, for example, is "Techniques for Securing Virtual Cloud Assets ***at Rest*** Against Cyber Threats." *See Wastow Enters., LLC v. Truckmovers.com, Inc.*, 855 F. App'x 748, 750 (Fed. Cir. 2021) (construing "device" to mean "universal folding boom trailer" because, in part, the "patent's title—'Universal Folding Boom Trailer'—also indicates that a relevant artisan would understand that the claims require a universal folding boom trailer"). The rest of the written description then consistently emphasizes VMs and other virtual cloud assets "at rest," including in the Abstract, the figures, the problem to be solved, and the disclosed embodiments. *See* '031 patent at Abstract (securing virtual cloud assets ***at rest***), Fig. 2 ("scan a VM at rest"), 2:15-36 (identifying deficiencies in prior art approaches that they do not allow "detection of vulnerabilities in data ***at rest***"), 2:56-57 ("a method for securing virtual cloud assets ***at rest*** against cyber threats"), 2:57-67 (same), 3:1-14 (same), 3:45-59 ("techniques disclosed herein include techniques for securing data ***at rest*** or machines ***at rest***" the "disclosed techniques are utilized to scan for … machines ***at rest***"); *see also id.* at 6:26-27 ("[T]he VM 119-2 is in its inactive state (***at rest***) during its analysis"), 8:42 ("a snapshot of the VM, ***at rest***, is accessed"). These "clear, repeated, and consistent statements" support construing the claims to require snapshots of VMs "at rest" whether taken or requested. *SkinMedica, Inc. v. Histogen Inc.*,

727 F.3d 1187, 1203 (Fed. Cir. 2013).

The prosecution history eliminates any doubt and makes clear "taking" the snapshot is also done on "the virtual machine at rest," not just "requesting taking" that snapshot. Following a prior art rejection, Orca amended the originally filed claims to recite "perform at least one of taking a snapshot of the virtual machine at rest, or requesting the snapshot of the virtual machine at rest." As amended, the "virtual machine at rest" was initially repeated twice to explicitly modify both the "taking" and "requesting" clauses:

> "~~generate~~ perform at least one of taking a snapshot of the virtual machine at rest, or requesting the snapshot of the ~~virtual disks of the~~ virtual machine at rest, wherein the snapshot represents a copy of the virtual disks of the virtual machine at a point in time[.]"

Ex. 7 ('031 patent prosecution history) at 12 (underlining and strikethrough in original), 14, 16. In the arguments accompanying these amendments, Orca used the language now in the claims, referring three times to these claim amendments as:

> "perform[ing] at least one of: (i) taking at least one snapshot, and (ii) requesting taking at least one snapshot of the virtual machine at rest, wherein the at least one snapshot represents a copy of the virtual disks of the virtual machine at a point in time;"

Ex. 7 at 19-21. Orca then made clear that, this phraseology did not change the meaning of the amended limitation despite not repeating "virtual machine at rest" in the "taking" clause; rather, it still meant that the "taking" clause was also of the "virtual machine at rest." In particular, Orca explained that Derbeko does not "describe ***taking*** and analyzing a snapshot ***while the VM is at rest***," because, in Derbeko, "***the VM is not at rest***, … but is running (e.g., active)" and Bansal just "uses snapshots to backup a virtual machine" and thus, does not "solve or attempt to solve the problem addressed by the pending claims"—"***analyz[ing]*** a snapshot taken ***while the VM is at rest*** to detect vulnerabilities." *Id.* (emphasis altered). Following an Examiner interview, Orca amended

the limitations to have the form repeatedly presented in its arguments which made clear both the taking and requesting clauses were "of the virtual machine at rest." *Id.* at 2, 20-21 (emphasis omitted). The scope of the claims should be read consistently with the patent prosecution: that both the "taking" and "requesting taking" of the snapshot must be of a VM at rest. *See Personalized Media Commc'ns, LLC v. Apple Inc.*, 952 F.3d 1336, 1345 (Fed. Cir. 2020) (recognizing importance of "[a]n applicant's repeated and consistent remarks during prosecution").

2. Defendant's Answering Position

Wiz proposes a straightforward reading of the relevant clause of the claim, which states:

> perform at least one of: (i) taking at least one snapshot, and (ii) requesting taking at least one snapshot of the virtual machine at rest, wherein the at least one snapshot represents a copy of the virtual disks of the virtual machine at a point in time;

Ex. 1 at claims 1, 9, 16. As written, the clause shows that the phrase "the virtual machine at rest" applies to (ii). There is no indication it applies to (i). The use of commas within the clause confirms this reading. There is no comma before "of the virtual machine at rest," but there is a comma afterwards, before the wherein clause. The use of a numbered list also supports the structure of the claim as providing two different options, (i) and (ii). The opening phrase "perform at least one of" further supports the reading of two different options. Option (ii) requires that the virtual machine is at rest. Option (i) does not contain such a requirement.

The remainder of the claim language is consistent with this approach. The "wherein" clause that follows refers to "the at least one snapshot"—that is, it refers back to the snapshot introduced in either option (i) or (ii). This is consistent with the claim language, which requires "perform[ing] at least one of" the two options. *See Iridescent Networks, Inc. v. AT&T Mobility, LLC*, No. 16-01003, 2017 WL 3033400, at *8 (E.D. Tex. July 18, 2017), *aff'd*, 933 F.3d 1345 (Fed. Cir. 2019) ("the 'doctrine of the last antecedent' states that '[r]eferential and qualifying words and

phrases, where no contrary intention appears, refer solely to the last antecedent'") (quoting *Finisar Corp. v. DirecTV Grp., Inc.,* 523 F.3d 1323, 1336 (Fed. Cir. 2008).[5]

The rest of the intrinsic record is in accord with Wiz's common-sense proposal. *See* Ex. 1 at 5:40-42 ("Multiple snapshots of a VM can be created at multiple possible point-in-time restore points."); Ex. 7 at 19 ("perform at least one of: (i) taking at least one snapshot, and (ii) requesting taking at least one snapshot of the virtual machine at rest, wherein the at least one snapshot represents a copy of the virtual disks of the virtual machine at a point in time").

Orca now seeks to rewrite the claim based on three arguments, none of which find support in the intrinsic record. First, Orca argues that the "wherein" clause following the comma after option (ii) means "there is only one snapshot" and that the snapshot is of a virtual machine at rest. *See supra* at 7 (OOBr.). But the last point is a non sequitur. Wiz does not dispute that the "wherein" clause refers to a particular snapshot under principles of antecedent basis. That is irrelevant to the issue of whether that snapshot must be taken of a VM at rest or not. Rather, the claim requires that one of two options be performed, both of which result in a snapshot: one requires a VM at rest, the other does not. The other claim language referring to "the snapshot" is consistent with this reading. Orca quotes a portion of claim 1 of the '031 Patent as allegedly in support: "analyze the at least one snapshot to detect vulnerabilities, wherein …, the virtual machine is inactive." *Id.* But they omit the portion of the claim language clarifying it only speaks to "***during the detection of the vulnerabilities***" the virtual machine is at rest. Ex. 1 at claim 1. The

[5] Orca cites *Paroline v. United States*, 572 U.S. 434 (2014), but that decision supports Wiz, not Orca. It states that wording of an element of a clause was found as "applicable to all" of the earlier wording of a clause because the section employed the use of the word "including" followed by a listing of elements separated by semicolons, with an "and" inserted prior to the last element. *Id.* at 447. There is no similar "including" language present here.

clause under construction speaks to whether the virtual machine is at rest ***when taking a snapshot***. *Id.* That the VM would be at rest at one time (during "detection") does not mean it is necessarily at rest at another period of time (during "taking"). Nor does Orca's argument that "the snapshot of the claims must be of something" make sense. Wiz does not contend the snapshot need not "be of something," but that the claim language simply be read as written.

Second, Orca argues that the specification supports its contrary reading. But the specification is not limited to at-rest capture as Orca alleges. *See, e.g.*, Ex. 1 at 6:5-9. This argument also misses the mark because it ignores that limitations regarding virtual machines being at rest are present in the claims under both parties' proposals. It is one of the options provided by the claim when taking the snapshot—option (ii). *Id.* at claim 1. And the claim later requires that the virtual machine be at rest during "detect[ing]." *Id.* That the title, and specification discusses the concept of virtual machines being at rest does not contradict the plain reading of the claim, which includes one option for taking a snapshot while the virtual machine is at rest and another option with no such requirement.

Third, Orca argues the prosecution history supports its contrary reading to the plain language. It does not. As with its specification argument, the prosecution history of the '031 patent is simply discussing other parts of the claim that do require the virtual machine be at rest. Orca also fails to mention that, just before allowance, Orca expressly removed the "at rest" requirement from the first clause. Ex. 7 at 2. Moreover, they did so without informing the Examiner of the change since the amendment was presented without marking the removal as required by Patent Office regulations. *Id.*; 37 C.F.R. §1.121(c)(2) ("The text of any deleted matter must be shown by strike-through…."). Orca cannot justify its attempt to read a limitation into the claims based on arguments made during prosecution *before* that limitation was removed by Orca,

especially when the removal of the limitation was hidden from the Examiner. *See United States v. Telectronics, Inc.*, 857 F.2d 778, 782-83 (Fed. Cir. 1988) (rejecting attempt to read in limitation that was added during prosecution and then removed in a subsequent amendment).

Orca's attempt to rewrite its claim should be rejected. In any event, Orca's statements fall far short of the "clear and unambiguous disclaimer" necessary to support the disavowal of claim scope that Orca urges. *Schwing GmbH v. Putzmeister Aktiengesellschaft & Putzmeister*, 305 F.3d 1318, 1324 (Fed. Cir. 2002) (prosecution history "cannot be used to limit the scope of a claim unless the applicant took a position before the PTO that would lead a competitor to believe that the applicant had disavowed coverage of the relevant subject matter").

3. Plaintiff's Reply Position

Independent claims 1, 9, and 16 of the '031 patent include limitations reciting "(i) taking at least one snapshot, and (ii) requesting taking at least one snapshot of the virtual machine at rest." '031 patent at cls. 1, 9, 16. Wiz contends there is "no indication" the phrase "of the virtual machine at rest" in these limitations applies to "taking at least one snapshot" because "[t]here is no comma before" that phrase in the limitations' "numbered list." *Supra* at 10 (WABr.). But Wiz's argument incorrectly elevates form over substance, as the '031 patent's claims, specification, and prosecution history all demonstrate that the phrase "of the virtual machine at rest" modifies both of the two preceding clauses. *Supra* at 6-10 (OOBr.).

First, in the claims, both clauses are in the same limitation, which ends by requiring "wherein ***the*** at least one snapshot represents a copy of the virtual disks of the virtual machine at a point in time." '031 patent at cls. 1, 9, 16. And, notwithstanding Wiz's contrary assertion, persons of ordinary skill in the art would understand from the reference to "***the***" snapshot that there is only one snapshot—not two different snapshots of two different datasets as required by Wiz's interpretation. *Supra* at 7 (OOBr.). Moreover, snapshots must be of something, and the only

something set forth in the claims is "the virtual machine at rest," which therefore logically applies to both "(i) taking at least one snapshot" and "(ii) requesting taking at least one snapshot." *Supra* at 8 (OOBr.); *Paroline v. United States*, 572 U.S. 434, 447 (2014) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.").[6] Wiz argues that it "does not contend the snapshot need not 'be of something,' but that the claim language simply be read as written." *Supra* at 12 (WABr.). But Wiz does not identify what it contends the requisite "something" is, and the claims recite only "the virtual machine at rest." '031 patent at cls. 1, 9, 16. Wiz's attempt to broaden the claims beyond this cannot be squared with the clear claim language.[7]

Second, the '031 patent's written description repeatedly emphasizes that the claimed invention is applied to virtual machines "at rest," beginning with its title and continuing throughout the specification. *See Supra* at 8 (OOBr.); *see also, e.g.*, '031 patent at Title ("Techniques for Securing Virtual Cloud Assets ***at Rest*** Against Cyber Threats"), Abstract, Fig. 2, 2:15-36, 2:56-67, 3:1-14, 3:45-59, 6:26-27, 8:42. The patent's "clear, repeated, and consistent statements" support construing the claims to require snapshots of VMs "at rest," whether taken or requested. *SkinMedica, Inc. v. Histogen, Inc.*, 727 F.3d 1187, 1203 (Fed. Cir. 2013). In support of its argument that "the specification is not limited to at-rest capture," Wiz cites five lines in the

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[6] *Paroline* does not "support[] Wiz," as Wiz contends. *Supra* at 11 n.5 (WABr.). The canon of construction reiterated in *Paroline*, and quoted above, is not limited to only "use of the word 'including' followed by a listing of elements separated by semicolons, with an 'and' inserted prior to the last element" (*id.*). *See Paroline*, 572 U.S. at 447.

[7] The one case Wiz relies on, *Iridescent Networks, Inc. v. AT&T Mobility, LLC*, is inapposite. Whereas *Iridescent* did note that "the doctrine of the last antecedent states that referential and qualifying words and phrases … refer solely to the last antecedent," it further recognized this doctrine applies only where—unlike in this case—there is no evidence of a contrary intention. 2017 WL 3033400, at *8 (E.D. Tex. July 18, 2017).

specification noting that captures are possible in different states, e.g., when a VM "is about to transition into an inactive state or when the same VM [] is at rest." *Supra* at 12 (WABr.); '031 patent at 6:5-9. But it comes as no surprise the '031 patent acknowledges that other types of captures are possible; it shares the same parent application as Orca's other asserted patents, which are ***not*** limited to securing virtual machines "at rest." *See, e.g.*, '032 patent at Title, Abstract. The '031 patent's claims, however, are directed to and consistently described as "securing virtual assets ***at rest***." '031 patent at Title, Abstract, cls. 1, 9, 16; *see also TIP Sys. v. Phillips & Brooks/Gladwin, Inc.*, 529 F.3d 1364, 1373 (Fed. Cir. 2008) (alternative embodiments "do[] not outweigh the language of the claim, especially when the court's construction is supported by the intrinsic evidence"); *Acco Brands v. Micro Sec. Devices*, 346 F.3d 1075, 1079 (Fed. Cir. 2003) ("The presence in the [patent's] specification of embodiments carried over from the parent application, but claimed in other patents, does not serve to broaden the scope of the [patent's] claims.").

Third, the '031 patent's prosecution history confirms the claimed "taking" of a snapshot is also done on "the virtual machine at rest." *Supra* at 9-10 (OOBr.). Wiz contends that Orca is attempting to "read a limitation into the claims" that it previously removed and allegedly "hid[] from the Examiner." *Supra* at 12-13 (WABr.). This is incorrect. To the contrary, the prosecution history shows that Orca understood—as a skilled artisan would—that the limitations of the issued claims have the same scope and meaning as limitations submitted during prosecution that used "the virtual machine at rest" language twice. *Supra* at 9-10 (OOBr.). As previously explained, Orca made multiple arguments to the USPTO during prosecution using the language now in the claims to distinguish prior art on the basis that it did not "describe ***taking*** and analyzing a snapshot while the VM is ***at rest***." *Id.*; *see also Personalized Media Commc'ns, LLC v. Apple Inc.*, 952 F.3d 1336, 1345 (Fed. Cir. 2020) (recognizing importance of "[a]n applicant's repeated and consistent

remarks during prosecution"); *Edwards Lifesciences LLC v. Cook Inc.*, 582 F.3d 1322, 1330-31 (Fed. Cir. 2009) (construing "graft" to require it be "intraluminal" despite claim amendment that "delete[d] the word 'intraluminal,' modifying 'graft'" because accompanying remarks indicated inventors applied the same meaning to "graft" before and after the amendment).

4. Defendant's Sur-Reply Position

In its Reply, Orca does not meaningfully address Wiz's arguments, but simply restates its own positions from its opening brief. Wiz's arguments are thus effectively unrebutted. At bottom, Orca seeks the construction of the claim it now wishes it drafted, but elected not to.

During prosecution, the claims originally recited "at rest" twice in this clause: once in subpart (i), and once in subpart (ii). This is the meaning that Orca seeks now. But just before allowance, Orca removed the "at rest" requirement from the first clause. Ex. 7 at 2. Orca now argues that the claims "have the same scope and meaning" when the claims previously used "the virtual machine at rest" language twice (*see supra* at 15 (ORBr.))—in other words, that this amendment was meaningless. Orca is wrong. The claim language controls. *See DSW, Inc. v. Shoe Pavilion, Inc.*, 537 F.3d 1342, 1347 (Fed. Cir. 2008). The prosecution history firmly supports Wiz.

Wiz also explained how the grammar and claim language support the common sense reading of this phrase that Wiz proposes. *See supra* at 10-11(WABr.). Orca's response is not that Wiz is wrong, but that relying on the claim language "elevates form over substance." *See supra* at 13 (ORBr.). Relying on claim language is not merely "elevat[ing] form over substance." Rather, "as in all aspects of claim construction, 'the name of the game is the claim.'" *Apple Inc. v. Motorola, Inc.*, 757 F. 3d 1286, 1298 (Fed. Cir. 2014). Orca then repeats—almost verbatim—its argument that the claim language references "the snapshot" and therefore there is only one snapshot, not two. Wiz already addressed that issue in its Answer. *See supra* at 11 (WABr.) ("Wiz

does not dispute that the 'wherein' clause refers to a particular snapshot under principles of antecedent basis. That is irrelevant to the issue of whether that snapshot must be taken of a VM at rest or not."). Orca provides no response in its Reply, and conspicuously does not rebut Wiz's analysis of the surrounding claim language. *Compare supra* at 11-12 (WABr.) *with supra* at 13-16 (ORBr.).

The same is true for Orca's second argument regarding the '031 patent's written description. Orca repeats its argument that the specification refers to the VM being at rest. *See supra* at 14-15 (ORBr.). Again, Wiz addressed this. *See supra* at 12 (WABr.). As Wiz explained, the specification is not limited to at-rest capture (*see supra* at 12 (WABr.)), which Orca now concedes. *See supra* at 15 (ORBr.). Wiz also explained that other parts of the claims ***separately*** require a VM to be at rest during vulnerability detection. *See supra* at 12 (WABr.) (Orca "ignores that limitations regarding virtual machines being at rest are present in the claims under both parties' proposals."). Wiz cannot be omitting the "at rest" concept when it is captured by the '031 patent claims regardless. Orca provides no rebuttal to this point.[8]

[8] Wiz's construction is supported by Orca's cited case law as well. In *TIP Systems, LLC v. Phillips & Brooks/Gladwin, Inc.*, the Federal Circuit found "no error by the district court in relying heavily on the claim language to construe the claim term." 529 F.3d 1364, 1369 (Fed. Cir. 2008) (rejected patent holder's argument that the term needed a different construction in light of the specification.) Orca also cites to *Acco Brands v. Micro Security Devices*, where the Court held that specific embodiments described in the specification were omitted from the claims and that the patent holder could not broaden the language of the claims simply because the specification described those embodiments. 346 F.3d 1075, 1079 (Fed. Cir. 2003). Here, Wiz's construction is supported by the claim language itself.

B. "Snapshot" ('031 Patent, claims 1, 5-9, 13-16; '032 Patent, claims 1, 7-10, 13-25; '685 Patent, claims 1, 2, 4, 8-14, 16; '809 Patent, claims 1, 6-9, 12-23; '926 Patent, claims 1, 5, 8, 12-15 ; '326 Patent, claims 1, 2, 4, 5, 9, 10, 13, 14)

Orca's Proposed Construction	Wiz's Proposed Construction
Plain and ordinary meaning, "a copy of data on a virtual disk (or disk file) at a given point in time."	"An offline backup file or delta file of the machine's virtual disk (or disk file) at a given point in time that includes a change log for the virtual disk."

1. Plaintiff's Opening Position

The parties agree that "snapshot" should be construed in the same way across all of Orca's Asserted Patents, and that a snapshot is of "a virtual disk (or disk file) at a given point in time." The dispute is whether a snapshot is "a copy of data" (Orca's position), or "an offline backup file or delta file of the machine" that must "include[] a change log for the virtual disk" (Wiz's position). As explained below, Orca's proposed construction reflects the plain meaning of "snapshot," a well-established term the context of cloud computing, consistent with how the term is used consistently throughout the intrinsic and extrinsic evidence. Wiz's construction, in contrast, should be rejected because it injects requirements not found in the intrinsic evidence and renders claims superfluous.

Orca's proposal—that a snapshot is a "copy of data"—finds direct support in the claims. For example, claim 1 of the '031 patent claims a "system for inspecting ***data***" and specifies "the at least one snapshot represents ***a copy*** of the virtual disks of the virtual machine at a point in time." '031 patent at cl. 1; *see also, e.g.,* '685 patent at cl. 1 ("system for inspecting data"), cl. 13 ("method for inspecting data."). Other claims similarly recite analyzing "the snapshot" to determine "cyber threats" that are "***based on data*** stored on the virtual disk." '926 patent at cls. 1, 14, 15. The claims uniformly support that a snapshot is a copy of "data" on a virtual disk.

The specifications confirm this, stating in the context of a virtual machine (VM) that a "snapshot is a copy of the machine's virtual disk (or disk file) at a given point in time." '031 patent

at 5:35-36; *see also* ’032 patent at 4:60-61; ’685 patent at 4:58-59; ’809 patent at 4:60-61; ’926 patent at 4:60-61; ’326 patent at 4:60-61. This passage is nearly identical to Orca’s proposed construction. The patents elaborate that a “snapshot” contains the “data” that was written on a VM. *See, e.g.,* ’031 patent at 5:39-40;’032 patent at 4:64-65. The specifications then explain the same is true not only for VMs but for “any virtual cloud asset including, but not limited to, a software container, a micro-service, a serverless function, and the like.” *See, e.g.,* ’031 patent at 4:11-14; ’032 patent at 3:51-54. That a snapshot is a “copy of data on a virtual disk” properly encompasses virtual machines as recited in some claims and these other protected virtual cloud assets as recited in others. *See, e.g.,* ’031 patent at cl. 1 (reciting snapshots of “a virtual machine at rest”); ’032 patent at cl. 1 (reciting snapshots of a “protected virtual cloud asset”).

The prosecution history of the ’031 patent provides still more support for Orca’s construction. The Examiner noted “per Applicant’s disclosure, a VM’s snapshot ‘[i]s a copy of the machine’s virtual disk (or disk file) at a given point in time,’” and “a snapshot is a particular copy of the VM disk file at a given point (i.e., past) in time.” Ex. 7 at 30.

Even Wiz’s IPR expert conceded that “[s]napshots were well known and had been used to create a ***point in time copy*** of a virtual machine since at least 2005.” Ex. 8 (IPR2024-00863, Ex. 1002 (Decl. of Dr. Stavrou)) ¶ 32; *see also* IPR2024-00864, -00865, -01109, -01190, -01191, Ex. 1002 ¶ 32 (same). And Wiz’s own patents state “a snapshot is a copy of a disk at a point in time.” *See, e.g.,* Ex. 9 (U.S. Patent Pub. No. 2023/0418931A1) ¶ 10. And numerous other sources are consistent, including from external cloud computing providers expressly referenced in the Orca Asserted Patent specifications. ’031 patent at 3:65-67 (referring to Amazon AWS, Microsoft Azure, and Google Cloud); Ex. 10 (Amazon) (“Snapshots are a point in time copy of your data.”); Ex. 11 (Microsoft) (“A snapshot is a full, read-only copy of a virtual hard disk (VHD).”); Ex. 12

(Google) ("snapshots incrementally back up data on a disk" and "snapshots … all capture the contents of a disk at a specific point-in-time").

This evidence comes together neatly to show the well-known meaning of "snapshot" is (and was) "a copy of data on a virtual disk (or disk file) at a given point in time." Wiz rejects this ordinary meaning and proposes one it coins for this case alone: "an offline backup file or delta file of the machine's virtual disk (or disk file) at a given point in time that includes a change log for the virtual disk." This wordy construction should be rejected for at least three reasons.

First, the words "offline" and "delta" never appear in the intrinsic evidence, let alone restricting a "snapshot" to "an offline backup file or delta file." Wiz's construction would improperly exclude "online snapshots," which Wiz's IPR expert recites as a well-known type of snapshot since 2005. Ex. 8 ¶ 32; *see also* IPR2024-00864, -00865, -01109, -01190, -01191, Ex. 1002 ¶ 32 (same). Nor is there evidence that Orca "explicitly redefine[d] the term or disavow[ed] its full scope." *Thorner v. Sony Computer Ent. Am. LLC*, 669 F.3d 1362, 1367 (Fed. Cir. 2012).

Second, Wiz's requirement that a snapshot must only be of a "machine" does not account for the different uses of "snapshot" across Orca's Asserted Patents. *Samsung Elecs. Co. v. Elm 3DS Innovations, LLC*, 925 F.3d 1373, 1378 (Fed. Cir. 2019) ("Where multiple patents derive from the same parent application and share many common terms, we must interpret the claims consistently across all asserted patents."). While the '685 and '031 patents recite that snapshots are for a "virtual machine" or "virtual machine at rest" (*see, e.g.,* '685 patent at cl. 1; '031 patent at cl. 1), the other Orca's Asserted Patents are broader and recite snapshots of a "protected virtual cloud asset." *See, e.g.*, '809 patent at cl. 1; *see also id.* at 4:51-53. Wiz's construction is therefore wrong because it introduces superfluous language for the '031 and '685 patent claims while importing unclaimed requirements into the '032, '809, '926, and '326 claims.

Third, Wiz's attempt to limit "snapshot" to something that "includes a change log for the virtual disk" would also render language in dependent claims superfluous. '031 patent at cls. 5, 13 ("wherein the at least one snapshot includes a change log of at least one of the virtual disks configured to restore the virtual machine to a particular point in time."); '685 patent at cls. 8, 20 (same). If every reference to a "snapshot" necessarily included a change log, as Wiz argues, there would be no reason to add such logs in these dependent claims. *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 801, 810 (Fed. Cir. 2021) ("It is highly disfavored to construe terms in a way that renders them void, meaningless, or superfluous.").

2. Defendant's Answering Position[9]

Both parties agree a snapshot is a term of art in the industry. The question is what the term means. This is important as Orca has repeatedly distinguished the prior art based on its use of snapshots. Ex. 30 at ORCA_0000116 (Orca argues prior art does not teach limitations related to "snapshots"). In fact, without the recitation of snapshots in the claim, the claims are more comparable to any computer anti-virus program, which has been around for decades.

As background, snapshots are a technique traditionally used to create computer "restore points" so that a computer can "roll back" to its prior state. The concept has been around for many years and was traditionally applied in Windows computers to create restore points. From 2010: "System Restore in Windows XP monitors a core set of system and application files, archiving the states of these files before system changes are made. System Restore also saves a full snapshot of

[9] On October 16, 2024, Orca served supplemental infringement contentions, purporting to add source code citations for its infringement theories. Wiz replied to that service email and asked for clarification whether Orca was asserting infringement by Wiz based on a different technology, disk cloning. Orca has thus far refused to answer this question in correspondence and a meet and confer. To the extent Orca seeks to accused disk cloning as snapshots, Wiz reserves the right to seek supplemental claim construction briefing to address this position.

the registry and some dynamic system files." *See* Ex. 31 (Microsoft.com archive.org from 2010). Snapshots are different than simply making a copy of one's disk in a number of ways, including that snapshots are incremental. This limits the amount of data necessary for backups and restore points. Wiz's construction of "snapshot" accurately reflects the meaning of snapshot and the intrinsic record. The Orca Asserted Patents introduce the term as follows:

> A VM's snapshot is a copy of the machine's virtual disk (or disk file) at a given point in time. Snapshots provide a change log for the virtual disk and are used to restore a VM to a particular point in time when a failure error occurs. Typically, any data that was writable on a VM becomes read-only when the snapshot is taken. Multiple snapshots of a VM can be created at multiple possible point-in-time restore points. When a VM reverts to a snapshot, current disk and memory states are deleted and the snapshot becomes the new parent snapshot for that VM.

Ex. 1 at 5:35-44.

This portion of the specification is consistent with Wiz's proposed construction and the understanding of the term in the relevant field. As mentioned, one of the main features of snapshots is one can compare them to prior snapshots, in order to lessen the amount of data required when multiple snapshots are generated for a given resource. This is why the specification explains "[w]hen a VM reverts to a snapshot, current disk and memory states are deleted and the snapshot becomes the new parent snapshot for that VM." *Id.* The "parent snapshot" referred to in the specification only exists because of the use of a delta file and the change log included in snapshots. *Id*. at 5:31-44. This is also the referenced "copy" that is used to "restore a VM … when a failure error occurs." *Id.* To be a snapshot requires that it be an offline backup file (the "parent" snapshot) or a delta file (if a later snapshot of the same virtual machine). Snapshots also capture a virtual machine's state a "given point in time," as this is how they can create the restore point referred to in the specification.

Even Orca's cited evidence supports Wiz's construction. Orca's cited document from Amazon describes its snapshots as: "incremental, storing only the changes since the last snapshot,

making them cost effective and ideal for frequent backups." Ex. 10 at 2; *see also id.* ("Amazon EBS Snapshots are a convenient way to backup your EBS volumes."). Orca's cited Microsoft documentation similarly supports Wiz. Ex. 11 at 2 ("To recover using a snapshot, you must create a new disk from the snapshot, then either deploy a new VM, and use the managed disk as the OS disk, or attach the disk as a data disk to an existing VM."). The same is true for the documentation Orca cited from Google. Ex. 12 at 1 ("Standard snapshots incrementally back up data on a disk."). Other extrinsic evidence supports Wiz's proposed construction. *See* Ex. 32 at 3 (snapshots "record delta changes from a certain point in time").

The intrinsic, extrinsic and even Orca's own cited evidence supports Wiz's construction. The discussion should end there in the face of a unanimous record, but Orca quibbles with Wiz's construction in its brief. Each complaint lacks merit. Orca first argues that "offline" and "delta" never appear in the intrinsic record, but this ignores the specification's discussion of "parent" snapshots and multiple snapshots taken for different points in time—*i.e.* the delta. Orca's own expert uses the same terms as Wiz's construction, referring to snapshots as "a file that stores the running state of the VM at a particular moment in time, usually in terms of deltas with respect to a baseline state." Ex. 29, ¶ 71 (quoting US Pat. App. Pub. No. 2008/0320583, ¶¶ 160-63.) With regard to "offline," this is again consistent with the specification's description that snapshots are "read-only when the snapshot is taken." And, as Orca's own evidence confirms, to "recover using a snapshot, you must create a new disk from the snapshot, then either deploy a new VM, and use the managed disk as the OS disk, or attach the disk as a data disk to an existing VM." Ex. 11 at 2. Thus, "offline" simply reflects the state of the snapshot, not excluding any "online snapshots" as Orca purportedly asserts. Orca's second complaint regarding the word "machines" seems to be in

error. There is no discussion in the specification other than machines; even the "cloud asset" that Orca points to still reside on a machine. Ex. 1 at 4:11-17.

Finally, Orca argues that including a "change log" renders dependent claims superfluous. *See supra* at 21 (OOBr.). Orca pointedly does not argue that Wiz's construction is not supported by the intrinsic or extrinsic record. In fact, Orca provides no argument that snapshots do not include change logs. Nor could it as the intrinsic record expressly states they are included. "Snapshots provide a change log for the virtual disk and are used to restore a VM to a particular point in time when a failure error occurs." Ex. 1 at 5:36-38. Orca's only argument is that it renders terms superfluous in dependent claims. This is a claim differentiation argument, which fails for three reasons. First, the dependent claims contain limitations not found in Wiz's construction, and therefore claim differentiation does not apply. *ProMOS Techs., Inc. v. Samsung Elecs. Co.*, 809 F. App'x 825, 839 (Fed. Cir. 2020) (claim differentiation does not apply "because the claims contain different steps that confer different claim scope separate and apart from the language at issue.") For example, the cited dependent claims discuss the snapshot being "configured to restore" a VM, which is not included in Wiz's proposed construction. *See, e.g.*, Ex. 1 at claim 5. Second, claim differentiation is only a presumption, "not a hard and fast rule of construction." *Kraft Foods, Inc. v. Int'l Trading Co.*, 203 F. 3d 1362, 1368 (Fed. Cir. 2000). "Claim differentiation can not broaden claims beyond their correct scope." *Id.* (quoting *Multiform Desiccants Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1480, (Fed. Cir.1998)). This is exactly what Orca is seeking to do here—broaden its claim beyond their correct scope based only on added dependent claims. Orca's incorrect claim differentiation argument cannot and should not overcome the clear intrinsic and extrinsic record. *Multiform Desiccants*, 133 F.3d at 1480 (the "correct scope" is "determined in light of the specification and the prosecution history and any relevant extrinsic

evidence."). Finally, if Orca's logic were adopted, its ***own*** construction of snapshot would be improper because it recites the same "point in time" requirement as stated elsewhere in the claims, rendering that part of the claim redundant.

Orca proposes a construction contrary to the unanimous record for two reasons: (1) because its claims do not read on Wiz's system; and (2) because Orca is attempting to read around invalidating prior art raised in IPRs. Orca's attempt to effectively read out the term "snapshot" out of its claims should be rejected.

The major problem is that Orca proposes that a snapshot simply be a "copy of data." That phrase appears ***nowhere in the intrinsic record***. It was seemingly plucked out of thin air by Orca's counsel in order to broaden the claims and divorce them from the actual meaning of the term. Even its own expert in its IPR proceedings did not use that phrase to describe a snapshot. Ex. 29, ¶ 71. By contrast, Orca's reading of "copies of data" would encompass any copy of a disk, which does not reflect the meaning of snapshot according to all the evidence in the record.

Most recently, Orca and its IPR expert explicitly opined on the differences between "snapshots" and "images" to argue that two prior art references should not be combined. Ex. 29, ¶ 71; Ex. 28 at 44 ("POSAs would have known that VM images and VM snapshots are not the same"). As noted, Orca's expert did not use Orca's definition of snapshots, which would have contradicted his argument. Ex. 29, ¶ 71. Instead, he distinguished "images" from "snapshots," because snapshots are "a file that stores the running state of the VM at a particular moment in time, usually in terms of deltas with respect to a baseline state," while VM images are "a virtual disk file that stores the contents of the virtual machine's hard disk drive." *Id.* Orca further described an "image" as "a file that contains a virtual disk which has a bootable operating system installed on it." And it said that such an "image" is not a snapshot. *Id.* But under Orca's construction

before this Court, a "virtual disk file" as stated would easily satisfy Orca's proposed construction of "a copy of data on a virtual disk (or disk file) at a given point in time." Orca clearly and repeatedly argued that images and disks are different in a manner inconsistent with its construction here. *Id.*, ¶¶ 48-72, 79-81 (explaining differences between images and snapshots).[10] Whether considered as a disclaimer or as additional intrinsic evidence argued by Orca itself in IPR, these statements by Orca in the IPR compel that Wiz's definition should be adopted. *Aylus Networks, Inc. v. Apple Inc.,* 856 F.3d 1353, 1362 (Fed. Cir. 2017).

By contrast, Orca's support for its own construction is wholly lacking. It first refers to "data" in the preambles—*e.g.*, "system for inspecting data"—none of which speak to what a "snapshot" is or means in the context of the Orca Asserted Patents. *See supra* at 18 (OOBr.). That the claim mentions "data" does not transform the meaning of "snapshot" into simply "data." Orca next looks to the specification, but that only supports Wiz's construction, not Orca. *See supra* at 18-19 (OOBr.). No part of the specification refers to "snapshots" as "copies of data." Lacking any better options, Orca cites primarily to the portion of the specification block quoted above, which does not describe snapshots as "copy of data" and only supports Wiz's construction as described above. The file history is similar, it does not mention a "copy of a data" and says that snapshots are a "***particular*** copy of the VM disk file at a given point (i.e., past) in time)." *See supra* at 19 (OOBr.) (quoting Ex. 7 at 30) (altered). Only Wiz's construction gives meaning to why a snapshot is a particular copy. None of these references recite Orca's construction.

Wiz's proposal should be adopted.

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[10] Even Orca's evidence in its claim construction brief distinguishes snapshots from copies of a disk. *Id.*; *see also* Ex. 12 at 4 ("Snapshots are incremental, so you can create regular snapshots on a Persistent Disk or Hyperdisk faster and at a lower cost (/compute/disks-image-pricing#persistentdisk) compared to regularly creating a full image of the disk.").

3. Plaintiff's Reply Position

The Court should adopt Orca's proposed construction for the term "snapshot" because it comes directly from the intrinsic record and reflects the meaning skilled artisans would ascribe to this term. *Supra* at 18-21 (OOBr.). As Orca previously explained, the parties agree that a "snapshot" is of "a virtual disk (or disk file) at a given point in time," so their disputes about this term concern whether a snapshot is "a copy of data" (Orca's position), or "an offline backup file or delta file of the machine" that must "include[] a change log for the virtual disk" (Wiz's position). *Id*.

Wiz argues that "Orca proposes that a snapshot simply be a 'copy of data.'" *Supra* at 25 (WABr.). That is not true. Orca proposes that "snapshot" be construed as "a copy of data on a virtual disk (or disk file) at a given point in time." *Supra* at 18 (OOBr.). And this proposal is fully consistent with the asserted patents' specifications, which provide that "[a] VM's snapshot is a copy of the machine's virtual disk (or disk file) at a given point in time" (*see, e.g.*, '031 patent at 5:35-36), with two slight differences derived directly from the intrinsic record. First, Orca's proposed construction states that a snapshot is a copy "of data" because the claims uniformly support, and the specifications demonstrate, that a snapshot is a copy of "data" on a virtual disk (or disk file). *Supra* at 18-19 (OOBr.). Second, Orca's proposed construction does not state that the snapshot is a copy of "the machine's" virtual disk because some of the asserted claims require virtual machines, and others do not (e.g., they require protected virtual cloud assets), and the parties agree the term "snapshot" should be construed consistently across the asserted patents. *Id.*[11]

[11] Wiz asserts that Orca's position on machines "seems to be in error," as each of the "cloud assets" discussed in the specification are "machines" generally. *Supra* at 23-24 (WABr.). Wiz is wrong. The patents expressly state that virtual cloud assets include "serverless functions," which are not described as "machines." *See, e.g.,* '809 patent at 1:40-42, 3:51-54. The Court should reject Wiz's attempt to import a "machine" requirement into claims where no machine is recited.

Wiz concedes the preambles of the asserted claims show that the asserted patents' systems and methods are directed to using snapshots to inspect "data." *Supra* at 26 (WABr.). Yet Wiz contends Orca is attempting to "transform the meaning of 'snapshot' into simply 'data'" and has "plucked out of thin air" the phrase "copy of data." *Id.* at 25-26. Again, Wiz is wrong. The words "copy of" come directly from the specifications' description of a "VM's snapshot," i.e., "[a] VM's snapshot is a **copy of** the machine's virtual disk (or disk file) at a given point in time." *See, e.g.*, '031 patent at 5:35-36. Those disks or disk files contain only data, and the asserted patents' claimed inventions use snapshots to inspect "data" on virtual disks (or disk files) regardless of the specific type of "virtual cloud asset." Thus, skilled artisans would understand that a snapshot, whether of a virtual machine or other virtual cloud asset, is a "copy of data." *See Otsuka Pharm. Co. v. Mylan Labs. Ltd.*, 2023 WL 5928313, at *3 (D. Del. Sept. 12, 2023) (rejecting argument that proposed construction should not be adopted because its specific phrasing was not in the specification). Indeed, even Wiz's arguments reflect that snapshots are copies of "data" on a virtual disk (or disk file). *See, e.g.*, *Supra* at 22 (WABr.) ("***[S]napshots*** are incremental. This limits the amount of ***data*** necessary for backups and restore points."), *id.* ("[O]ne of the main features of ***snapshots*** is one can compare them to prior snapshots, in order to lessen the amount of ***data*** required when multiple snapshots are generated"), *id.* at 23 ("'Standard ***snapshots*** incrementally back up ***data*** on a disk.'") (quoting Ex. 12 at 1).

Wiz again retreats to mischaracterizing statements Orca made to distinguish prior art that Wiz cited in IPR petitions, where Orca explained that prior art that focused on VM images (and never mentioned snapshots) does not teach the asserted patents' claimed techniques. *Supra* at 25-26 (WABr.); *see also* Ex. 29 at ¶ 71. But nothing in those explanations is inconsistent with Orca's proposed construction of "snapshot." For example, Orca's IPR expert explained that VM images

lack a temporal aspect, whereas snapshots "record[] the state and data of the virtual machine at the moment the snapshot was taken." Ex. 29 at ¶ 71. Consequently, a VM image would not meet the "at a given point in time" requirement of either party's proposed construction for "snapshot."

In contrast to Orca's proposed construction, Wiz's proposed construction—"an offline backup file or delta file of the machine"—improperly injects requirements not found in the intrinsic record and renders claims superfluous. *Supra* at 20-21 (OOBr.). Wiz argues its inclusion of "offline" is "consistent with the specification's description that snapshots are 'read-only when the snapshot is taken.'" *Supra* at 23 (WABr.). But Wiz does not dispute that the term "offline" is not in the intrinsic record. And, Wiz admits the term snapshot does "not exclud[e] any 'online snapshots,'" which were well-known. *Id.*; *Supra* at 20 (OOBr.). Thus, Wiz's attempt to limit a snapshot to being "offline" is wrong, or at a minimum confusing, and should be rejected. *See Bd. of Regents v. BENQ Am. Corp.*, 533 F.3d 1362, 1366 (Fed. Cir. 2008) (affirming district court's refusal to adopt construction that was "both unhelpful to a jury and possibly incorrect"); *see also CallWave Commc'ns, LLC v. AT&T Mobility, LLC*, 2014 WL 7205657, at *5 (D. Del. Dec. 17, 2014) (rejecting proposed construction that "cause[d] more confusion than clarity"); *Geodynamics, Inc. v. Dynaenergetics US, Inc.*, 2016 WL 6217181, at *11 (E.D. Tex. Oct. 25, 2016) (rejecting proposed construction that "introduces technical terms that could unnecessarily confuse the jury").

Wiz contends the specifications' discussion of "multiple snapshots taken for different points in time" supports its "delta file" phrase. *Supra* at 23 (WABr.). Wiz, however, fails to explain why "delta file," which also is not found in the intrinsic record, would help the Court or a jury understand what a snapshot is. And, injecting "delta file" into the "snapshot" term would

only muddy the term's meaning, not clarify it. *See BENQ.*, 533 F.3d at 1366; *CallWave*, 2014 WL 7205657, at *5; *Geodynamics*, 2016 WL 6217181, at *11.

Wiz asserts the term "snapshot" must include "a change log for the virtual disk." *Supra* at 24 (WABr.). But the intrinsic record does not "expressly state[]" that such logs are included in any snapshot, as Wiz argues. *Id.* Rather, the specifications state that "[s]napshots *provide* a change log." '031 patent at 5:36-37. There is a difference between snapshots "provid[ing]" a change log (an exemplary functionality), e.g., through comparison of multiple snapshots, as described in the specification, and any single snapshot necessarily "includ[ing]" a change log. This is not to say that a snapshot cannot include a change log, but a snapshot does not definitionally require one. Accordingly, here too, Wiz's proposed construction is off-target and confusing. *See BENQ*, 533 F.3d at 1366; *CallWave*, 2014 WL 7205657, at *5; *Geodynamics*, 2016 WL 6217181, at *11.

Additionally, Wiz's proposed construction improperly renders superfluous dependent claims that require snapshots that "include[] a change log of at least one of the virtual disks configured to restore the virtual machine to a particular point in time." '031 patent at cls. 5, 13; '685 patent at cls. 8, 20; *Supra* at 21 (OOBr.); *see also Digital-Vending Servs. v. Univ. of Phoenix*, 672 F.3d 1270, 1275 (Fed. Cir. 2012) (rejecting proposed construction that would have rendered "superfluous" "language in many of the asserted claims"); *see also S.I.SV.EL. Societa Italiana Per Lo Sviluppo dell'Elettronica S.p.A. v. Rhapsody Int'l, Inc.*, 2020 WL 4584355, at *6 (D. Del. Aug. 10, 2020) (rejecting proposed construction adding limitation from dependent claim). Wiz argues that its proposed construction does not violate the doctrine of claim differentiation, contending the doctrine is "not a hard and fast rule" and the relevant dependent claims "contain limitations not found in Wiz's construction." *Supra* at 24 (WABr.). As even the case Wiz relies on shows, however, the doctrine of claim differentiation is presumed to apply absent clear countervailing

evidence, such as an "unequivocal declaration in the written description." *Kraft Foods, Inc. v. Int'l Trading Co.*, 203 F.3d 1362, 1367 (Fed. Cir. 2000); *see also Collabo Innovations, Inc. v. OmniVision Techs., Inc.*, 2017 WL 3670661, at *4 (D. Del. Aug. 25, 2017) (rejecting proposed construction for failing to meet the "exacting standard for overcoming the doctrine of claim differentiation"). And Wiz cites no such evidence. The three additional words from the relevant dependent claims that Wiz emphasizes—"configured to restore" (*supra* at 24 (WABr.))—are insufficient. *See Fraunhofer-Gesellschaft Zur Forderung Der Angewandten Forschung E.V. v. Sirus XM Radio Inc.*, 2020 WL 549801, at *6 (D. Del. Feb. 4, 2020) (rejecting proposed construction that included delay means because dependent claim included delay means and additional requirements); *Monaghan Med. Corp. v. Smiths Med. ASD, Inc.*, 2018 WL 3323823, at *7 (D. Del. July 6, 2018) (rejecting proposed construction that "import[ed] a limitation … from a dependent claim" that also included other elements).[12, 13]

4. Defendant's Sur-Reply Position

Orca's response on the central term "snapshot" does not address the import of its own cited evidence and strongly contradicts its own arguments in IPR. Orca's attempt to effectively read "snapshot" out of the claim before this Court should be rejected.

The intrinsic and extrinsic record support Wiz's construction. In some instances, Orca completely ignores that record in its Reply. For example, Wiz explained how Orca's own evidence

[12] In *ProMOS Techs. v. Samsung Elecs.*, which Wiz cites, the Federal Circuit decided not to apply the doctrine of claim differentiation because, unlike here, the proposed construction did not read out, or overlap with, language in the dependent claims. 809 F. App'x 825, 835 (Fed. Cir. 2020).

[13] In a footnote, Wiz asserts it may seek supplemental briefing on the "snapshot" term based on a question relating to "disk cloning" technology. *Supra* at 21 n.9 (WABr.). Wiz's assertion that Orca "refused" to answer its question is incorrect, *see* Ex. 35 at 1, 4-5, 6-7, and any related request for supplemental briefing should be denied. *Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1367 (Fed. Cir. 2008) ("A 'claim is construed in the light of the claim language ... not in light of the accused device.'").

supports Wiz's construction. Orca's citations to Amazon, Microsoft and Google cloud documentation ***all*** support Wiz's construction of a snapshot. *See supra* at 22-23 (WABr.) (discussing Orca's Exs. 10, 11, 12). This is evidence Orca chose to attach and rely on for claim construction. Orca's Reply has no response, leaving Wiz's arguments unrebutted. *Compare supra* at 22-23 (WABr.) *with supra* at 27-31 (ORBr.). Wiz similarly explained how Orca's own technical expert in IPR referred to snapshots as including "deltas," just as Wiz's construction proposes including "delta files." Ex. 29, ¶ 71 (describing snapshots as "a file that stores the running state of the VM at a particular moment in time, usually in terms of deltas with respect to a baseline state."). Orca again does not respond, leaving Wiz's arguments unrebutted. *Compare supra* at 22-23 (WABr.) *with supra* at 29-30 (ORBr.) (referring to "delta file" without addressing its own expert). Even more egregiously, Orca claims the phrase delta file "is not found in the intrinsic record." *See supra* at 29 (ORBr.). As Wiz explained, it is fully supported by the specification. *See supra* at 22 (WABr.). But at a minimum, Orca's own expert quoting "deltas" in an IPR declaration while explaining snapshots is ***itself*** intrinsic evidence supporting Wiz's construction including "delta files." *See generally Artec*, 2024 WL 4479810.[14]

Orca's arguments as to the specification are similarly inapt. Wiz pointed out that the specification expressly states: "Snapshots provide a change log for the virtual disk," directly supporting Wiz's inclusion of "change logs" in its construction. Ex. 1 at 5:35-44. Orca's response is to argue that "providing" does not mean what it says. *See supra* at 30 (ORBr.) (arguing "provide a change log" does not mean a change log is "necessarily" included in a snapshot). Orca does not

[14] Wiz also noted that while a snapshot may be used to instantiate a virtual machine, the snapshot itself is not running. It is "offline." Orca's references to "online snapshots" as discussed by Wiz's expert before the Patent Office clearly describe what the snapshot is of, not the snapshot itself. Ex. 8, ¶ 32 ("With online snapshots, you can create a point-in-time copy of a running virtual machine").

explain how a snapshot could "provide" a change log but not include one. It does not and any other reading would exclude every embodiment described in the specification. *See Vitronics Corp. v. Conceptronic, Inc.,* 90 F.3d 1576, 1583 (Fed. Cir. 1996) (explaining that excluding a preferred embodiment is "rarely, if ever correct").

Not only does the intrinsic and extrinsic record support Wiz's construction, but Orca's proposal contradicts its position in IPR. Orca and its IPR expert explicitly opined on the differences between "snapshots" and "images" to argue that two prior art references should not be combined. Ex. 29, ¶ 71; Ex. 28 at 44 ("POSAs would have known that VM images and VM snapshots are not the same"). In response, Orca argues that its arguments are not inconsistent, stating that "a VM image would not meet the 'at a given point in time' requirement of either party's proposed construction for 'snapshot.'" *See supra* at 28-29 (ORBr.). But according to Orca, any file or image, when created, is created "at a point in time." This includes an image according to Orca's own expert. Ex. 29, ¶ 71 ("A VM image, in contrast, is a data file that 'include[s] an installed and configured guest operating system and applications' and is used for running a virtual machine."). Wiz's construction is the only one that accurately defines what a "snapshot" comprises in contrast to an image, including according to Orca's own expert. Orca, meanwhile, seeks to argue that "images" are different than "snapshots" before the PTO while arguing the opposite before this Court.

When turning to its own construction, Orca fares no better. Orca attempts to bolster its own construction by claiming it "comes directly from the intrinsic record" (*see supra* at 27 (ORBr.)), but then immediately contradicts this position. Orca quotes the specification's language stating "[a] VM's snapshot is a copy of the machine's ***virtual disk (or disk file)*** at a given point in time" (*see supra* at 28 (ORBr.), but offers a different construction. To justify its changes, Orca

claims that its construction offers only "two slight differences[.]" *See supra* at 27 (ORBr.). Orca proposes that instead of a copy of "'the machine's' virtual disk," a snapshot is a "copy of '***data***' on a virtual disk…" *See supra* at 27 (ORBr.). Orca attempts to wave away this significant change by arguing that because a "disk" contains data, "skilled artisans would understand that a snapshot, whether of a virtual machine or other virtual cloud asset, is a 'copy of data.'" *See supra* at 28 (ORBr.). But in making this change, Orca provides no description of what type of data must be copied or how the copied data can be used. This construction would improperly broaden the claim term to encompass any copy of data regardless of its purpose or format. For example, a "copy of data on a virtual disk" would include copying a single text file on a virtual disk, but nothing in the intrinsic or extrinsic evidence supports such a broad construction of snapshot. Wiz's construction properly differentiates a snapshot from any copy of data. Wiz's construction should be adopted.

C. "Alert(s)" ('031 Patent, claims 1, 2, 9, 10, 16; '032 Patent, claims 1, 18, 22; '685 Patent, claims 1, 5, 13, 17, 22; '809 Patent, claims 1, 2, 3, 16, 19; '926 Patent, claims 1, 14, 15

Orca's Proposed Construction	Wiz's Proposed Construction
Plain and ordinary meaning, "notification(s)."	"An affirmative message sent to a user to notify them regarding a detected threat or vulnerability."

1. Plaintiff's Opening Position

The Parties agree "alert(s)" should be construed consistently across each patent and claim. Orca's construction of "alert(s)" is the term's plain and ordinary meaning: "notification(s)." Wiz agrees that alerts "notify," but then seeks to muddy and unjustifiably narrow the term by requiring an "an affirmative message sent to a user." The remainder of Wiz's construction, "regarding a detected threat or vulnerability," is redundant and confusing when applied across Orca's Patents. Orca's construction should be adopted, and Wiz's rejected.

The term "alert" is recited in the independent Asserted Claims in five of Orca's Asserted

Patents, the ’031, ’032, ’685, ’809, and ’926 patents. Claim 1 of each of those patents is representative and recites “report[ing]” detected vulnerabilities, sensitive data, and/or cyber threats as “alerts” or “prioritized alerts.” *See, e.g.*, ’031 patent at cl. 1 (“report the detected vulnerabilities as alerts”); ’032 patent at cl. 1 (“reporting the determined potential cyber vulnerabilities, as prioritized alerts”); ’685 patent at cl. 1 (“report the detected vulnerabilities and sensitive data as alerts”); ’809 patent at cl. 1 (“reporting the determined plurality of potential cyber vulnerabilities as alerts”); ’926 patent at cl. 1 (“reporting at least some of the determined plurality of potential cyber threats as alerts”). The claims therefore use “alerts” to mean “notifications” regarding a detected cyber security threat (e.g., a vulnerability) previously recited in the claims.

Unlike Wiz’s construction, the independent claims do not restrict where or to whom an alert is reported, leaving such detail open or to be added later in certain dependent claims. For example, independent claim 1 of the ’032 patent recites “reporting determined potential cyber vulnerability as alerts,” and dependent claim 6 adds “wherein reporting the determined potential cyber vulnerabilities includes communicating the determined cyber vulnerabilities to a user console or a security information and event management (SIEM) system.” ’032 patent at cls. 1, 6. Similarly, independent claim 1 of the ’809 patent recites “reporting the determined plurality of potential cyber vulnerabilities as alerts prioritized according to the determined risk” and dependent claims 2 and 3 add “wherein reporting the determined potential cyber vulnerabilities includes communicating the prioritized alerts to a user console or a security information and event management (SIEM) system” and “such that a number of the prioritized alerts reported to a user console or a SIEM system is less than a total number of determined potential cyber vulnerabilities,” respectively. ’809 patent at cls. 1-3. The claim language thus establishes that an “alert” is a notification that can be communicated in different ways and that such alerts need not always be

"message sent to a user" as Wiz would have it. Rather than messages akin to emails sent directly to the user, the alerts can be sent to other systems such as a console or SIEM system.

The specification follows suit and notes that "detected cyber threats and/or vulnerabilities are reported, for example, as alerts." '032 patent at 7:53-54. It then makes clear that the detected cyber threats (including vulnerabilities) can be reported as alerts in multiple ways and not always as a "message sent to a user." It then describes the same examples from the claims, disclosing threats as "reported to a user console 180," *id.* at 6:40-47, or to "a security information and event management (SIEM) system." *Id.* at 6:40-47. *See also* '685 patent at 6:38-45 (same); '809 patent at 6:40-47; '926 patent at 6:40-47. Contrary to being messages sent to a user, reporting alerts to a SIEM are described as allowing detected cyber threats to "be filtered or prioritized [to] reduce[] the number of alerts reported to the user." *Id.* at 6:44-47, 7:57-59.

Other intrinsic evidence confirms that "alerts" were understood to broadly refer to "notifications" that could be sent to and displayed on consoles or devices. For example, U.S. Patent No. 10,812,521 ("Mehr"), cited on the face of the '809 patent, explains "security alerts" are "for example, a notification" that can be "view[ed]" and "respond[ed]" to via "GUIs." Ex. 13 (U.S. Patent No. 10,812,521) at 25:17-23, 25:63-67; *V-Formation, Inc. v. Benetton Grp. SpA*, 401 F.3d 1307, 1311 (Fed. Cir. 2005) ("This court has established that prior art cited in a patent or cited in the prosecution history of the patent constitutes intrinsic evidence.") (cleaned up).[15]

In view of the intrinsic evidence, the Court should construe "alerts" to have its ordinary meaning: "notifications." Conversely, Wiz's construction—"an affirmative message sent to a user

[15] While the meaning of "alerts" is apparent from the intrinsic evidence, Orca's plain meaning construction is also supported by extrinsic evidence. For example, the NIST Computer Security Resource Center defines "alert" as a "brief, usually human-readable, **technical notification** regarding current vulnerabilities, exploits, and other security issues." Ex. 14 (NST Special Publication 800-150) at 30.

to notify them regarding a detected threat or vulnerability"—should be rejected for three reasons.

First, "affirmative message" is unclear and risks confusing the jury, whereas "alerts" and "notifications" are common terms and readily understood. Second, as noted above, Wiz's construction requiring the alert be a "message sent to a user" would exclude "alerts" communicated to a user console or a SIEM system and so reads out preferred embodiments and renders illogical certain dependent claims (*e.g.*, claim 6 of the '032 patent, claims 2 and 3 of the '809 patent) which recite those embodiments. '032 patent at 6:40-47 (reporting detected vulnerabilities to SIEM); *see also* '685 patent at 6:38-45; '809 patent at 6:40-47; '926 patent at 6:40-47; *Baxalta Inc. v. Genentech, Inc.*, 972 F.3d 1341, 1346 (Fed. Cir. 2020) ("construction which excludes … explicitly claimed embodiments is inconsistent with the plain language of the claims"); *Broadcom Corp. v. Netflix, Inc.*, 2023 WL 4115909, at *1 (Fed. Cir. June 22, 2023) (interpretations that read out preferred embodiments are "rarely, if ever, correct and would require highly persuasive evidentiary support") (internal citation omitted); *Wright Med. Tech., Inc. v. Osteonics Corp.*, 122 F.3d 1440, 1445 (Fed. Cir. 1997) ("[W]e must not interpret an independent claim in a way that is inconsistent with a claim which depends from it.").

Second, Wiz's addition of "regarding a detected threat or vulnerability" is unnecessary and confusing. The surrounding claim language already expressly specifies what type of cyber security threat (e.g., vulnerabilities, sensitive data, or potential cyber threats) is "reported" as an "alert." And only certain claims recite detecting "threats," '926 patent at cls. 1, 14, while others recite detecting "vulnerabilities," '031 patent at cls. 1-2, 9-10, 16; '032 patent at cls. 1, 18, 22, '685 patent at 1, 5, 13, 17, 22; '809 patent at 1-3, 16, 19, and yet others claim "sensitive data," '685 patent at 1, 5, 13, 17, 22, which is inexplicably omitted from Wiz's construction.

2. Defendant's Answering Position

Wiz's proposed construction is straightforward based on the claim language itself. The claims require, *e.g.*, "report the detected vulnerabilities as alerts." Ex. 1 at claim 1. A report and an alert must mean different things to give meaning to all the claim language. *Merck & Co. v. Teva Pharms. USA*, 395 F. 3d 1364, 1372 (Fed. Cir. 2005) ("A claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so."). Orca's own expert in IPR agrees: "a person of ordinary skill in the art would have known and understood that reporting results and reporting detected vulnerabilities 'as alerts,' as claimed, are not the same." Ex. 29, ¶ 122. Only Wiz's construction gives meaning to "alerts" as distinct from "reports." Orca, by contrast, argues here that reports and alerts are effectively the same thing, the opposite of its express statements to the PTO in recent IPRs.

As Orca admits, the term "alert" is found in all instances paired with "report" or "reporting." *See supra* at 34-35 (OOBr.). This claim language directly supports Wiz's construction, as the claims presuppose that one would be able to report results without using alerts. Otherwise the "as alerts" language in the relevant claims would be superfluous. *Intel Corp. v. Qualcomm Inc.,* 21 F.4th 801, 810 (Fed. Cir. 2021) ("It is highly disfavored to construe terms in a way that renders them void, meaningless, or superfluous."). The specification is in accord, referring to reports and alerts separately "At S250, the detected cyber threats and/or vulnerabilities are reported, for example, as alerts." Ex. 1 at 8:60-61.

Orca's own statements and expert in IPR once again support Wiz's construction. According to Orca's expert: "a person of ordinary skill in the art would have known and understood that reporting results and reporting detected vulnerabilities 'as alerts,' as claimed, are not the same." Ex. 29, ¶ 122. "For example, alert functions and report functions can involve different system components and capabilities." *Id.* Alerts, could be provided by "via email, SMS text

message, MMS, web page, intranet alert, extranet alert, or any other way." *Id.* (quoting U.S. Pat. No. 9,467,465 ("Hibbert"), 20:34-44."). All of these examples support Wiz's construction requiring an affirmative message to distinguish from a "report" as described in the specification.

Relevant here, Orca and its expert argued that the prior art's reporting of results were not alerts. *See* Ex. 28 at 47-48. Now it proposes that any notification would suffice. This is contrary to its own statements that "reports" and alerts are not the same thing. The reason is simple; Wiz proactively advertises that it does not use the same alert-based approach that Orca claimed. *See* Ex. 33 at ORCA_0011646 (Wiz "[r]educe[s] alert fatigue"). Now, faced with this difficulty, it seeks to argue that any reporting of results on a console or dashboard are now "alerts." Either as a disclaimer or based on the evidence Orca itself relies on in the IPR, this contradiction should be rejected.

Regardless, left unanswered by Orca's construction is how one of skill would differentiate a report versus an alert. Orca's proposed construction of "plain and ordinary meaning," with their suggested construction to reflect "notification(s)" does not create any distinction between the two. Would including a row with a vulnerability in a dashboard be a notification or a merely a report? Would coloring such a row red versus black be a "notification"? Orca's proposal answers none of these basic questions. Its proposed construction of "notification" "does not resolve the parties' dispute[s]." *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.,* 521 F.3d 1351, 1361 (Fed. Cir. 2008). Wiz's proposal is the only one that resolves this dispute, and it is supported by Orca's own statements and expert in the IPR.

3. Plaintiff's Reply Position

Orca's proposed construction of "alerts" is this term's plain and ordinary meaning: "notifications." *Supra* at 34-37 (OOBr.). Wiz contends that Orca "argues here that reports and alerts are effectively the same thing, the opposite of its express statements to the PTO in recent

IPRs." *Supra* at 38 (WABr.). But, as discussed in Section I.C.2, Wiz is wrong—Orca argued in IPR proceedings, and maintains here, that "reporting results and reporting results 'as alerts' are different." Ex. 28 at 47; *see also Supra* at 34-37 (OOBr.). And, the same holds true if "alerts" is construed as "notifications"—reporting results and reporting results as notifications are different.

Notably, Wiz itself points to a passage in the specification drawing this distinction. Specifically, Wiz cites two lines from one asserted patent that provide, "[a]t S250, the detected cyber threats and/or vulnerabilities are reported, for example, as alerts." *Supra* at 38 (WABr.). Wiz cites these lines correctly to support the assertion that "one would be able to report results without using alerts" (*id.*). This is Orca's point, and it supports Orca's construction.

Nothing in Wiz's cited passage or otherwise in the intrinsic record supports the "affirmative message sent to a user" language or the "regarding a detected threat or vulnerability" language that Wiz's proposed construction would inject into the "alerts" term. Wiz's "affirmative message sent to a user" language is unclear and risks confusing the jury. A jury would readily understand the common words "alerts" or "notifications," but the scope of "affirmative message" is ambiguous. *See PageMelding, Inc. v. ESPN, Inc.*, 2013 WL 431600, at *8 (N.D. Cal. Feb. 1, 2013) (explaining that an "alternative construction of the common word 'forming' could be confusing for a jury"); *see also BENQ*, 533 F.3d at 1366; *CallWave*, 2014 WL 7205657, at *5; *Geodynamics*, 2016 WL 6217181, at *11. Also, this language excludes embodiments, for example, threats reported not "to a user" but to a security information and event management (SIEM) system. *See, e.g.*, '032 patent at 6:40-47; *see also Broadcom Corp. v. Netflix, Inc.*, 2023 WL 4115909, at *1 (Fed. Cir. June 22, 2023). And, this language would render superfluous dependent claims, e.g., dependent claims directed to SIEMs. *See Supra* at 35-37 (OOBr.); *see also Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc.*, 520 F.3d 1358, 1362 (Fed. Cir. 2008) ("[T]his court strives to

reach a claim construction that does not render claim language in dependent claims meaningless."); *Littelfuse, Inc. v. Mersen USA EP Corp.*, 29 F.4th 1376, 1380 (Fed. Cir. 2022) (rejecting proposed construction that would "render the dependent claims superfluous").

Wiz's "regarding a detected threat or vulnerability" language is equally wrong because it is redundant and unnecessary. Claim language surrounding the "alerts" term already specifies what type of cybersecurity threat (e.g., vulnerabilities, sensitive data, or potential cyber threats) must be "reported" as an "alert." *See Chalumeau Power Sys. LLC v. Alcatel-Lucent*, 2013 WL 5913849, at *4 (D. Del. Oct. 30, 2013) (rejecting proposed construction that would "make claim terms redundant"); *see also IDB Ventures, LLC v. Charlotte Russe Hldgs.*, 2018 WL 5629620, at *2 (E.D. Tex. Oct. 31, 2018) (Bryson, J. by designation) (rejecting proposed construction that "include[d] a reworded version of the functions" of the disputed term because it was "either redundant … or would be confusing") (cleaned up). And only certain claims recite detecting "threats," while others recite detecting "vulnerabilities," and yet others recite "sensitive data," which Wiz inexplicably omits from its proposed construction. *Supra* at 37 (OOBr.).

Wiz invokes a disclosure from a third-party patent, U.S. Pat. No. 9,467,465 (Hibbert), which, in pertinent part, provides that alerts can be provided "via email, SMS text message, MMS, web page, intranet alert, extranet alert, or any other way." *Supra* at 38-39 (WABr.). But this open-ended language does not support Wiz's proposed construction, as even in Hibbert the "alerts" are not all "affirmative message[s] sent to a user." Regardless, this extrinsic evidence cannot supplant the intrinsic record, which supports Orca's proposed construction. *See Genuine Enabling Tech. LLC v. Nintendo Co.*, 29 F.4th 1365, 1373 (Fed. Cir. 2022) ("[E]xtrinsic evidence is to be used for the court's understanding of the patent, not for the purpose of varying or contradicting the terms of the claims."). Likewise, Wiz's invocation of three words pulled from one of its own advertising

documents (*supra* at 39 (WABr.)) should be disregarded as irrelevant. *See Genuine Enabling Tech.*, 29 F.4th at 1372-73 (cautioning that extrinsic evidence "might have been selectively plucked from the unbounded universe of potentially relevant material to advance a litigant's position"). Orca's proposed construction was not impacted by this advertising document, and Wiz offers no evidence to substantiate its contrary attorney argument. *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1359 (Fed. Cir. 2018) ("[a]ttorney argument is not evidence").

Wiz also invites legal error by asserting that *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.* dictates adoption of its proposed construction. *Supra* at 39 (WABr.) (citing 521 F.3d 1351, 1361 (Fed. Cir. 2008)). When, as here, "the plain and ordinary meaning of the disputed claim language is clear," that suffices. *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1291 (Fed. Cir. 2015) (citing *O2 Micro*); *cf. O2 Micro*, 521 F.3d at 1362 ("[D]istrict courts are not (and should not be) required to construe every limitation present in a patent's asserted claims"); *Sentient Sensors, LLC v. Cypress Semiconductor Corp.*, 2021 WL 1966406, at *1 (D. Del. May 17, 2021) (denying a motion for reargument of a term the Court decided not to construe).

4. Defendant's Sur-Reply Position

Wiz quoted Orca's expert's description of "alerts" as including affirmative messages, which is consistent with Wiz's construction. *See supra* at 38-39 (WABr.). Incredibly, Orca claimed in response that "Wiz invoke[d] a disclosure from a ***third-party*** patent, U.S. Pat. No. 9,467,465 (Hibbert)" (*see supra* at 41 (ORBr.))—even though Wiz was quoting ***Orca's expert*** and his declaration on what "alerts" means in the context of the asserted patents. This was not just a "third-party patent," it is Orca and its expert's statements to the PTO, and thus intrinsic evidence. *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1360 (Fed. Cir. 2017). Orca also failed to address any of the issues that Wiz identified as unanswered by Orca's construction (*see supra* at 39 (WABr.)), thus leaving unclear how to draw lines between a report and an alert.

D. "Virtual Machine" ('031 Patent, claims 1, 4-6, 9, 12-14, 16; '685 Patent, claims 1-4, 7, 8, 13-16, 19, 20, 22)

Orca's Proposed Construction	Wiz's Proposed Construction
Plain and ordinary meaning, "emulation of one or more computers."	"Software emulation of compute, memory and storage hardware, distinct from software containers."

1. Plaintiff's Opening Position

Orca's construction of virtual machine is the term's well-understood meaning, "emulation of one or more computers," as used in the '031 and '685 patents, whereas Wiz's construction unjustifiably narrows the term in a manner divorced from the intrinsic evidence.

Orca's construction comes from the specification: "***A virtual machine emulates a number of 'computers'*** or instances, all within a single physical device."[16] '031 patent at 1:29-30; '685 patent at 1:29-30. This plain meaning of "virtual machine" was confirmed during prosecution of the '031 patent, where the Examiner found the "customary understanding of virtual machine and virtual disks as emulating physical computer system."[17] Ex. 7 at 50; *id.* at 29. This customary understanding of "virtual machine" was also confirmed by Wiz's expert in IPR proceedings against the '031 and '685 patents. Dr. Stavrou testified that a VM is "[a]n emulated physical computer." Ex. 8 ¶ 25. The specification, prosecution history, and extrinsic evidence thus all support that the claims of the '031 and '685 patents use "virtual machine" in its ordinary sense to refer to an "emulation of one or more computers."

Wiz's proposed construction, in contrast, improperly narrows the term's plain meaning and

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[16] Neither party contends that, as used in the claims, the "virtual machine" is of an "instance" or must be "all within a single physical device."

[17] As a matter of law, the Examiner acts from the viewpoint of one skilled in the art. *See St. Clair Intellectual Prop. Consultants, Inc.*, 412 F. App'x 270, 276 (Fed. Cir. 2011); *In re Sang Su Lee*, 277 F.3d 1338, 1345 (Fed. Cir. 2002).

should be rejected for two reasons. *First,* Wiz has not identified any intrinsic evidence referring to a VM as a "software emulation of compute, memory, and storage hardware." *Eon Corp. IP Holdings v. Silver Spring Networks*, 815 F.3d 1314, 1320 (Fed. Cir. 2016) (rejecting construction without support in specification); D.I. 151 at 6-7. One the contrary, as shown above, the intrinsic evidence refers to the emulation of "computers" broadly and does not compel "memory" or "storage hardware." And, contrary to Wiz's construction that would limit the claims to "software emulation," Wiz's IPR expert explained it was "well known" for "virtual machines" to execute "directly on the hardware ***without*** software interpretation." Ex. 8 ¶ 24.

Second, Wiz's construction would improperly inject a negative limitation; that a VM is "distinct from software containers." The Federal Circuit has explained that claims should only be construed to include negative limitations if there is "support either 'in the words of the claim' or through an 'express disclaimer or independent lexicography in the written description that would justify adding that negative limitation.'" *Ethicon LLC v. Intuitive Surgical, Inc.*, 847 F. App'x 901, 907 (Fed. Cir. 2021) (quoting *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003)). There is no such justification here. In fact, Wiz's negative limitation is irreconcilable with the specifications, which state that, far from being "distinct from software containers," "a software container" can be a "subset" of a VM. *See* '031 patent at 6:66-7:2; '685 patent at 5:58-61. In other words, the specifications state software containers are *part of*—not distinct from—a VM. [18]

[18] Wiz's own patents recognize that a "VM may be configured to run a container entity." *See* Ex. 15 (U.S. Patent No. 11,995,193) at 7:16-18; Ex. 16 (U.S. Patent No. 11,929,896) at 7:47-50; *see also* Ex. 17 (U.S. Patent No. 12,093,384) at 4:53-55 ("[A] container virtual machine … is a virtual machine on which a container engine 110 is run.").

2. Defendant's Answering Position

Wiz has proposed a construction that represents a plain and ordinary meaning of a virtual machine, while Orca seeks to propose a construction that would be overbroad to include "containers" as "virtual machines" which would be contrary to the intrinsic evidence. *See* Ex. 1 at 6:66-7:2 (referring to a "software container (e.g. Docker® container)" as a "subset" of a VM). For example, a computer requires computation capability, memory, and storage hardware, therefore a virtual machine, which emulates a computer, would also require the same features. *Id.* at 1:31-34 ("virtual machines provide the ability to emulate a separate operating system (OS), also referred to as a guest OS, and, therefore, a separate computer, from an existing OS (the host)"). A "container" is not a "virtual machine" by any definition or understanding in the intrinsic evidence. *See id.* at 6:66-7:2.

Orca's proposed construction is not an explicit definition from the specification as it cherry picks a few words from a longer description of a "virtual machine" in the specification, requiring its ability to "emulate a separate operating systems (OS) . . . and, therefore, a separate computer." *See id.* at 1:29-35. Orca also excerpts the declaration of Wiz's IPR expert, Dr. Stavrou, that "a VM is '[a]n emulated physical computer'" to support its position, but Orca does not explain the full context of the statement requiring a VM to emulate the full scope of a "physical computer." *See supra* at 43 (OOBr.) (citing Ex. 8, ¶ 25); *cf* with Ex. 8, ¶ 24 ("In running as a virtual machine, a computer's hardware is emulated and presented to an operating system as if the hardware truly existed.") Orca's proposed construction does not specifically include the elements of a "virtual machine" to differentiate it from other virtual entities, such as carriers.[19]

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[19] Orca's brief attempts to reference Wiz's use of the term "a container virtual machine" in Wiz's patents as support for its proposal, but takes it out of context as the term is present only in Wiz's

3. Plaintiff's Reply Position

Orca's proposed construction for "virtual machine"—an "emulation of one or more computers"—is supported by the '031 and '685 patents' specifications, prosecution history, and extrinsic evidence, including Wiz's own expert's testimony that a virtual machine (or VM) is "[a]n emulated physical computer." *Supra* at 43 (OOBr.); *see also, e.g.*, '031 patent at 1:29-30 ("A virtual machine emulates a number of 'computers' or instances, all within a single physical device."); '685 patent at 1:29-30 (same); *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) ("the specification … is the single best guide to the meaning of a disputed term"). Wiz's brief even admits that a VM "emulates a computer." *Supra* at 45 (WABr.). That should end the analysis.

Wiz's proposed construction improperly injects into the "virtual machine" term limitations that find no footing in the intrinsic record, including a negative limitation that is irreconcilable with the patents' specifications. *Supra* at 43-44 (OOBr.); *see also, e.g.*, '031 patent at 6:66-7:2 ("a software container" can be a "subset" of a VM); '685 patent at 5:58-61 (same); *Ethicon LLC v. Intuitive Surgical, Inc.*, 847 F. App'x 901, 907 (Fed. Cir. 2021).

Further, Wiz does not meaningfully attempt to defend its proposed construction, e.g., by identifying intrinsic record support. Rather, Wiz simply asserts without support that its proposed construction "represents a plain and ordinary meaning of a virtual machine." *Supra* at 45 (WABr.); *see also Elbit*, 881 F.3d at 1359. Then, Wiz attacks Orca's proposed construction for "not specifically includ[ing] elements of a 'virtual machine' to differentiate it from other virtual entities, such as carriers." *Supra* at 45 (WABr.). But the specifications are clear that a VM, not some

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patents and not Orca's. *See supra* at 44, n.19 (OOBr.); *see also Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1585 (Fed. Cir. 1996) (terms must be given meaning with respect to the patent claim, specification and file history").

"other virtual entities," (*id.*), "emulates a number of 'computers.'" '031 patent at 1:29-30; '685 patent at 1:29-30. And, Wiz fails to explain what "other virtual entities" might be encompassed by Orca's proposed construction. Wiz does not even try to explain what the "carriers" it identifies are, or how they pertain to this case, let alone to the "virtual machine" term.

4. Defendant's Sur-Reply Position

Both Orca and its expert agree that a virtual machine emulates a physical computer. Orca, however, does not address Wiz's points that a physical computer contains certain components, namely, computing processors, memory and storage. More importantly, Orca provides no support for its assertion that a software container ***is*** a virtual machine.[20] In fact, Orca cites an example in the specification of a software container being a "subset" of a virtual machine. *See supra* at 46 (ORBr.) (citing '031 Patent at 6:66-7:2). That is, a software container is something less than a virtual machine. This is because a software container is missing critical components that define a virtual machine. Orca's construction improperly broadens the claim terms and should be rejected.

E. "Remedial Action" ('031 Patent, claims 3, 11; '685 Patent, claims 6, 18)

Orca's Proposed Construction	Wiz's Proposed Construction
"An action toward mitigating a detected threat or vulnerability."	"An action taken that eliminates the detected threat or vulnerability."

1. Plaintiff's Opening Position

The parties' dispute here centers on Wiz's improper attempt to replace "remedial" with "eliminate[d]" in the claims. The plain English and the context of the intrinsic evidence make clear that a remedial action need only be what its words say, an action toward mitigating a threat of vulnerability. Wiz's construction would require the complete elimination of a threat or

[20] References to "carriers" in Wiz's answering brief were typographical errors for "containers."

vulnerability instead, reading out all remedial actions that are intended to mitigate a threat even if they don't completely eradicate it. Wiz's narrowing of the claims is unwarranted.

The claims recite "implement[ing] a remedial action for at least one of the detected vulnerabilities [and sensitive data]" of a VM. '031 patent at cls. 3, 11; '685 patent at cls. 6, 18. "Remedial" on its face means tending to remedy or improve, Ex. 18 (The Merriam-Webster Dictionary (2016), "remedial") at 611 ("intended to remedy or improve"); Ex. 19 (The American Heritage Dictionary, 5th Ed. (2012), "remedial") at 702 ("[i]ntended to correct or improve something"), and is not limited to complete elimination of a threat or vulnerability. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1322 (Fed. Cir. 2005) ("Dictionaries ... are often useful to assist in understanding the commonly understood meaning of words and have been used both by our court and the Supreme Court in claim interpretation."); *see also* Ex. 20 (U.S. National Institute of Standards and Technology (NIST) Computer Security and Resource Center (CSRC), "remediation")) (defining "Remediation" as "[t]he act of mitigating a vulnerability or a threat"); *see also* Ex. 26 (NIST, "mitigation") (defining "mitigation" as "[a] decision, action, or practice intended to reduce the level of risk associated with one or more threat events, threat scenarios, or vulnerabilities" and "[t]he temporary reduction or lessening of the impact of a vulnerability or the likelihood of its exploitation."). Had Orca intended to claim "elimination" it would have said so.

The specification in turn refers to "mitigat[ing] a detected threat or vulnerability," without requiring "elimination." '031 patent at 9:8-9; '685 patent at 7:65-66. The specification describes that, upon detecting a vulnerability or threat, a "mitigation action may be triggered to mitigate a detected threat or vulnerability," where the mitigation action "may include blocking traffic from untrusted networks, halting the operation of the VM, quarantining an infected VM, preventing its launch, and the like." *See* '031 patent at 9:8-14. Other mitigation actions could also include, for

example, "disabling the VM," "updating the VM … with recent patches, and so on." '031 patent at 7:61-65, 8:1-4; *see also* '685 patent at 6:61-65, 7:66-8:3.

Although "remedial" is not expressly recited in the specification, a person of ordinary skill would have understood it to refer to such remedial actions in its many references to "mitigation actions." *See* '031 patent at 7:61-62, 8:1-6, 9:8-11, Fig. 2; '685 patent at 6:59-65, 7:65-8:1, Fig. 2. Moreover, the specification makes clear that these mitigation actions are taken toward mitigating a threat or vulnerability, as in Orca's construction, and need not even actually achieve mitigation. Specifically, while the security system *triggers* mitigation actions, the mitigation actions themselves may be "executed" by separate "mitigation tools." '031 patent at 8:4-6 ("The mitigation actions may be performed by a mitigation tool and not the system 140."), 9:9-11 ("A mitigation action may be executed by a mitigation tool and triggered by the system 140"); '685 patent at 6:63-65, 7:66-8:1 (same).

Wiz's expert in the IPR proceedings again supports Orca's construction. He testified a "remedial action," such as a "quarantining" action, goes toward mitigating a detected threat, not eliminating it. Ex. 21 (IPR2024-00865, Paper 2 (Petition)) at 52 (citing Wiz's expert to support "remediation was well known"); *see id.*, Ex. 8 ¶ 69 ("It was also commonplace for cyber security systems to facilitate *mitigation* of the identified threats and vulnerabilities."), ¶ 70 ("Quarantining was often performed to avoid or *mitigate* damage to the system or network.") (emphases added).

Finally, Wiz's construction again improperly reads out preferred embodiments. *See e.g.,* '031 patent at 9:9-14 ("Such an action may include blocking traffic from untrusted networks, halting the operation of the VM, quarantining an infected VM, preventing its launch and the like"); *Broadcom*, 2023 WL 4115909, at *1. As described above, the specification describes a wide array of "actions" that a security system can either "trigger" or "execute" to mitigate a potential threat,

and does not constrain the claims to actions that themselves "eliminate" a threat or vulnerability. *See, e.g.,* '031 patent at 9:11-13, 8:1-4; '685 patent at 6:61-63, 8:1-3.

2. Defendant's Answering Position

Wiz's definition focuses on remedial as an adjective that defines action. Here in defining the action itself as a straightforward definition of "an action taken that eliminates the detected threat or vulnerability," makes sense in a cybersecurity software context of the intrinsic record, as that is the function of the software, and what the users employ the software to affirmatively accomplish. *See* Ex. 1 at 7:61-65 ("actions may include disabling the VM [] from execution" or "updating the VM [] with recent patches"), 8:1-4 ("actions may include blocking traffic from untrusted networks, halting the operation of the VM, quarantining an infected VM, and the like").

Orca incorrectly argues that Wiz's proposed construction reads out embodiments from the specification because the mitigating actions that Orca cites are still examples of actions that eliminate the detected threat. *See id.*; *cf with* Ex. 1 at 9:11-14 ("Such an action may include blocking traffic from untrusted networks, halting the operation of the VM, quarantining an infected VM, preventing its launch and the like."). Orca's definition of "an action toward mitigating a detected threat or vulnerability" also includes the word "toward" which then confounds the definition with almost any other action in the steps to remedy a cybersecurity issue, such as first identifying the issue.

3. Plaintiff's Reply Position

Orca's proposed construction for "remedial action"—"an action toward mitigating a detected threat or vulnerability"—is supported by the intrinsic record and reflects the meaning persons of ordinary skill in the art, including Wiz's IPR expert, ascribe to this term. *Supra* at 47-49 (OOBr.). Wiz's proposed construction, in contrast, improperly rewrites this term to narrow it, such that it requires the complete elimination of a detected threat or vulnerability, rather than what

the claims actually recite—an action remediating or mitigating such a threat or vulnerability. *Id.* at 49-50.

The only defense Wiz musters for its overly narrow elimination requirement is unsubstantiated argument that its proposed construction "makes sense" because that is what "users employ [cybersecurity] software to affirmatively accomplish," and "mitigating actions that Orca cites are still examples of actions that eliminate [a] detected threat." *Supra* at 50 (WABr.). Wiz fails to point to any actual evidence—intrinsic or extrinsic—demonstrating remediation requires elimination. Nor could it. Had Orca intended to claim "elimination," it would have said so.

Wiz argues that Orca's proposed construction "confounds the definition" of "remediation action" because it "includes the word 'toward,'" and this, Wiz asserts, could be interpreted to include "almost any other action in the steps to remedy a cybersecurity issue, such as first identifying the issue." *Supra* at 50 (WABr.). But "toward" is a common, readily understood word, and there is no risk a jury will confuse threshold identifications of threats or vulnerabilities and subsequent actions toward mitigating such detected threats or vulnerabilities. The asserted claims themselves, as well as the '031 and '685 patent specifications, distinguish these activities and thus refute Wiz's argument. *See, e.g.*, '031 patent at cl. 1 (requiring the "detection of [] vulnerabilities"), cl. 3 (requiring a "processor [] further configured to implement a remedial action for at least one of the detected vulnerabilities"), cls. 9 and 11 (similar); '685 patent at cls. 1, 6, 13, and 18 (similar); '031 patent at 9:8-11 ("a mitigation action may be triggered to mitigate a detected threat or vulnerability"); '685 patent at 7:65-8:1 (same).

4. Defendant's Sur-Reply Position

Orca's construction not only is unclear, but also fails to offer any guidance on the scope and meaning of "remedial action." As previously stated, an action "toward" mitigating a detected

threat or vulnerability could be any action, including merely identifying a threat.

F. "Determining Whether the Matching Installed Applications are Used By the Protected Virtual Cloud Asset" ('032 Patent, claims 1-5, 18, 22; '326 Patent, claim 8)

Orca's Proposed Construction	Wiz's Proposed Construction
Not indefinite. No construction required.	Indefinite.

1. Plaintiff's Opening Position

Wiz argues this term is indefinite because a skilled artisan would not reasonably understand whether "installed applications ***are used*** by the protected virtual cloud asset" as recited in claims of the '032 and '326 patents. Wiz is wrong. The intrinsic records and Wiz's statements in IPR proceedings for these patents demonstrate that the claims are not indefinite because they "inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014).

Here, the invention's scope is clear: based on a claimed matching process, "potential cyber vulnerabilities" are determined and prioritized based on whether the "matching installed applications are used by the protected cloud asset." '032 patent at cls. 1, 18, 22. "In use" is hardly an abstruse phrase beyond the ken of the person of ordinary skill in the art (or a jury for that matter). Rather, it means what it says and would cover any form of use of the installed applications. Indeed, the dependent claims recite ways in which it can be determined whether installed applications are or are not in use: "checking configuration files of the matching installed applications" ('032 patent at cl. 3), "verifying access times to files by an operating system" (*id*. at cl. 4), and "analyzing application logs or system logs" (*id.* at cl. 5).

The specification is consistent, explaining that a security system may analyze a snapshot to determine vulnerable installed applications and then determine whether such applications are

"in use." '032 patent at 5:31-48. Like the claims, the specification discloses several examples for making this determination, including to "check the configuration files of the applications and operating system of the VM" (*id.* at 5:49-51); "verify access times to files by the operating system" (*id.* at 5:51-52); "analyze the active application and/or system logs in order to deduce what applications and modules are running" (*id*. at 5:52-54); "analyz[e] the page file" that reflects "machine memory" to "allow deduction of running applications and modules by the VM" (*id.* at 6:5-12); and "read process identification number (PID) files and check their access or write times, which are matched against process descriptors … to deduce which processes are running" (*id.* at 6:13-18). These examples provide a person of ordinary skill with ample certainty as to the scope of "determining whether the matching installed applications ***are used*** by the protected virtual cloud asset." *See Sonix Tech. Co. v. Publications Int'l, Ltd.*, 844 F.3d 1370, 1379 (Fed. Cir. 2017) (finding claim term definite in view of specification's specific examples).

During prosecution, the Examiner demonstrated his understanding of "whether the matching installed applications are used by the protected virtual cloud asset" by quoting the claim language and commenting on these limitations while allowing the claims. Ex. 22 ('032 patent prosecution history) at 8-9; *see also id.* at 16-17; *Tinnus Enters., LLC v. Telebrands Corp.*, 733 F. App'x 1011, 1020 (Fed. Cir. 2018) (finding "examiner's own remarks regarding an amendment confirm that the claim language informs a person of ordinary skill of the objective boundaries of the claim term."); *Sonix*, 844 F.3d at 1379-1380 (application by an examiner provide evidence of reasonable certainty). Moreover, Wiz's assertion that "in use" is indefinite is again belied by its own expert who, in support of Wiz's IPR petition, demonstrated no difficulty applying the scope of the term when analyzing prior art. Ex. 23 (IPR2024-00864 Paper 2 (Petition)) at 37-38, 44; Ex. 24 (IPR2024-01191 Paper 2 (Petition)) at 46-47; *see Sonix*, 844 F.3d at 1380.

2. Defendant's Answering Position

This term is indefinite because there is no way for one of ordinary skill to determine what it means to "determine whether matching installed applications are used." The claim separately requires that the applications must be installed. But is unclear when and how to determine whether the already installed applications "are used" and how the method "determines" this. Must the applications be used within a day, within 30 days or ever? The intrinsic record is silent. The references in the specifications to installed applications do not provide guidance regarding whether those applications "are used." Ex. 2 at 5:34-37 ("To this end, the security system [] is configured to match installed application lists, with their respective versions, to a known list of vulnerable applications.").

Orca's arguments support only underline the indefiniteness. *See supra* at 52-53 (OOBr.). Orca cites examples of determining whether applications "are running," but that only confounds the question because that is in the present tense ("are running"), while the claim is in the past tense ("are used"). *See supra* 52-53 (OOBr.)*; see also* Ex. 2 at 5:52-54 ("analyze the active application and/or system logs in order to deduce what applications and modules are running"), 6:5-12 ("analyz[e] the page file" that reflects "machine memory" to "allow[] deduction of running applications and modules by the VM"); 6:13-18 ("read process identification number (PID) files and check their access or write times, which are matched against process descriptors … to deduce which processes are running"). "Running" is also different than "used." At bottom, Orca cites to no disclosure that provides any examples or objective guidance to determine whether installed applications "are used" as claimed. This is a prototypical example of indefiniteness.[21] *Mantissa*

[21] Orca cites Wiz's expert's declaration in support of Wiz's IPR, but the expert comments were look at whether an application was "in use" and not the phrase "are used." *See supra* at 53 (OOBr.).

Corp. v. First Fin. Corp., No. 2022-1963, 2024 WL 607717, at *4 (Fed. Cir. Feb. 14, 2024) (finding claims indefinite because "The public is not apprised of what is claimed by the patent.")

Orca further argues that it must have been clear to the Examiner at the PTO, as the claims were ultimately allowed. *See supra* at 53 (OOBr.). If that were sufficient, no claim would ever be found indefinite in district court, which is not the case. *See Praxair, Inc. v. ATMI, Inc.,* 543 F.3d 1306, 1319 (Fed. Cir. 2008) ("Indefiniteness is a matter of claim construction, and the same principles that generally govern claim construction are applicable to determining whether allegedly indefinite claim language is subject to construction.").

The term should be found indefinite.

3. Plaintiff's Reply Position

The intrinsic records for the '032 and '326 patents, as well as Wiz's own IPR expert's statements, demonstrate that Wiz cannot meet its burden of proving by clear and convincing evidence that the "determining whether the matching installed applications are used by the protected virtual cloud asset" term is indefinite. This term "inform[s], with reasonable certainty, those skilled in the art about the scope of the invention[s]," and nothing more is required. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014); *supra* at 52 (OOBr.).

Wiz argues the intrinsic record "is silent" with respect to "when and how to determine whether the already installed applications 'are used' and how the method 'determines' this." *Supra* at 54 (WABr.). But skilled artisans would readily understand from the claims, including dependent claims reciting ways to determine whether installed applications are or are not in use, as well as multiple examples in the '032 and '326 patents' specifications, how to determine when matching installed applications "are used." *Id.* at 54-55; *see also, e.g.*, '032 patent at cls. 1, 3, 5, 18, 22, 5:14-48, 5:49-54, 6:5-18. Moreover, as Orca has explained, this is not an abstruse phrase. It means what it says. *Supra* at 52 (OOBr.); *see also Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, 30

F.4th 1339, 1349 (Fed. Cir. 2022) (ruling "resilient" was not indefinite in view of examples in dependent claims and the specification). Indeed, the examiner of the '032 patent's application understood this term. *Supra* At 53 (OOBr.); *see also Tinnus Enters., LLC v. Telebrands Corp.*, 733 F. App'x 1011, 1020 (Fed. Cir. 2018) (finding "examiner's own remarks [regarding an amendment] confirm that the claim language informs a person of ordinary skill of the objective boundaries of the claim term."); *Sonix Tech. Co. v. Publ'ns Int'l, Ltd.*, 844 F.3d 1370, 1379-81 (Fed. Cir. 2017) (application by an examiner provides evidence of reasonable certainty). And so did Wiz and its technical expert in IPR proceedings. *Supra* at 53 (OOBr.); Ex. 36 (IPR2024-00864, Ex. 1002 (Stavrou Decl.)) at ¶ 151 (arguing prior art met this limitation); Ex. 37 (IPR2024-01191, Ex. 1002 (Stavrou Decl.)) at ¶¶ 213-16; *cf. Sonix*, 844 F.3d at 1380 (finding experts' application of the term to prior art "provide[s] evidence that a skilled artisan did understand the scope of this invention with reasonable certainty").

Wiz asks the Court to ignore the multiple disclosures and examples in the '032 and '326 patents that inform this term's meaning, because, it contends, those examples relate to only whether installed applications "are running," not whether they "are used." *Supra* at 54-55 (WABr.). This contention is meritless. The specifications disclose determining whether applications are used by determining through logs, machine memory, and process identification number files whether such applications are running. *See, e.g.*, '032 patent at 5:46-54 ("[I]f there is a vulnerable version or module not ***in use***, the priority of that issue is reduced dramatically. To this end, the security system 140 may be configured to . . . analyze the active application and/or system logs in order to deduce what applications and modules ***are running***."), 6:5-20, cl. 5. And, Wiz ignores other disclosed methods of determining whether installed applications are used, e.g., through "check[ing] configuration files" and "verify[ing] access times to files." '032 patent at

5:46-53, cls. 3, 4. In a footnote, Wiz tries to dodge its IPR expert's understanding of this term by arguing that the expert merely commented on whether applications were "in use," not about determinations of whether applications "are used." *Supra* at 54 n.21 (WABr.). But this linguistic sleight-of-hand fails; Wiz's expert drew no such distinction. *See, e.g.*, Ex. 36 at ¶ 151 (Wiz's expert contending prior art taught "whether the matching installed applications ***are used*** by the protected virtual cloud asset" because it disclosed "adjusting previously assigned threat levels based on whether the associated file/code ***is*** dormant or active"). Skilled artisans are able to understand this term with "reasonable certainty." *Nautilus*, 572 U.S. at 901.[22]

4. Defendant's Sur-Reply Position

Orca fails to answer this basic question: what it means for the claims to require "determining whether the matching applications are used." *See supra* at 54 (WABr.) ("But is unclear when and how to determine whether the already installed applications 'are used' and how the method 'determines' this. Must the applications be used within a day, within 30 days or ever?").

Orca cites no intrinsic evidence regarding how recent or how often an application must have been used to meet this limitation. The intrinsic evidence citations that Orca ***does*** provide, however, support Wiz's argument that the specification only discloses detecting applications "in use" or those that "are running." Even the dependent claims Orca cites use "configuration files," "access times to files" and "application logs" to determine whether an application is "not **in use**."

[22] Neither of the two cases Wiz relies on to challenge this term show otherwise. In *Mantissa Corp. v. First Financial Corp.*, claims were found indefinite because the intrinsic record failed to provide guidance as to the identity of a "transaction partner," which was a term that did not appear in the specification or have a commonly understood meaning. 2024 WL 607717, at *3-4 (Fed. Cir. 2024). Here, the specification provides several examples of methods for determining whether installed applications "are used" that would be readily understood. In *Praxair, Inc. v. ATMI, Inc.*, the Federal Circuit reversed a finding of indefiniteness. 543 F.3d 1306, 1319 (Fed. Cir. 2008).

’032 Patent cls. 3-5. Determining what applications are currently running and determining what applications previously ran are different inquiries, both logically and technically. The specification provides no guidance for determining which applications in the latter category fall within the claims’ scope and neither does Orca.

Orca did not propose a construction that “are used” means running or in use. Yet, Orca provides no evidence, intrinsic or extrinsic, to demonstrate how any other determination of whether an application is “used” is made. Instead, a person of ordinary skill is left with no guidance as to when, for how long, or how often an application must be run to meet this limitation. The specification’s disclosure only describes determining running applications while the claim language on its face encompasses much more. The claims, read in light of the specification, thus do not inform a person of ordinary skill about the full scope of determining what applications “are used” with reasonable certainty.

G. “Sensitive Data” (’685 Patent, claims 1, 5, 6, 13, 17, 18, 22)

Orca’s Proposed Construction	Wiz’s Proposed Construction
Not indefinite. No construction required.	Indefinite.

1. Plaintiff’s Opening Position

Wiz cannot satisfy its clear and convincing burden to prove that a person of ordinary skill in the art would not understand with reasonable certainty the meaning of “sensitive data” in the ’685 patent claims. *Cox Commc’ns, Inc. v. Sprint Commc’n Co.*, 838 F.3d 1224, 1228 (Fed. Cir. 2016). The ’685 patent uses “sensitive data” consistent with its well-known and plain meaning to include personally identifiable information, encryption keys, passwords and other credentials, and the like. Far from indefinite, Wiz argued in its IPR Petition for the ’685 patent that “[s]ensitive-data detection” was a “well-understood, predictable technique[].” (Ex. 21 at 25). No construction

of this simple phrase is necessary.

Independent claims 1, 13 and 22 recite analyzing a snapshot of a virtual disk of a virtual machine "to detect vulnerabilities and sensitive data" and to "report the detected vulnerabilities and sensitive data as alerts," where the alerts are "filtered and prioritized based on the determined risk level of the virtual machine." '685 patent at 9:44-54, cl. 1; *see also id.* at 10:39-47, 11:22-30, cls. 13, 22. The specifications provide several examples of "sensitive data," including "[f]or example, the security system 140 may detect and alert on sensitive data not being encrypted on the logical disks[.]" '685 patent at 6:19-23. Such sensitive data may "includ[e] personally identifiable information, PII[.]" *Id.* at 6:46-48; *see also id.* at 6:21-30 (describing other examples including "private keys" and "system credentials"). These examples inform a person of ordinary skill as to the scope of sensitive data with reasonable certainty. *See, e.g.*, *ClearOne, Inc. v. Shure Acquisition Holdings, Inc.*, 35 F.4th 1345, 1349 (Fed. Cir. 2022) (finding term "self-similar" was not indefinite based on the examples provided in the written description); *Sonix,* 844 F.3d at 1379-80.

Here again, Wiz contradicts itself. Before the Patent Office in its IPR petitions, Wiz argued that "traditional security systems" improved "security by identifying risks including … ***sensitive data (e.g., personal information, financial information, or encryption keys***)" (Ex. 21 at 13). *See also id.* at 19 (recognizing "various types of sensitive data"), 39 (arguing that "confidential information" and "information about an encryption key" were examples of "sensitive data"). These concessions cannot be squared with Wiz's position here that a person of skill in the art would be unable to understand "sensitive data" with reasonable certainty. *See Sonix*, 844 F.3d at 1380.

2. Defendant's Answering Position

The term "sensitive data" is indefinite because it is subjective. Determining whether data is "sensitive"—or sensitive enough—is a fully subjective exercise. The specification and intrinsic record provide no guidance on what is or is not "sensitive" data, rendering the term indefinite.

Datamize, LLC v. Plumtree Software, Inc. is instructive. 417 F.3d 1342 (Fed. Cir. 2005). There, the Federal Circuit found the term "aesthetically pleasing" indefinite under the prior more strict insolubly ambiguous standard because it was subjective. *Id.* at 1350. In particular, the Federal Circuit noted that "[t]he scope of claim language cannot depend solely on the unrestrained, subjective opinion of a particular individual purportedly practicing the invention"—indeed, "[a] purely subjective construction of 'aesthetically pleasing' would not notify the public of the patentee's right to exclude since the meaning of the claim language would depend on the unpredictable vagaries of any one person's opinion of the aesthetics of interface screens." *Id.*. The same principle applies here. Whether data is "sensitive" is within the eye of the beholder: one person may consider their address "sensitive," another may not.

Orca's assertion that Wiz's expert opined on sensitive data as "well understood" misses the issue, as the expert argued that the "detection" of "sensitive data" was an understood "technique" but did not address the scope of the data to be detected and his declaration was intended to at least address the examples in the specification. *See supra* at 58 (OOBr.) (citing Ex. 21 at 25). Orca's examples of data it cites from the specification as "sensitive" provide no objective measures for what is and is not sensitive. *See supra* at 58-59 (OOBr.). And in the specification, "sensitive data" is not described in any terms other than through circular logic; nor is there a definition of personally identifiable information. *See* Ex. 3 at 6:46-48. Further, in cybersecurity applications, different customers may have different ideas on what is, or is not, sensitive. *Id.* at 1:26-27 ("a cloud storage service can maintain data of multiple different users); Ex. 34 at 2. (An "important fact is that sensitive data are quite subjective to users' preferences and application scenarios.").

The term "sensitive data" should be found indefinite.

3. Plaintiff's Reply Position

Wiz contends "[t]he term 'sensitive data' is indefinite because it is subjective." *Supra* at 59 (WABr.). It is not. The '685 patent uses "sensitive data" consistent with its well-known and plain meaning to include personally identifiable information, encryption keys, passwords and other credentials, and the like. *Supra* at 58-59 (OOBr.). And, contrary to what Wiz asserts, the '685 patent provides ample guidance, including multiple examples, that inform skilled artisans what this term means. *See id.* (collecting disclosures); *see also ClearOne v. Shure Acquisition Hldgs.* 35 F.4th 1345, 1349 (Fed. Cir. 2022) (finding "self-similar" not indefinite based on disclosed examples); *Sonix*, 844 F.3d at 1379-80 (finding "visually negligible" not subjective or indefinite because specification provided examples). Indeed, Wiz argued in its IPR petition for the '685 patent that "[s]ensitive-data detection" was a "well-understood, predictable technique[]," and recognized what it encompasses. Ex. 21 at 25; *id.* at 13 (Wiz arguing certain prior art disclosed detection of "sensitive data (e.g., personal information, financial information, or encryption keys)").

The pre-*Nautilus* case Wiz emphasizes in its indefiniteness challenge, *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342 (Fed. Cir. 2005), is inapposite. In *Datamize*, the Federal Circuit addressed the term "aesthetically pleasing," and found that term indefinite because it was "purely subjective" and "depend[ed] on the unpredictable vagaries of any one person's opinion of the aesthetics of interface screens." 417 F.3d at 1350. The "sensitive data" term at issue here is nothing like the "aesthetically pleasing" term in *Datamize*; it is neither "purely subjective" nor dependent on "vagaries of any one person's opinion." *Id.*; *see also Sonix,* 844 F.3d at 1377-78 ("That there are examples [in the specification] at all distinguishes this case from *Datamize*"); *Niazi*, 30 F.4th at 1349-50 (finding terms "'resilient' and 'pliable' are not purely subjective terms like those in *Datamize*" because intrinsic record provided examples); *Cap. Sec. Sys., Inc. v. NCR*

Corp., 725 F. App'x 952, 957 (Fed. Cir. 2018) (finding "ascertaining an apparent signature" not indefinite because, unlike the term in *Datamize*, it did "not depend on the unrestrained, subjective opinion of a particular individual"). Rather, "sensitive data" is a known term in the cybersecurity industry, and, in the context of the '685 patent, is readily understood. *See* Ex. 21 at 25 (Wiz effectively conceding this point in its IPR petition). In fact, Wiz also has patents claiming the detection of "sensitive data." *See* Ex. 38 (U.S. Patent No. 12,061,719) at cl. 1 ("A method for agentless detection of ***sensitive data*** in a cloud computing environment…").

Furthermore, even if the Court were to credit Wiz's assertion that, "in cybersecurity applications, different customers may have different ideas on what is, or is not, sensitive" (*supra* at 60 (WABr.)), Wiz has not shown (and cannot show) that "sensitive data" is subject to such variability that, to skilled artisans, it is uncertain in scope. *See 3form, Inc. v. Lumicor, Inc.*, 2017 WL 443652, at *4 (Fed. Cir. 2017) (finding "substantial natural conformation" definite because a skilled artisan would understand the term notwithstanding an absence of specific mathematical specifications). The record demonstrates that this term is reasonably certain and thus definite. *See Nautilus*, 572 U.S. at 901.

4. Defendant's Sur-Reply Position

What makes data "sensitive"? What dividing line can a POSA use to objectively discern between "sensitive data" and not-sensitive data? Orca fails to provide any objective guideposts as to what data is and is not "sensitive," leaving it entirely up to subjective opinion.

And the "examples" that Orca cites from the specification support Wiz, not Orca. The '685 Patent excerpt that Orca cites as supposedly having examples of sensitive data instead identifies "private keys," "system credentials," and "weak passwords" ***separately*** from "sensitive data." It never identifies them ***as examples*** of "sensitive data." *See supra* at 61 (ORBr.) (citing *supra* at 59 (OOBr.) (citing '685 Patent at 6:21-30).) But even if these ***were*** examples of sensitive data, the

specification provides no criteria with which to make determinations of other types of "sensitive data." Non-limiting examples do not on their own define the bounds of a claim. *IQASR LLC v. Wendt Corp.*, 825 F. App'x 900, 906 (Fed. Cir. 2020) ("Open-ended definition of categories that might or might not possess certain traits cannot provide reasonably certain bounds on the scope of [a claim term]").

The only other example Orca identifies is "personally identifiable information," which could similarly encompass information that one may or may not consider "sensitive," such as one's address. Claims 1, 14, and 15 of the related '926 Patent similarly include the clause "wherein the data includes at least one of: unencrypted sensitive data" and a host of other categories, including "personally identifiable information"—thereby similarly describing "personally identifiable information" separately from "sensitive data," not as an example of it.

Orca cites various decisions in an attempt to distinguish the *Datamize* case on the basis that the '685 specification purportedly provides examples. Those cases are inapplicable. In *Niazi Licensing Corp. v. St. Jude Medical SC, Inc.*, "[t]he intrinsic record provide[d] objective boundaries by which a skilled artisan could determine the scope of the claims." 30 F. 4th 1339, 1349 (Fed. Cir. 2022). Orca's other cited cases state similarly. But as discussed, the '685 Patent provides no such objective boundaries. *See Datamize, LLC v. Plumtree Software, Inc.,* 417 F.3d 1342 (Fed. Cir. 2005); *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1372 (Fed. Cir. 2014) ("unobtrusive manner" indefinite where the intrinsic record "at best muddled" the term rather than clarifying it); *Intell. Ventures I LLC v. T-Mobile USA, Inc.*, 902 F.3d 1372, 1381 (Fed. Cir. 2018) ("QoS requirements" indefinite where term was "entirely subjective and user-defined").

H. "Analyz[e/ing] the (At Least One) Snapshot" (all asserted claims of the Orca Asserted Patents)

Orca's Proposed Construction	Wiz's Proposed Construction
No construction necessary; *see* "snapshot" above	"analyz[e/ing] the snapshot itself"

1. Plaintiff's Opening Position

The Orca Asserted Patents do not create or specify a unique definition for "analyz[e/ing] the (at least one) snapshot," and there is nothing unclear about that term. Notably, Wiz does not attempt to construe any part of the phrase, merely changing "snapshot" to "snapshot itself," apparently to prohibit the indirect analysis of a snapshot (e.g., by analyzing a copy of the snapshot or data about the snapshot). But a snapshot can be analyzed indirectly, and nothing in the intrinsic evidence supports reading such indirect analysis out of the claims as Wiz asks the Court to do. *See, e.g.*, '685 patent at 5:25-27 ("Various techniques can be utilized to analyze the snapshots, depending on the type of vulnerability and cyber threats to be detected"); '031 patent at 6:30-32 (similar). Moreover, dependent claims dictate that "analyzing the snapshot" includes indirect analysis, such as creating a copy of a snapshot and "analyzing the copy of the snapshot." '809 patent at cl. 23 ("The method of claim 1 … further wherein analyzing the snapshot of the at least one virtual disk comprises analyzing the copy of the snapshot"). As another example, dependent claims require "analyzing the snapshot" includes "parsing the snapshot" and "scanning the parsed snapshot … to detect the potential cyber vulnerabilities." '326 patent at cl. 9; *see also id.* cl. 10 ("wherein scanning the parsed snapshot further includes…"). Wiz's construction would cause these dependent claims to be in conflict with the independent claims and must therefore be rejected. *See Wright Med.*, 122 F.3d at 1445 ("[W]e must not interpret an independent claim in a way that is inconsistent with a claim which depends from it").

During the parties' meet and confer, Wiz alleged it took its construction from Orca's Patent

Owner Preliminary Response to Wiz's IPR for the '031 patent, where Orca stated "POSAs would understand the limitations reciting 'analyzing the at least one snapshot' encompass analyzing the snapshot itself, but not VMs instantiated from the snapshot." Ex. 25 (IPR2024-00863, Paper 6 (POPR)) at 13. But Orca's statement regarding what analyzing a snapshot "encompasses" is not a redefinition or clear disavowal of claim scope. *See Thorner*, 669 F.3d at 1367; *Pac. Biosciences of Cal., Inc. v. Oxford Nanopore Techs., Inc.*, 2019 WL 1056276, at *4 (D. Del. Mar. 6, 2019).

2. Defendant's Answering Position

Wiz's construction is taken verbatim from Orca's recent statements to the Patent Office. Orca stated: "'analyzing the at least one snapshot' encompass analyzing the snapshot itself, but not VMs instantiated from a snapshot." *See* Ex. 28 at 13. Wiz's construction fairly reflects Orca's own positions as to the scope of this claim, as well as the intrinsic record. By contrast, Orca now argues the claims include "indirect analysis" such as analyzing "data ***about*** the snapshot." This is the opposite of what Orca told the Patent Office, as indirectly analyzing "data about the snapshot" would readily cover the exact scenario that Orca said was not covered by the claims.

In recent IPRs, Orca has argued that the Veselov prior art from Amazon does not teach its claims because in one example, Veselov takes a snapshot, restores it to a VM, then analyzes that VM. Ex. 29, ¶¶ 47, 52-58. There is no dispute that the restored VM is based on the snapshot and includes data about the snapshot. Nevertheless, Orca and its expert argue that such indirect analysis is not "analyzing a snapshot" as claimed. *See id.*, ¶ 29.

As explained by Orca's own IPR expert, to analyze the snapshot, one has to analyze the snapshot itself. *Id.* If one was analyzing a VM based on that snapshot or restored virtual disk, those are "not snapshots" and therefore one is not "analyzing a snapshot." *Id.* This is consistent

with the language of the claims, which all recite in some fashion analyzing a snapshot.[23] The specification is similar, which discusses analyzing a snapshot. Ex. 1 at Fig. 2, 6:17-18.

Despite these clear statements, Orca now baldly claims to this Court that "indirect analysis of a snapshot (e.g., by analyzing a copy of the snapshot or data about the snapshot)" is within the scope of the claim. *See supra* at 64 (OOBr.). But analyzing a "data about the snapshot" would readily cover analyzing a VM instantiated from a snapshot. And thus, Orca is again arguing contrary to its earlier statements to the Patent Office.

Orca does not even address the operative claim language, which requires "analyzing a snapshot" in its brief. It then gives short shrift to its own statements in IPR, trying to argue that its use of "encompasses" does not bind it. *See supra* at 64-65 (OOBr.). But Orca put forth its view of the correct construction of this entire phrase to the Patent Office in multiple clear and unmistakable statements that cannot be ignored. It has an entire section of its POPR under the heading "Claim Construction" that distinguishes "analyzing a snapshot" from the same type of "indirect analysis" it now argues is permissible here. Ex. 28 at 12-14. Wiz is not simply relying on one isolated statement, but Orca's own arguments as to the correct construction of the claim. *Id.*

The claim terms should also not be read in isolation. Orca first argues that a snapshot is only a "copy of data." *See supra* at 18 (OOBr.). It further argues that "analysis of a snapshot" includes analyzing "data about a snapshot." *See supra* at 64 (OOBr.). In sum, Orca is telling this Court that the claims only require analyzing some data about some data. This is contrary to the

[23] None of the dependent claims cited by Orca address the question of what analyzing "the snapshot" means, but rather add further information. *Compare supra* at 64-65 (OOBr.) *with* Ex. 4 at claim 23 (discussing analyzing a copy of "the snapshot.")

claim's recitation of "snapshots," what "analyzing a snapshot" means and ***all*** of Orca's statements to the PTO.

Whether as a disclaimer or based on the intrinsic evidence Orca itself argued before the Patent Office, the claims require analyzing the "snapshot itself" not "indirect analysis." Orca should not be permitted to twist the claims for purposes of invalidity and infringement. *Aylus Networks*, 856 F.3d at 1360 (applying "prosecution disclaimer doctrine to IPR proceedings will ensure that claims are not argued one way in order to maintain their patentability and in a different way against accused infringers").

3. Plaintiff's Reply Position

The "analyz[e/ing] the (at least one) snapshot" terms need no construction. The term "snapshot" is being addressed separately, *see* Section II.B, and neither Orca nor Wiz seeks a construction of the term "analyz[e/ing]." *Supra* at 63 (OOBr.). Nevertheless, Wiz asks the Court to rewrite this term by changing "snapshot" to "snapshot itself," improperly attempting to exclude from the scope of the asserted claims indirect snapshot analyses covered by the asserted claims' plain language and encompassed by the asserted patents' written descriptions. *See id.*; *see also, e.g.*, '809 patent at cl. 23 ("The method of claim 1 … further wherein analyzing the snapshot of the at least one virtual disk comprises analyzing the copy of the snapshot"); '326 patent at cl. 9 (requiring snapshot analysis comprising "parsing the snapshot" and "scanning the parsed snapshot … to detect the potential cyber vulnerabilities"); '685 patent at 5:25-27 ("Various techniques can be utilized to analyze the snapshots, depending on the type of vulnerability and cyber threats to be detected"); '031 patent at 6:30-32 (similar).

Wiz purports to ground its proposed construction in a statement Orca made in recent IPR proceedings. *Supra* at 65-66 (WABr.). But, to be clear, Wiz's proposed construction is ***not*** "taken verbatim from Orca's recent statements to the Patent Office," as Wiz asserts. *Id.* To the USPTO,

Orca explained that "POSAs would understand the limitations reciting 'analyzing the at least one snapshot' encompass analyzing the snapshot itself, but not VMs instantiated from a snapshot," because "when a duplicate VM is instantiated from a snapshot for subsequent monitoring, the instantiated VM is not a 'snapshot,' and monitoring or assessing it is not 'analyzing' a 'snapshot' as claimed." Ex. 28 at 13-14. And Orca further explained that Wiz and its IPR expert adopted a contrary, incorrect interpretation "to improperly mix and match embodiments" in a prior art reference "because the majority of [that reference]'s disclosures focus on and emphasize evaluations of duplicate VMs instead of analyzing snapshots." *Id.* Nothing in these statements restricted, or disavowed scope covered by, the "analyz[e/ing] the (at least one) snapshot" terms, in any way. Orca merely explained—correctly—that evaluations of VMs are not analyses of snapshots even if the VMs are instantiated from snapshots. Further, on its face, the language Wiz selectively quotes—"limitations reciting 'analyzing the at least one snapshot' ***encompass*** analyzing the snapshot itself"—is not limiting. *See Thorner v. Sony Comput. Ent. Am. LLC*, 669 F.3d 1362, 1366 (Fed. Cir. 2012) ("Absent a clear disavowal in the specification or the prosecution history, the patentee is entitled to the full scope of its claim language."); *Pac. Biosciences of California, Inc. v. Oxford Nanopore Techs., Inc.*, 2019 WL 1056276, at *2 (D. Del. Mar. 6, 2019) ("[C]laims of [a] patent will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope using words or expressions of manifest exclusion or restriction.").

4. Defendant's Sur-Reply Position

Orca devoted an entire "claim construction" section in briefing to the PTO that "analyzing a snapshot" does ***not*** include analyzing a virtual machine instantiated from a snapshot because it does not analyze "a snapshot." Ex. 28 at 12; *id.* at 12-14. But before this Court, Orca argues that "analyzing a snapshot" includes "indirect snapshot analyses," such as analyzing "data about the snapshot." *See supra* at 67 (ORBr.); *supra* at 64 (OOBr.). The latter cannot be reconciled with

what Orca and its expert told the PTO, which is that analyzing a virtual machine instantiated from a snapshot falls squarely within the "indirect analysis"[24] ***not*** covered by the claims:

> [Wiz's expert] Dr. Stavrou treats limitations in the challenged claims that recite "[analyze/analyzing] the at least one snapshot" as though they "encompass[] ***both*** [1] ***direct analysis*** of the snapshot data ***and*** [2] analysis of a VM instantiated from the snapshot." . . . ***I disagree with that approach to, and interpretation of, these limitations***, because that is not how a [POSA] would understand them.

Ex. 29, ¶ 28. Further:

> An analysis of a VM instantiated from a snapshot is an analysis of a VM—***not a snapshot***. Once a VM is instantiated from a snapshot, e.g., when a duplicate VM is instantiated from a snapshot for subsequent monitoring, ***the instantiated VM is no longer a "snapshot," and monitoring, assessing, or evaluating it is not "analyze/analyzing" a "snapshot" as claimed***.

Id., ¶ 29.

As Wiz's construction provides, and as Orca and its expert clearly and unmistakably have argued to the PTO, analyzing anything other than the snapshot itself is not "analyzing a snapshot." This is exactly what Wiz's construction provides, quoting Orca's own response to the Patent Office. Ex. 28 at 12-13 ("analyzing the snapshot itself"). There is no way to apply Orca and its expert's own interpretation to include "indirect analyses" of data "about the snapshot."

Orca next relies on dependent claims. But those claims existed when Orca and its expert argued to the PTO that the claims only cover analyzing the snapshot "itself," not indirectly analyzing data about the snapshot. If the dependent claims somehow broadened the independent claims—they do not—Orca's own claim construction arguments to the PTO would be incorrect. Orca in IPR states clearly that a POSA would understand analyzing the snapshot to be "analyzing the snapshot itself," exactly as Wiz proposes.

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[24] The phrase "indirect analysis" is nowhere in the intrinsic record—which is unsurprising, given that Orca coined it for the instant claim construction proceedings.

III. CONCLUSION

A. Plaintiff's Opening Position

For the reasons discussed above, Orca's constructions should be adopted.

B. Defendant's Answering Position

For the reasons stated above, Wiz respectfully requests that its proposed constructions and indefiniteness claims be adopted, and Orca's proposed constructions rejected.

C. Plaintiff's Reply Position

Orca respectfully requests that the Court adopt its proposed constructions.

D. Defendant's Sur-Reply Position

Wiz respectfully requests that its constructions and indefiniteness claims be adopted.

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