

Filed on behalf of: Orca Security Ltd.

Entered: October 6, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WIZ, INC.,
Petitioner,

v.

ORCA SECURITY LTD.,
Patent Owner.

IPR2024-01190
Patent 11,740,926

**PATENT OWNER'S OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE**

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2001	Declaration of David R. Kaeli, Ph.D. ("Kaeli Decl.")
2002	<i>Curriculum Vitae</i> of David R. Kaeli, Ph.D.
2003	Trend Micro™ vmware®, <i>Trend Micro Enterprise Security: Changing the Game for Anti-Virus in the Virtual Datacenter</i> (White Paper) (Sept. 2010), https://www.kennisportal.com/wp-content/uploads/2022/06/ChangingtheGameintheVirtualDatacenter.pdf (last visited Sept. 7, 2024) ("vmware, Trend Micro Enterprise Security")
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2007	Dominik Birk, <i>Technical Challenges of Forensic Investigations in Cloud Computing Environments</i> (Jan. 12, 2011), https://cachin.com/cc/csc2011/submissions/birk.pdf (last visited Sept. 7, 2024) ("Birk, Technical Challenges")
2008-2009	RESERVED
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2014	Complaint for Patent Infringement, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. July 12, 2023), ECF No. 1 (“Orca Compl.”)
2015	Oral Order (Joint Motion for Discovery Dispute Teleconference), <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. May 17, 2024), ECF No. 62 (“Oral Order”)
2016	Defendant Wiz, Inc.’s Initial Invalidity Contentions, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. June 7, 2024) (excerpt) (“Pet’r’s Invalidity Contentions”)
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2019	Derek Uluski, Real Time Anti-Virus for a Virtualized Environment (2008) (M.S.E.E., Thesis, Northeastern University) (excerpt) (“Uluski Thesis”)
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2022	Diego Perez-Botero et al., <i>Characterizing Hypervisor Vulnerabilities in Cloud Computing Servers</i> , Conference: Proceedings of the Workshop on Security in Cloud Computing (SCC), Hangzhou, China 1–8 (May 8, 2013) (“Perez-Botero, <i>Characterizing Hypervisor Vulnerabilities</i> ”)
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2025	Red Hat, <i>Red Hat OpenStack Platform 11: Instances and Images Guide – Managing Instances and Images</i> (updated Feb. 19, 2018), https://docs.redhat.com/en-us/documentation/red_hat_openshift_platform/11/pdf/instances_and_images_guide/Red_Hat_OpenStack_Platform-11-Instances_and_Images_Guideen-US.pdf (“Red Hat Open Stack”)
2026	Greg Zemlin, <i>Agentless vs. Agent-Based Security: Which is Better for the Cloud?</i> , Wiz (Nov. 26, 2023), https://www.wiz.io/academy/agentless-vs-agent-based-security (“Wiz Marketing”)
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2044	<i>Agentless vs Agent-Based Scanning: A Comparative Analysis</i> , Runecast.com (July 20, 2023)
2045	Joint Claim Construction Chart, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. Sept. 25, 2024) (“Jt. Claim Constr. Chart”)
2046	Appendix E, Invalidity of United States Patent 11,740,926 (the “’926 Patent”), attached to Defendant Wiz, Inc.’s Initial Invalidity Contentions, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. June 7, 2024)
2047	Appendix E-1, Invalidity of United States Patent 11,740,926 (the “’926 Patent”), attached to Defendant Wiz, Inc.’s Initial Invalidity Contentions, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. June 7, 2024)

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2048	Wiz, Inc.'s Answering Claim Construction Brief, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. Oct. 22, 2024) (excerpt) ("Answering Claim Constr. Chart")
2049	Declaration of Douglas E. Lumish Pursuant to 37 C.F.R. § 42.10(c)(2)
2050	Declaration of Steven W. Peters In Response to Petitioner's First Objections to Evidence [<i>served, not filed</i>]
2051-2052	RESERVED
2053	Listing of Requested Documents
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2056	Orca Security Ltd.'s Eleventh Supplemental Responses and Objections to Defendant Wiz's First Set of Interrogatories, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. Dec. 13, 2024) (excerpts)
2057	Stipulated Protective Order, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. Mar. 15, 2024), ECF No. 38
2058	Email exchange between counsel for Wiz, Inc. and counsel for Orca Security Ltd. (Dec. 17-26, 2024)
2059	Email exchange between counsel for Wiz, Inc. and counsel for Orca Security Ltd. (Dec. 23, 2024 – Feb. 25, 2025)
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2065	<i>Orca Security Lands \$6.5M Seed Round to Deliver IT Security Teams Unprecedented Full Stack Cloud Visibility, Securing High-Velocity Cloud Growth</i> , Orca Security Blog (June 12, 2019), https://orca.security/resources/blog/orca-security-lands-6-5m-seed-round-to-deliver-it-security-teams-unprecedented-full-stack-cloud-visibility-securing-high-velocity-cloud-growth/

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2066	Orca Security, <i>The Ultimate Guide to: Gaining Full Stack Visibility Into Your Cloud Assets</i> (Nov. 2019)
2067	Orca Security Technical Brief, <i>SideScanning™ – Inside the Engine that Powers Orca Security</i> (2020)
2068	Letter from counsel for Orca Security Ltd. to counsel for Wiz, Inc. (May 20, 2024), filed in <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. Sept. 10, 2024), ECF No. 140-2
2069	Letter to the Honorable Sherry R. Fallon from Rodger D. Smith Regarding Discovery Disputes, <i>Orca Sec. Ltd. v. Wiz, Inc.</i> , No. 1:23-cv-00758 (D. Del. Oct. 9, 2024), ECF No. 165
2070	Francis & James Berthoty, <i>Redefining CNAPP: A Complete Guide to the Future of Cloud Security</i> , Software Analyst Cyber Research (Sept. 12, 2024), https://softwareanalyst.substack.com/p/redefining-cnapp-a-complete-guide
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2072	Declaration of Blake R. Davis Pursuant to 37 C.F.R. § 42.10(c)(2)
2073	Declaration of Dr. David Kaeli in Support of Patent Owner's Response ("Kaeli") [PROTECTIVE ORDER MATERIAL AND REDACTED VERSIONS]
2074	Declaration of Avi Shua ("Shua") [PROTECTIVE ORDER MATERIAL AND REDACTED VERSIONS]
2075	Wiz Experts Team, Containers vs. VMs: What's the difference? (Apr. 8, 2024) [Stavrou Dep. Ex. 2075]
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2094	Video of <i>Orca Pod (In-Account) Onboarding</i> , https://www.youtube.com/watch?v=FEvqhAktFS0 (first made available May 1, 2020)
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2099	<i>Orca Security-Deep Cloud Inspection</i> (last visited Mar. 19, 2025), https://www.youtube.com/watch?v=VwZ-7guGHw0
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2102	Qualys, Inc., <i>Qualys Unveils Cloud Agent Platform for Continuous Asset Inventory, Security and Compliance</i> (Apr. 22, 2015), https://www.bankinfosecurity.com/press-releases/qualys-unveils-cloud-agent-platform-for-continuous-asset-p-223
2103	Saumitra Das, <i>Security Agents Don't Belong in Your Cloud!</i> (Aug. 18, 2021), https://cloudsecurityalliance.org/blog/2021/08/18/security-agents-don-t-belong-in-your-cloud
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2117	Orca Security, <i>Unprecedented Holistic View of Cloud Security</i> (last visited Mar. 19, 2025), https://panoramait.com/en/solution-orca-security/
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2148	Chris Ray, <i>GigaOm Radar for Cloud Workload Security</i> (Jan. 15, 2025), https://gigaom.com/reprint/gigaom-radar-for-cloud-workload-security-241089-check-point/
2149	Provisional Patent Application No. 62/797,718
2150	<i>Azure Onboarding with Orca Security Orca Security and Its Partners</i> (last visited Mar. 23, 2025), https://www.youtube.com/watch?v=zw091YvbjsI
2151	RESERVED
2152	Citizens JMP Cyber 66 Report (2024), https://7938840.fs1.hubspotusercontent-na1.net/hubfs/7938840/2024_CJMP_Cyber_66.pdf

Exhibit	Description
2153	Julie Bort, <i>Wiz Hopes to Hit \$1B in ARR in 2025 Before an IPO, after Turning Down Google's \$23B</i> (Oct. 23, 2024), https://techcrunch.com/2024/10/23/wiz-hopes-to-hit-1b-in-arr-in-2025-before-an-ipo-after-turning-down-googles-23b/
2154	Ofir Dor, <i>Wiz Launches New Cloud Data Security Technology</i> (Nov. 22, 2022), https://en.globes.co.il/en/article-wiz-launchesnew-cloud-data-security-technology-1001430578
2155	George Pisha, <i>Wiz Becomes the First CNAPP to Deliver Integrated Data Security Posture Management</i> (Nov. 21, 2022), https://www.wiz.io/blog/wiz-becomes-first-cnapp-to-deliverintegrated-data-security-posture-management
2156	Wiz Experts Team, <i>CSPM vs. DSPM: Why You Need Both</i> (May 12, 2024), https://www.wiz.io/academy/cspm-vs-dspm
2157	Wiz Experts Team, <i>Sensitive Data Discovery</i> (Oct. 31, 2024), https://www.wiz.io/academy/sensitive-data-discovery
2158	Amazon Web Services, <i>Viewing Recent Management Events with the Console</i> (last visited Apr. 3, 2025), https://docs.aws.amazon.com/awscloudtrail/latest/userguide/view-cloudtrail-events-console.html
2159	Amazon Web Services, <i>Policies and Permissions in AWS Identity and Access Management</i> (last visited Apr. 3, 2025), https://docs.aws.amazon.com/IAM/latest/UserGuide/access_policies.html
2160	Alon Weiss & Jiong Liu, <i>Uncover What Is Really Deployed in Your Environment with the Enhanced Wiz Inventory</i> (Dec. 8, 2022), https://www.wiz.io/blog/uncover-what-is-deployed-in-your-environment-with-enhanced-wiz-inventory
2161	Joint Proposed Protective Order
2162	Redline Comparison between Joint Proposed Protective Order and Default Protective Order

Exhibit	Description
2163-2169	RESERVED
2170	Declaration of Nicole Elena Bruner Pursuant to 37 C.F.R. § 42.10(c)
2171	Email exchange between counsel for Wiz, Inc. and counsel for Orca Security Ltd. (Mar. 28, 2025)
2172	Transcript of Deposition of Angelos Stavrou, Ph.D., taken April 2, 2025 ("2nd Stavrou Tr.")
2173	Qualys, <i>Vulnerability Management</i> (2017), https://cdn2.qualys.com/docs/mktg/vulnerability-management-datasheet.pdf
2174	Jane Man, <i>Live Monitoring with Endpoint Agents</i> (Sept. 28, 2016), https://www.rapid7.com/blog/post/2016/09/28/live-monitoring-for-endpoints/
2175-2178	RESERVED
2179	Orca Security, <i>Sensitive Data Detection</i> (last visited May 5, 2025), https://orca.security/solutions/sensitive-data-detection/
2180	Avi Shua, <i>How Orca's Cloud Security Solution Detects Weak Passwords</i> (Feb. 13, 2020), https://orca.security/resources/blog/how-orcas-cloud-security-solution-detects-weak-passwords/
2181	Orca Security, <i>Orca Cloud Security Platform: Comprehensive Cloud Security – In Minutes</i> (2023)
2182	Matika Lidgi & Nicolas Ehrman, <i>Automatically Discover and Secure Your APIs with Wiz Dynamic Scanner</i> (Dec. 21, 2022), https://www.wiz.io/blog/automatically-discover-and-secure-your-apis-with-wiz-dynamic-scanner
2183	U.S. Patent No. 11,663,031
2184	U.S. Patent No. 11,663,032
2185	U.S. Patent No. 11,693,685

Exhibit	Description
2186	U.S. Patent No. 11,775,326
2187	U.S. Patent No. 11,726,809
2188	<i>Vulnerabilities</i> , NIST Vulnerability Database (last visited May 8, 2025), https://nvd.nist.gov/vuln
2189	U.S. Patent Application Pub. No. 2020/0244678 A1
2190	Karthik Muthukrishnan, <i>Automating Cloud Security Governance</i> (May 14, 2017) (Master's Thesis, Helsinki Metropolia University of Applied Sciences), https://www.theseus.fi/bitstream/handle/10024/130058/Muthukrishnan_Karthik.pdf?sequence=1
2191	Ferda Özdemir Sönmez et al., <i>Evaluation of Security Information and Event Management Systems for Custom Security Visualization Generation</i> (2018) https://www.researchgate.net/profile/Ferda-Oezdemir-Soenmez/publication/328714022_Evaluation_of_Security_Information_and_Event_Management_Systems_for_Custom_Security_Visualization_Generation/links/66cb5356920e05672e503f60/Evaluation-of-Security-Information-and-Event-Management-Systems-for-Custom-Security-Visualization-Generation?_cf_chl_tk=GFDVvFCEO0W43yRmGpNuvRoYvLxLlf5MQty2WjCtIKQ-1746109122-1.0.1.1-9thX8K_E0POm9M_WksJEsRdeg1KqYZ7qaqwHQ8.8yw
2192	Declaration of Raghav Bajaj in Response to Petitioner's Third Objections to Evidence [PROTECTIVE ORDER MATERIAL] [served, not filed]
2193	Jordan Novet, <i>A Tiny Security Start-Up Founded By Engineers Who Sold Their Last Company to Microsoft is Already Worth \$1.7 Billion</i> , CNBC (updated Mar. 22, 2021, 11:40 A.M. EDT), https://www.cnbc.com/2021/03/22/security-start-up-wiz-valued-at-1point7-billion-after-a-year-of-existence.html (last visited Sept. 19, 2025)

Exhibit	Description
2194	Assaf Rappaport, <i>Wiz Becomes Fastest Growing Security Startup Ever With New \$1.7B Valuation</i> , WIZ, Inc. (updated Apr. 7, 2021), https://www.wiz.io/blog/wiz-fastest-growing-security-startup-ever-with-new-valuation (last visited Sept. 19, 2025)
2195	Transcript of Deposition of Angelos Stavrou, Ph.D., taken September 24, 2025 ("StavrouTr4.") [PROTECTIVE ORDER MATERIAL]
2196	Transcript of Deposition of Ami Luttwak, taken September 2, 2025 ("LuttwakTr."), as to IPR2024-00863, -00864, -00865, -01109, -01190, and -01191 [PROTECTIVE ORDER MATERIAL]
2197	Transcript of Deposition of Angelos Stavrou, Ph.D., taken August 19, 2025 ("StavrouTr3."), as to IPR2024-00863, -00864, and -00865 [PROTECTIVE ORDER MATERIAL]
2198-2299	RESERVED
2300	Excerpt from Orca Product Documentation (2024) [PROTECTIVE ORDER MATERIAL]
2301	<i>API Onboarding with GCP Multi Scanner for In-Account</i> [PROTECTIVE ORDER MATERIAL]
2302	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2303	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2304	<i>AWS Permissions</i> [PROTECTIVE ORDER MATERIAL]
2305	RESERVED

Exhibit	Description
2306	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2307	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2308	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2309	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2310	RESERVED
2311	Excerpt from Orca Product Documentation (2024) Part 2 [PROTECTIVE ORDER MATERIAL]
2312	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2313	Excerpt from Orca Product Documentation (2024) [PROTECTIVE ORDER MATERIAL]
2314-2399	RESERVED
2400	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2401	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2402	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2403	[REDACTED] [PROTECTIVE ORDER MATERIAL]

Exhibit	Description
2404	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2405	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2406	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2407	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2408	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2409	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2410	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2411	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2412	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2413	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2414	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2415	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2416	[REDACTED] [PROTECTIVE ORDER MATERIAL]

Exhibit	Description
2417	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2418	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2419	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2420	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2421	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2422	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2423	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2424	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2425	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2426	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2427	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2428	[REDACTED] [PROTECTIVE ORDER MATERIAL]
2500	Certificate of Accuracy of Transcription for Exhibit 2079 [served, not filed]

Exhibit	Description
2501	Certificate of Accuracy of Transcription for Exhibit 2081 [<i>served, not filed</i>]
2502	Certificate of Accuracy of Transcription for Exhibit 2083 [<i>served, not filed</i>]
2503	Certificate of Accuracy of Transcription for Exhibit 2411 [<i>served, not filed</i>]
2504	Certificate of Accuracy of Translation for Exhibits 2421 and 2425 [<i>served, not filed</i>]

I. INTRODUCTION

Patent Owner Orca Security Ltd. opposes Petitioner Wiz, Inc.'s Motion to Exclude Evidence Pursuant to 37 C.F.R. § 42.64(c) (Paper 53, "Motion"). The Board should deny Wiz's request to exclude Exhibits 2134-2137, 2148, and 2400-2428.

II. THE CHALLENGED EXHIBITS ARE ADMISSIBLE**A. Exhibits 2134-2137, 2148, 2406, 2412, 2414, and 2416 Are Admissible Under Federal Rules of Evidence 801-805 and 807**

Citing little authority beyond the Federal Rules of Evidence ("Rule") and decisions reciting general hearsay concepts, Wiz seeks to exclude Orca's Internet article evidence, some of Wiz's own documents, and Orca's reliance on this evidence to support its arguments about the objective indicia of non-obviousness for its patented inventions. Mot. 1-9. But each exhibit is admissible because it is either not hearsay or falls into one or more exceptions to the rule against hearsay.

1. The Internet exhibits (2134-2137 and 2148) are not hearsay

The exhibits Wiz seeks to exclude as hearsay are not hearsay at all. *See* Fed. R. Evid. 801(c)(2). As Wiz acknowledges, Orca cites the evidence to support its arguments about long-felt need, skepticism, praise, commercial success, and copying. *See* Mot. 1-2. The exhibits are therefore offered as evidence of what they describe, not for the truth of the matters each one addresses. *See, e.g., MOM Enters., LLC v. Vieth*, IPR2023-00726, Paper 112 at 89 (P.T.A.B. Sept. 10, 2024) ("[W]e do

not find that the statement in the journal article is offered for the truth of the matter asserted therein Rather, we find that Patent Owner offers the statement in an effort to show that third parties have praised ‘the patented features of the ‘958 Patent.’”); *HTC Corp. v. Tech Props. Ltd.*, No. 5:08-cv-882, 2013 WL 4782598, at *5 (N.D. Cal. Sept. 6, 2013) (evidence of “industry acclaim” served non-hearsay purpose); *Hynix Semiconductor, Inc. v. Rambus Inc.*, No. C-00-20905, 2009 WL 112834, at *14 (N.D. Cal. Jan. 16, 2009) (article did “not constitute hearsay because it was admitted not for its truth, but as a proper secondary consideration of nonobviousness” (citations omitted)), *aff’d*, 645 F.3d 1336 (Fed. Cir. 2011).

So, for example, the Internet articles Wiz moves to exclude are not hearsay because Orca relies on each one as evidence of customer and industry perceptions—regardless of the truth of the cited remark or statement itself. Taking each in turn:

- Dr. Kaeli cites **Exhibit 2134** not for the truth that cloud adoption in fact took off around 2012 but instead as evidence that industry observers perceived cloud adoption that way, regardless of whether the point is true. Ex. 2073 ¶ 203. The evidence supports the general point that cloud adoption was occurring. *See id.* He may, in any event, rely on the exhibit under Rule 703 regardless of its admissibility.
- **Exhibit 2135** shows that the market perceived agentless scanning as extending coverage, supporting the idea that those of skill in the art at

the relevant time felt that previous methods of protecting cloud computing infrastructures were inadequate for certain applications. Ex. 2073 ¶ 210. Dr. Kaeli cites the exhibit not for the truth of the fact that agentless scanning *in fact* extended coverage but, rather, as evidence that a skilled artisan would have seen agentless scanning as addressing a need. And again, he may rely on the exhibit under Rule 703 regardless of its admissibility.

- **Exhibit 2136** shows industry perceptions of existing technology, supporting Orca's argument regarding long-felt need; whether cybersecurity professionals in fact remained concerned about security in the cloud is beside the point. *See* Ex. 2073 ¶ 204. That applies to both levels of hearsay Wiz purports to identify. *See* Mot. 3-4. Further, Exhibit 2136 is a survey produced "by the 400,000 member Information Security Community" (Ex. 2136, 2) and therefore constitutes a market report or similar commercial publication that is not excluded by the rule against hearsay and upon which Dr. Kaeli can rely regardless of its admissibility. *See* Fed. R. Evid. 703, 803.
- Similarly, **Exhibit 2137** is evidence of industry perception of the *need* for a specific cloud security solution, regardless of whether "the endless journey to obtain the right level of visibility and control over the cloud

workloads” was *in fact* “still a challenge.” POR 35.

- Finally, **Exhibit 2148** provides evidence of industry perceptions of Orca and its technology; whether those perceptions are accurate is irrelevant. *See* POR 35 (citing praise), 37-39 (discussing how a skilled artisan would have recognized that the patented technology addressed a long-felt need); Ex. 2074 ¶ 91 (citing Exhibit 2148 and observing that “*Security industry specialists remarked that Orca ‘introduced the concept of agentless side scanning’ and helped redefine the cloud security posture management (CSPM) market*” (emphasis added)). That, again, is true of both layers of purported hearsay. Mot. 4. Indeed, Wiz does not even suggest that Orca is offering any statement in this exhibit for the truth of the matter asserted, so it fails to make a threshold showing of inadmissibility. *See id.*

2. The Wiz-produced exhibits (2406, 2412, 2414, and 2416) are not hearsay

The Wiz-produced Exhibits 2406, 2412, 2414, and 2416 are not hearsay because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Further, each of these exhibits was produced under the Protective Order—indicating the documents were provided to Wiz under confidentiality obligations, confirming they contain information generated during a relationship with it. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- Orca cites statements in Exhibit 2406 that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- Orca relies on [REDACTED] in Exhibit 2412 because [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- Orca cites Exhibit 2414 for [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- Exhibit 2416 similarly contains [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Because Orca does not offer any of the objected-to exhibits for the truth of the matter asserted, none of them is hearsay. *See Asetek Danmark A/S v. CMI USA, Inc.*,

No. 13-cv-457, 2014 WL 12644295, at *1-2 (N.D. Cal. Nov. 19, 2014) (admitting articles and websites containing praise for plaintiff's products).

In arguing otherwise, Wiz suggests that if a speaker is offering personal opinions rather than speaking on behalf of the industry, the statement cannot be praise. *See* Mot. 8. But the decision Wiz cites, *Sonos, Inc. v. D&M Holdings Inc.*, No. 1:14-cv-01330 (D. Del. Dec. 8, 2017), Dkt. No. 504 ("*Sonos*, Order"), does not support Wiz here. While "favorable comments about a company and its products [can be] more problematical" than, for example, articles describing awards, they remain admissible when reflecting praise for the patented invention. *See Sonos*, Order at 6-7. Indeed, the court in *Sonos* admitted multiple statements reflecting positive views of the patented technology [REDACTED]

[REDACTED]

[REDACTED]

Even if the Board disagrees and finds that some of the Wiz-produced exhibits are hearsay, each one falls into recognized exceptions to the rule against hearsay.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

At minimum, all four Wiz-produced documents qualify for the residual exception to the hearsay rule. Under Rule 807, a hearsay statement is admissible if:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of the circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Fed. R. Evid. 807(a).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Federal Rule of Evidence 403 Does Not Render Wiz's Documents Inadmissible

Wiz next argues that Orca's use of Wiz's confidential documents (Exhibits 2400-2428) unfairly prejudices Wiz, confuses the issues, and wastes time. Mot. 11-15. This argument is entirely without merit.

As an initial matter, Wiz's argument rests on the (incorrect) premise that Orca has violated the protective order governing the district-court litigation between the parties. *See id.* 11-12 ("Before receiving the documents in district-court litigation, [Orca] agreed that it would not use them for 'any other purpose' beyond that litigation.... Despite this, [Orca] sought and obtained discovery of these documents here, and Wiz continues to suffer unfair prejudice due to [Orca]'s ongoing use of the fruits of this poisonous tree."). But the Board already explicitly instructed Wiz that this argument is inapplicable to this proceeding. *See* Paper 17 at 3 ("The parties are reminded that any requests to enforce or modify the District Court Protective Order should be directed to the District Court and not the Board."). Wiz voiced its position on this issue in its Opposition to Orca's Motion for Additional Discovery (*see* Paper 22 at 8-10), and the Board did not find it persuasive (*see, e.g.,* Paper 26 at 5-7). If the Board's handling of this issue troubled Wiz, it could have requested rehearing of

the Board's Order authorizing Orca's Motion or the Board's Order granting it.¹ In either case, such a rehearing request would have been due long ago. *See* 37 C.F.R. § 42.71(d)(1) (14-day deadline for rehearing request of non-final decisions). Wiz did not request rehearing, so this argument is waived. In any event, if Wiz believed that Orca had violated the district court's protective order or any other previous agreement, it should, as the Board instructed, have brought the issue to the district court rather than raise it for the third time here. It did not do so, and the Board can deny the motion to exclude Wiz's confidential documents on that basis alone.

Wiz's premise is also incorrect: Orca is not using documents that Wiz produced in the district-court litigation—rather, Orca sought and obtained the Board's permission to have the documents produced **in this proceeding**. *See* Paper 26. Pursuant to the Board's Order, the documents were thus produced *here*,

¹ Similarly, if the Board had concerns about *how* Orca knew about the documents it sought—that is, if there was any merit to Wiz's “fruit of the poisonous tree” argument—it would have raised the issue then. As it is, the requested documents were collectively cited in response to Orca's interrogatory requesting evidence that Wiz copied Orca, and there is no merit to Wiz's argument that it has suffered prejudice from Orca's counsel's knowledge of the documents. If anything, that knowledge allowed for more efficient and targeted discovery in this proceeding.

subject to a protective order that governs *this proceeding*, and Orca is using those documents accordingly. *See* Ex. 2171 (March 28, 2025 email from M. Argenti to R. Bajaj stating: “we confirm production of the requested documents **in the IPRs** pursuant to the Board’s order.” (emphasis added)). While Orca’s counsel used its knowledge of the documents to craft a targeted discovery request, Wiz provides no reason to believe that the documents would not have been responsive to discovery Orca would have propagated anyway, nor is there one. Indeed, had Orca simply served broad discovery requests that encompassed the same subject matter, the documents would have come to light regardless but the work necessary to reveal them may have been commensurately greater for both parties. Far from being prejudiced by Orca’s counsel’s knowledge, Wiz was likely saved the time and effort of engaging in broader discovery to get to the same place.

Wiz’s authority on this point is therefore inapposite. In *Meyer v. Ten Mile Island Condominium Association*, for example, the plaintiff’s expert was precluded from testifying about facts in a manner that was inconsistent with a prior settlement agreement. *See* No. 1:22-cv-02042, 2024 WL 1932891, at *3 (D. Colo. May 2, 2024). Here, there is no inconsistency between Orca’s arguments and any facts to which it previously agreed because it has not previously agreed to any facts. In *Burkette v. Waring*, the district court precluded use of discovery obtained by a *previous* discovery violation, a fact Wiz does not (and could not) allege. No. 10-

10230, 2010 WL 3419463, at *6 (E.D. Mich. Aug. 27, 2010). The same is true of *Fayemi v. Hambrecht & Quist, Inc.* See 174 F.R.D. 319, 326 (S.D.N.Y. 1997). And, in *Faison v. Thornton*, the plaintiffs “attempted to circumvent the rules of discovery by engaging in *ex parte* communication with a represented party,” a circumstance entirely absent here. See 863 F. Supp. 1204, 1216 (D. Nev. 1993). The factual distinctions between those cases and Orca's conduct here render them irrelevant.

Wiz's claim that it is prejudiced by Orca's “efforts to obtain Wiz Confidential Documents and its ongoing use of these ill-gotten documents”—actions the Board explicitly permitted—are, in effect, arguments that Wiz has been prejudiced by the Board's previous orders, not by the documents themselves (which are, after all, Wiz's own materials). As detailed above, if Wiz felt that the Board's granting of Orca's Motion for Additional Discovery was not in the interests of justice, it should have sought rehearing of the decision granting the additional discovery Orca requested, not moved to exclude the exhibits after it produced them and Orca relied on them to support its arguments. There is no other basis for Wiz to suggest that Orca's use of Wiz's own confidential materials has caused it prejudice—nor could there be, as any suggestion along those lines would be tantamount to arguing that all bad facts are overly prejudicial. That goes double for Wiz's complaint that Orca is trying to “smear” Wiz by attaching documents showing Wiz misappropriating Orca's confidential materials, which are especially probative of Wiz's copying. See

Iron Grip Barbell Co. v. USA Sports, Inc., 392 F.3d 1317, 1325 (Fed. Cir. 2004)

(evidence of copying may be demonstrated through internal documents, direct evidence, or *access to*, and substantial similarity of, the patented product).

So, once again, Wiz's cited authority is inapplicable. *Jazz Pharmaceuticals, Inc. v. Amneal Pharmaceuticals LLC* dealt with the *type* of situation the Board encouraged but Wiz eschewed here: a district court preventing use of confidential documents in an IPR. No. 13-391, 2016 WL 11480203, at *3 (D.N.J. Jan. 22, 2016). But, crucially, the district court there acknowledged that the relevant documents *could* be requested in the IPR, as they were here. *See id.* (“[I]t is the Court’s understanding that Jazz is under no obligation to produce that ‘additional discovery’ *unless Par successfully requests it from the PTAB.*” (emphasis added)). And *Errant Gene Therapeutics, LLC v. Sloan-Kettering Institute for Cancer Research* is wholly inapposite, as it involved the use of confidential materials to *file* a separate proceeding, a situation that is entirely different from the one here. *See* No. 15-cv-02044, 2017 WL 2418742, at *5 (S.D.N.Y. June 5, 2017).

On the other side of the ledger, Wiz's Reply newly introduced additional Wiz confidential documents (Exs. 1403-1413) that Wiz uses to support its arguments. These new documents were never produced in the district-court proceeding. Permitting Wiz to use the discovery process as a both a sword and a shield would undermine the very fairness principles that Rule 403 is intended to promote.

Finally, Wiz suggests that the Board should accord the documents little weight. *See* Mot. 15. This argument, cloaked in the language of Rule 403, is both incorrect and plainly intended to influence the Board's perception of the document rather than its admissibility, making it inappropriate for a motion to exclude. *See* USPTO, Consolidated Trial Practice Guide 79 (Nov. 2019), <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf?MURL=TrialPracticeGuideConsolidated> ("A motion to exclude ... may not be used to challenge the sufficiency of the evidence...."); *see also, e.g., Accord Healthcare Inc., USA v. Daiichi Sankyo Co.*, IPR2015-00864, Paper 104 at 33-35 (P.T.A.B. Sept. 12, 2016).

The Board should therefore deny Wiz's Motion to Exclude its confidential documents (Exhibits 2400-2428).

III. CONCLUSION

For the reasons set forth above, the Board should deny Wiz's Motion.

Respectfully submitted,

Dated: October 6, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on this 6th day October, 2025, a true and correct copy of the foregoing **Patent Owner's Opposition to Petitioner's Motion to Exclude and Exhibit 2171** were served by electronic mail on Petitioner's lead and backup counsel at the following email addresses:

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