

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WIZ, INC.,
Petitioner,

v.

ORCA SECURITY LTD.,
Patent Owner

IPR2024-01109 (Patent 11,726,809 B2)
IPR2024-01190 (Patent 11,740,926 B2)
IPR2024-01191 (Patent 11,775,326 B2)

Record of Oral hearing
Held: October 14, 2025

Before MICHAEL R. ZECHER, DANIEL J. GALLIGAN, and
GARTH D. BAER, *Administrative Patent Judges*.

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IPR2024-01191 (Patent 11,775,326 B2)

APPEARANCES:

ON BEHALF OF THE PETITIONER:

MATTHEW ARGENTI, ESQ.
WESLEY DERRYBERRY, ESQ.
JOSEPH BAILLARGEON, ESQ.
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300
margenti@wsgr.com
wderryberry@wsgr.com
jbailargeon@wsgr.com

ON BEHALF OF THE PATENT OWNER:

BLAKE DAVIS, ESQ.
RAGHAV BAJAJ, ESQ.
NICOLA BRUNER, ESQ.
Latham & Watkins LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111
(415) 395-8033
blake.davis@lw.com
raghav.bajaj@lw.com
nicole.brunner@lw.com

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P R O C E E D I N G S

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JUDGE BAER: Okay. Good morning, everybody. This is our hearing for IPR2024-01109, 01190, and 01191, between Petitioner Wiz and Patent Owner Orca. I'm Judge Baer. With me is Judge Zecher and Judge Galligan. Can you hear us?

MR. ARGENTI: Yeah, thanks.

JUDGE BAER: Great. Let's go ahead and get the party's appearances. If we could, please, who do we have for Petitioner?

Good morning, Your Honors. Matt Argenti --

JUDGE BAER: If you wouldn't mind to the -- that's okay?

MR. ARGENTI: Of course. Good morning, Your Honors. Matt Argenti from Wilson Sonsini, on behalf of Petitioner Wiz, Inc. With me today at counsel table is Wes Derryberry, and also here is Jo Baillargeon.

JUDGE BAER: Thank you. Nice to see you again, Mr. Argenti. And you'll be presenting for Petitioner?

MR. ARGENTI: That's correct, Your Honor.

JUDGE BAER: Thank you. And for Patent Owner, who do we have?

MR. DAVIS: Good morning, Your Honor. This is Blake Davis from Latham & Watkins, here for Patent Owner Orca Security. Also with me is Raghav Bajaj and Nicole Bruner, also from Latham & Watkins.

JUDGE BAER: Thank you, Mr. Davis. And I assume, you'll be

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1 doing the same as before where you'll be presenting part of the argument,
2 Mr. Bajaj will be doing part of the argument, and Ms. Bruner will be doing
3 part of the argument; is that correct?

4 MR. DAVIS: With a slight correction, which is that I'll be doing
5 the bulk of the argument, and then Nicole Bruner will be doing the LEAP
6 program. And then Raghav is here as lead counsel, who won't be
7 participating in the argument.

8 JUDGE BAER: Thank you, Mr. Davis. I believe we have a closed
9 hearing because we have, potentially, some confidential information. So
10 before we get going, is everybody covered by the protective order? Let's
11 start with Petitioner. From you, everybody's --

12 MR. ARGENTI: Yes, Your Honor.

13 JUDGE BAER: Thank you. And from Patent Owner?

14 MR. DAVIS: Yes, Your Honor.

15 JUDGE BAER: All right. So we'll start with a closed hearing.
16 And on the subject of confidential material, that sort of thing, Judge Zecher
17 has something he would like to address.

18 JUDGE ZECHER: Yeah. So we did this in the earlier hearing
19 with three related cases. But there's some papers that we need you guys to
20 file, redacted public versions. So I'm going to go ahead and list them here.
21 We're going to give you 10 business days to do so, same as the last three
22 cases. So for IPR2024-01109, we need a redacted version for Paper 43,
23 Petitioner's Reply; Paper 61, Patent Owner's Sur-reply. We need redacted
24 versions for the Motion to Exclude, that's Papers 56, 58, and 63. And then

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1 we need redacted versions for the demonstratives, I believe, for Patent
2 Owner, that's Paper 68; for Petitioner, that's Exhibit 1417.

3 For IPR2024-01190, we need a redacted version for Paper 41,
4 that's Petitioner's Reply; Paper 56, that's Patent Owner's Sur-reply. Once
5 again, the Motion to Exclude Briefing as -- that's Papers 53, 58, and 66.
6 And then the demonstratives, I believe Patent Owner is Paper 63, and
7 Petitioner is Exhibit 1417.

8 And then last but not least, we need redacted versions for these
9 papers in IPR2024-01191. We need a redacted version for Paper 42, that's
10 Petitioner's Reply; Paper 57, that's Patent Owner's Sur-reply. We need the
11 Motion to Exclude Briefing, that's Papers 54, 59, and 67. And then the
12 demonstratives, for Patent Owner, that's Paper 64; and for Petitioner, that's
13 Exhibit 1417.

14 JUDGE BAER: Great. Again, thank you all for being here. We
15 set forth the procedure in our Hearing Order. But just to remind everybody
16 how this will go, the parties each have 120 minutes of argument time. We
17 do have LEAP practitioner from Patent Owner side, which we appreciate
18 you doing that and participating in that program. So we'll be giving Patent
19 Owner an additional 15 minutes of argument time.

20 We will break at some point. But if you need a break, please let us
21 know. We can certainly accommodate that if you need a break at any point.
22 I think that's it for housekeeping matters, except to say same rules as last
23 time. If you would, please let us know what -- to keep the record clear, what
24 demonstrative you're referring to. Or if you're referring to something from

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1 the record, if you could articulate that to make the record clear, that would
2 be helpful.

3 Before we get going, do either the parties have slides -- a slide
4 deck they'd like to give us? We could do that.

5 MR. ARGENTI: Your Honor, if I may, I have a housekeeping
6 issue on that topic.

7 JUDGE BAER: Sure, go ahead.

8 MR. ARGENTI: We discovered last night that the slides that we
9 filed in the PTAB system on Friday are missing some highlighting that we
10 had added to the slides. It's a pretty extensive problem. It applies to the
11 majority of our slides. And so if I -- my request is that we refer to a
12 corrected version today. We have printouts of the corrected version. We
13 didn't get a chance to request to file them. But I'm prepared to put them on
14 the screen today, and we have printouts of those. And then we could file
15 them after the hearing, if that's acceptable.

16 JUDGE BAER: And is it true that the only difference is
17 highlighting?

18 MR. ARGENTI: That's correct, Your Honor.

19 JUDGE BAER: Okay. Patent Owner, any objection to them using
20 the different slides?

21 MR. DAVIS: No, Your Honor. And we also have one correction,
22 but it's one slide, which was -- there was an error with the attribution of a
23 quote. It's the same quote, but it's -- the two cases are on the page, and one
24 of them should be on the other. But we have updated update that.

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1 JUDGE BAER: And I assume no objection?

2 MR. ARGENTI: No objection, Your Honor.

3 JUDGE BAER: Okay, that's fine. We do want you to file the
4 corrected versions as soon as you can from here. And if you want to give us
5 whatever slide decks you have, if you have hard copies that you'd like to
6 give us now, it'd be a good time for that.

7 All right. We're going to go off the record.

8 (Whereupon, the above-entitled matter went off the record at 11:06
9 a.m. and resumed at 11:07 a.m.)

10 JUDGE BAER: And we're back on the record. Give us just a
11 moment, if you would. Actually, you can go from right there, Mr. Bajaj. Go
12 ahead.

13 MR. BAJAJ: Sure. So Your Honors, we sent an email, a joint
14 email, from both parties on September 26th, just asking to file some
15 corrected papers in these proceedings. One was an issue where our Patent
16 Owner Response was filed without page numbers, and then a couple of
17 requests from Petitioner as well. And we just wanted to note if we were
18 authorized to make those corrections.

19 JUDGE BAER: So there was a corrected -- I remember the
20 missing page numbers. What was the other correction?

21 MR. BAJAJ: From Petitioner, it was -- one corrected exhibit that
22 was inadvertently filed with the wrong number and corrected versions of the
23 replies with protective order material labeling.

24 JUDGE BAER: Petitioner, you agree with that characterization?

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1 MR. ARGENTI: I think so. Catching me off guard. It was a joint
2 email where are in agreement. I don't remember the full list of what the
3 corrections were.

4 JUDGE BAER: Sure. So you can both consider it's authorized.
5 You can send corrected versions of both those things. And if there needs to
6 be -- if anything needs to be expunged, let us know. Otherwise, we'll just do
7 the corrected version. Fair enough?

8 MR. BAJAJ: Yes.

9 MR. ARGENTI: Sounds good.

10 JUDGE BAER: Mr. Argenti, before we get going, anything else
11 we need to address housekeeping-wise, or any questions --

12 MR. ARGENTI: I think that covers it, Your Honor.

13 JUDGE BAER: And for Patent Owner, any other questions or
14 things we need to address before we get going?

15 MR. DAVIS: No, Your Honor. I think we've (CROSSTALK) --

16 JUDGE BAER: Thank you, Mr. Davis.

17 Mr. Argenti, you have 120 minutes of total time. Would you like
18 to reserve any time for rebuttal?

19 MR. ARGENTI: Twenty minutes, please, right.

20 JUDGE BAER: All right. And with that, you may begin when
21 you are ready.

22 MR. ARGENTI: Thank you, Your Honor. Again, my name is
23 Matt Argenti on behalf of Petitioner Wiz, Inc. Today, I'm going to be
24 referring to our demonstratives, which have been filed as Exhibit 1417 in

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1 these three IPRs. And again, as we noted before the hearing began, we'll be
2 filing a corrected version of those demonstratives after the hearing.

3 As Your Honors will recall, we were together about a month ago to
4 discuss three challenged Orca patents. Today, we're going to discuss three
5 more. That's the '809 Patent, the '926 Patent, and the '326 Patent, all of
6 which are related to each other and to those three patents that we discussed
7 during the last hearing.

8 Now we'll turn to Slide 5. As was the case at the last hearing, the
9 grounds here all begin with the Veselov reference. Veselov discloses most
10 of the claimed subject matter, including analyzing a snapshot of a virtual
11 disk of a virtual machine in a cloud environment and detecting
12 vulnerabilities or threats and reporting them as alerts. Veselov says that its
13 snapshot analysis approach is an improvement over known approaches using
14 agents and can achieve the same results as analyzing the VM itself. The
15 references that we combine with Veselov describe some of those known
16 types of analysis, and applying their teachings to Veselov's snapshot analysis
17 improvement makes a lot of sense.

18 Patent Owner's rebuttal arguments largely fall into two categories.
19 First, they argue that the specific ways the other references, like Mohanty
20 and Basavapatna and others, the specific ways that they accomplish their
21 analysis can't be done on Veselov. But that is a classic bodily incorporation
22 argument that attacks something that we never proposed. Veselov itself
23 says, take known types of analysis and perform them using snapshots.

24 Second, they spend a lot of time in their papers talking about

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1 secondary considerations. But as we discussed last time and I'll discuss
2 again today, they haven't shown nexus. And even if they had, their exhibits
3 don't support their arguments about the individual categories. As I did last
4 time, I plan to address the prior art issues for each patent one at a time, and
5 then I'll address secondary considerations for all three patents collectively
6 after that.

7 So if we turn to Slide 6 first for the '809 Patent, the claim
8 construction issues are the same as we discussed at the last hearing. There's
9 no dispute as to what the location of a snapshot means, and that it
10 encompasses both logical or physical locations. And as to analyzing the
11 snapshot, Patent Owner argues that that does not include analyzing a VM
12 instantiated from a snapshot. But that's at odds with their District Court
13 arguments and their own expert. Ultimately, though, it doesn't matter
14 because they admit that Veselov does disclose analyzing a snapshot in a way
15 that satisfies the claims.

16 So now, we will turn to Slide 10 in the Veselov reference, which
17 we addressed at length during the last hearing. Looking at Figure 1, it
18 discloses a computing resource service provider, which is a cloud
19 environment which has multiple virtual machines in it. And we see the
20 cloud environment, the scanning service that runs the security assessment,
21 and the user interface all communicating with each other via APIs.

22 As we see on the left here on the slide, Veselov says that a
23 snapshot can be all the data needed to recreate the virtual machine, or it can
24 be the state of any of the virtual or physical devices allocated to the resource

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1 like a virtual disk. And with that snapshot, Veselov says you can run any
2 suitable security assessment in order to get the same results the security
3 system would get if it was performing the assessment on the VM itself.

4 Turning to Slide 11 in Mohanty, which we didn't talk about during
5 the previous hearing on the other three patents. Mohanty describes a method
6 for prioritizing vulnerabilities in virtual machines based on context. As
7 reflected here in Figure 2, it describes a number of relevant factors. Like
8 Veselov, it says CVE databases provide information about vulnerabilities,
9 and that includes a CVSS severity score.

10 In Mohanty, it describes factoring in threat information, including
11 the types of data on the virtual machine that could be targeted. It also talks
12 about factoring in contextual factors, including the asset's network location.
13 And it explains that all of this information can be considered together to
14 come up with a prioritization score to indicate the overall risk attributed to
15 that vulnerability.

16 Now, turning to Slide 12, our petition shows that a POSA would
17 have applied Mohanty's disclosure to Veselov's snapshot analysis. That
18 includes Mohanty's teachings regarding correlating vulnerabilities with the
19 network location, determining a risk based on that, and prioritizing alerts
20 based on the risk. As our expert, Dr. Stavrou, points out, Mohanty expressly
21 teaches that considering contextual factors, like network location, leads to a
22 more accurate and meaningful risk assessment. Dr. Stavrou also explains
23 the prioritization, like Mohanty talks about, was known in the field and well
24 known to allow for rapid identification of the most significant risks and

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1 vulnerabilities.

2 So Mohanty says when you're assessing vulnerabilities in virtual
3 machines, it is useful to take into account environmental contexts like
4 network location, and it's good to prioritize the results to bring the most
5 critical issues to a user's attention. Patent Owner can't dispute that. So what
6 do they dispute? They try to come up with reasons that Mohanty's teachings
7 couldn't be applied to Veselov, but their arguments are misplaced.

8 Turn to the next slide, Slide 13. For example, they argue that
9 because Mohanty talks about continuous monitoring and says that some
10 snapshots can become obsolete, that means a POSA would not have applied
11 Mohanty's teachings regarding factoring in network location or prioritized
12 reporting. But that doesn't rebut the benefits that I just discussed when
13 applied to Veselov. Moreover, the gap between Mohanty and Veselov is not
14 nearly as wide as they would have you believe. Veselov talks about on
15 demand assessments and scheduled assessments, both of which can use a
16 snapshot taken at the time of the assessment.

17 Why wouldn't snapshots provide meaningful information about the
18 current state of the system?

19 JUDGE BAER: You would contest would you, Mr. Argenti, that
20 there are some disadvantages of using data that is not live? Is it your
21 position that there are no drawbacks, or that there are drawbacks but they're
22 just a trade-offs, that trade-offs are worth it? Do the trade-offs have to be
23 worth it, or does it just have to be some benefit? Could you explain that a
24 little bit more?

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1 MR. ARGENTI: So I would contest that -- I think there are
2 circumstances where there are no drawbacks. As I just pointed out, Veselov
3 is giving you, essentially, current real time data. If you are taking a snapshot
4 on demand to run the assessment right now, that is current data. So I would
5 not agree that there are drawbacks under all scenarios that Veselov envisions
6 and discloses.

7 Even to the extent that there might be drawbacks if Veselov is
8 running periodic snapshots on a monthly basis or anything that might fall
9 within the scope of what Veselov discloses, then we're getting into the trade-
10 offs that a POSA would consider, the benefits and drawbacks, which doesn't
11 undermine an obviousness showing, and their expert hasn't responded to.
12 Our expert, Dr. Stavrou, talked about weighing the benefits and that this
13 would be perfectly acceptable to a POSA under some scenarios. Their
14 expert pretty much stops his analysis at Veselov isn't continuous, therefore it
15 wouldn't happen.

16 JUDGE BAER: Thank you. What does it mean to be continuous?
17 Does that mean you're always pulling data to analyze it or --

18 MR. ARGENTI: I think that's certainly how Patent Owner
19 interprets it. I don't think it's something that -- unless I'm forgetting
20 testimony, which I'm sure my colleague will point out, I don't think it's
21 something that either expert weighed in on in a great level of detail.
22 Certainly, their point is that the agent is continuously running. Whether that
23 means you are continuously accessing a certain piece of data about a
24 network location, I don't think that's something that they've established.

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1 If you turn to Slide 14, Patent Owner also argues that Veselov's
2 snapshot assessments don't analyze the same types of data as what they call
3 Mohanty's agent-based assessments. There are multiple problems with that.
4 First, Mohanty never says that it is limited to using agents. It broadly
5 discloses that its vulnerability data comes from one or more scanners. That's
6 the word that it uses. We see it here in the top excerpt from Mohanty, it says
7 scanners. Well, remember, Veselov's security assessments are performed by
8 what it calls a scanning system or a scanning service. The two references
9 are talking about the same thing in broad terms.

10 JUDGE BAER: There are multiple ways to scan, though, clearly.
11 I mean, is it your point -- I guess I should ask the question. Is your point
12 that both scanning -- the scanning in both references is exactly the same or is
13 it that there are differences but they're trivial?

14 MR. ARGENTI: I think my -- our point is that the scanning in
15 both references is broadly disclosed and overlaps. It doesn't need to be
16 exactly the same. I think there's overlap in terms of the -- both agentless and
17 agent scanning that's disclosed.

18 JUDGE BAER: Does it matter? I mean, what exactly are you
19 relying on from Mohanty? What do you need? What teaching do you need
20 in Mohanty? Is it -- I'll just let you answer that. How much do you need
21 from Mohanty?

22 MR. ARGENTI: So I want to -- I will answer that question. But I
23 want to finish my answer to the first question, which is that even if it's
24 viewed as distinct types of scanning, that doesn't preclude obviousness under

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1 our ground. And we've addressed that as well. And I was going to get that
2 -- get to that on the next slide. So one, it's not limited to agentless. Two,
3 even if it was limited to agentless -- which, again, it's not -- that's not a
4 problem.

5 So ultimately, what we are relying on from Mohanty is really three
6 techniques, three principles. And this is what we called out in our petition.
7 It's one, the idea of correlating vulnerabilities with an assets network
8 location. Two, it's determining risk based on vulnerabilities and the network
9 location. And three, it's the idea of prioritizing and reporting based on that
10 risk. It's those techniques. It's not a specific, particular way of
11 accomplishing those techniques. It's the idea that a POSA would read that,
12 understand the value, understand the applicability to Veselov.

13 JUDGE ZECHER: Mr. Argenti, when we analyze Patent Owner's
14 arguments about rationale to combine, obviously, we're doing against this
15 -- of kind of the scope of the involved claims here. And I know in our
16 previous oral argument, there was a lot of discussion about agentless versus
17 agent and what's a fundamental requirement of agentless. I think it was
18 using an API. Is the claim at issue here actually require the use of an API?

19 MR. ARGENTI: They do not, Your Honor. That's very good
20 point that I was going to get to later on. But I agree completely, they do not
21 even require the use of an API.

22 JUDGE ZECHER: So I'm looking at just -- let's look at the '809
23 Patent. The determining step says determining using an API or service
24 provided by the cloud computing environment. What's a service in this

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1 context?

2 MR. ARGENTI: Right. So I've now jumped to Slide 2, which has
3 Claim 1 of the '809 Patent. And I believe we're looking at element that's
4 labeled as 1.2., it talks about using an API or a service provided by the cloud
5 computing environment. I don't think a service is something that Patent
6 Owner has ever explained what that is in the context of the claims, but it
7 certainly undermines their argument that this is all about using APIs.

8 JUDGE ZECHER: But you would agree just based on the last
9 three patents we looked at in a previous oral argument, that did require the
10 use of an API. Here we just don't have it. We have alternatives, right?

11 MR. ARGENTI: I don't know if it's true that all three of those
12 patents require the use of an API. I think two of them did.

13 JUDGE ZECHER: I went back and checked. I can verify for you.

14 MR. ARGENTI: Okay. Then fair enough, I will agree that API
15 was required by some, if not all, of those patents that we discussed last time.
16 In contrast, it's not required here.

17 JUDGE ZECHER: All right. Thank you.

18 MR. ARGENTI: All right. So back to Slide 14 and the issue that
19 Mohanty is not limited to using agents. I talked about the similarity between
20 the scanning disclosure in Mohanty and Veselov. Patent Owner, in addition,
21 puts a lot of emphasis on Mohanty's disclosure of using QUALYS or
22 RAPID7, and they say those are agent-based systems. Those are expressly
23 examples in Mohanty's disclosure, they're not requirements. And Patent
24 Owner's expert admitted that agentless vulnerability scanners were certainly

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1 known at this time. We have some examples of that here, or at least one
2 example in Exhibit 1140.

3 JUDGE BAER: And when you -- we had this discussion last time,
4 but I just want to give you another shot at it. When you say agentless
5 scanning, what do you mean by agentless scanning?

6 MR. ARGENTI: When I say agentless scanning -- and that's an
7 important distinction, right? Because they have come up with an argument
8 that they redefined what agentless scanning meant in the market. When I am
9 referring to agentless scanning, I am referring to what that term means on its
10 face, scanning without using an agent.

11 JUDGE BAER: I guess I would just like you to say a little bit
12 more about that. What do you mean when you say scanning without an
13 agent? Do you mean -- I mean, clearly there's some software installed
14 somewhere. Do you mean without an agent installed on the device that's
15 being scanned? Do you mean without anything installed anywhere? So if
16 you could just explore that a little more for me.

17 And I looked at our exchange last time when we talked about this,
18 and it just -- again, this is a term that's been used a lot in this case, both in
19 the papers and even comes up in some of the evidence in this case. And
20 we've got some record documents that explored a little bit, but I think we
21 could use some more clarity on what you mean by agentless scanning, other
22 than just not an agent, what that means.

23 MR. ARGENTI: Understood, Your Honor. And first, I want to
24 point out agentless is not a term that appears in the claims, any of the three

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1 claims that we're talking about today, any of the claims from last week. So
2 this is not a claim construction issue. To the extent that we referred to
3 anything as being agentless in our petitions -- which we did, agentless
4 options -- I think that was in response to arguments that they've made in
5 District Court about what their invention involved. But again, it's not
6 something that has a precise definition in terms of a claim construction.

7 And I think what you'll see is that when you look at, for example,
8 Veselov -- it's probably the most specific thing we can look at -- Veselov is
9 talking about the drawbacks of using an agent installed on the virtual
10 machine that you are trying to assess. And it says you don't need to do that.
11 You can use snapshots to do the analysis somewhere else. You don't have to
12 install an agent on the virtual machine. It gives a couple different categories
13 of that, right? One is you can install -- you can mount that snapshot as a
14 data file and analyze it that way.

15 I don't think there's any dispute that that is what you would
16 consider agentless scanning, both in terms of the known agentless
17 approaches leading up to simply the absence of an agent. There is no agent
18 involved there. There's no agent installed that's doing the analysis, at least
19 none that either side has raised as a point of dispute.

20 JUDGE BAER: You say there's no agent installed. You mean on
21 the virtual machine that's being examined; is that correct?

22 MR. ARGENTI: I mean, on the virtual machine or on the target
23 VM. Either way, right, the target VM is the VM that you could be using to
24 analyze the virtual disk, the snapshot. That's what you --

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1 JUDGE BAER: Assume you instantiate a new VM using a
2 snapshot, right, and assume there's an agent installed on that machine, so this
3 is not --

4 MR. ARGENTI: Yes.

5 JUDGE BAER: -- the live, real time VM. This is the backup VM
6 that you have instantiated to do the analysis. Assume you have an agent
7 installed on that machine, would that be agentless scanning because the
8 agent is not installed on the primary machine on which you are trying to do
9 the analysis?

10 MR. ARGENTI: I think that the parties would be in agreement
11 that that is also agentless scanning. I'm sure they'll correct me if they
12 disagree with that. But I think when Veselov is talking about you don't need
13 an agent on the VM that you are analyzing, the target VM -- you can install
14 an agent on an assessment VM. You can have a whole other VM that you
15 don't care about. You spin it up, then you analyze it that way. You install
16 an agent that way.

17 Is that agentless scanning? It's not an agent on the VM that is
18 being desired to be assessed on the target VM. So I think ultimately, at the
19 end of the day, it's not a question that anything really turns on here. Because
20 again, it's not in the claims, agentless is not recited or required by the claims.

21 And Your Honor, I could see by your furrowed brow, I still might
22 not have answered your question.

23 JUDGE BAER: Well, I mean, I agree that the claims don't
24 articulate agentless; they articulate something else. And Veselov doesn't say

[REDACTED]

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1 agentless, it says something else. It does use the term agent. So I do think
2 it's worth exploring. And I'm not sure that the answer is it doesn't matter.
3 But -- so we can leave it at that, or if you'd like to respond.

4 MR. ARGENTI: I could also add that to the extent it matters, I
5 think it's probably a better question for Patent Owner. Because one of the
6 foundations of their nexus case, or at least not -- I would -- it's not even
7 accurate to say it's a foundation of it. One of the arguments that they appear
8 to be raising in their Sur-reply, which is belated, is that agentless scanning
9 means these two things, the use of APIs and the use of snapshot, which is
10 not a definition that even requires the absence of an agent.

11 Again, their claims don't say anything about agentless. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. So there is a disconnect there. And I think that's a
15 disconnect that they need to resolve because it's not something that's in the
16 claims. It's not something that was -- anything that we were able to resolve
17 in our petitions.

18 JUDGE ZECHER: So did -- I understand you to say that you don't
19 agree with the two fundamental principles that they've put in their Sur-reply
20 for agentless analysis?

21 MR. ARGENTI: Well, one, I don't think we've had a chance to
22 weigh in with the benefit of expert testimony, because this is not an
23 argument that was articulated in the Patent Owner Response. So it's not for
24 us to take a position on whether we agree or don't agree. It's a belated

[REDACTED]

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1 argument. Second, as to the merits of the argument, I think it's kind of
2 suspect when they're saying these are the two requirements of agentless and
3 our SideScanning product satisfies these two requirements; [REDACTED]
[REDACTED].

5 JUDGE ZECHER: Well, I guess the reason I ask is -- I mean,
6 because you were -- you invoked it when you were responding to his
7 argument. It says privilege access to customer's cloud environment would
8 be APIs and snapshot scanning. We just talked about the claims at issue
9 here that don't require APIs.

10 MR. ARGENTI: Right.

11 JUDGE ZECHER: So then there's a disconnect. Because even if
12 that is the two fundamental principles of agentless analysis and the
13 argument, as I understand at least for nexus -- which I'm sure we'll get into it
14 later on -- is this whole notion of agentless side scanning and your claim
15 doesn't require APIs, you're missing one of the fundamental principles.

16 MR. ARGENTI: I agree, Your Honor.

17 JUDGE ZECHER: Okay.

18 JUDGE BAER: What about the privileged aspect, can we just
19 discuss that for a moment? Do you agree that agentless scanning must be
20 privileged in some way?

21 MR. ARGENTI: I don't even know what that means, Your Honor.
22 They haven't explained what that means. To the extent that it means you
23 have to have a log-in, I think that's pretty typical in a cloud environment or a
24 cloud account. So I don't think it adds much to their definition, but it's not

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1 something that they've ever explained what that means or how it's tied to
2 their claims.

3 JUDGE BAER: And I do appreciate the point that this is
4 something they've raised. At the same time, we have a lot of evidence that
5 deals in the secondary considerations world that addresses agentless
6 scanning. And you have said, well, that's in the prior art, so there's no nexus.
7 So I do think there's some impetus on you as Petitioner to articulate what
8 you mean by agentless. Because you've taken the position that agentless
9 scanning is -- whatever it is, as it relates to those secondary considerations,
10 well, that's in the prior art. So I do think it's fair for you to articulate what
11 you mean specifically when you say that.

12 And I think you've said that is in the prior art when Veselov says
13 you don't have to install an agent. And I want to know if there's anything
14 more to that, or once Veselov says you don't have to install an agent, that's
15 agentless scanning, period.

16 MR. ARGENTI: I think with the broader understanding of
17 agentless scanning being simply scanning without an agent, then we have
18 multiple examples of that in the prior art. The Vuls example here, the
19 Ammons reference that we've cited, lots of examples of agentless scanning
20 using snapshots. To the extent that their definition that they've come up with
21 is applied, which is that it has these two fundamental principles, the use of
22 APIs to access a cloud environment and the use of snapshot scanning, that's
23 where we get to Veselov. And we say Veselov discloses the same thing.

24 JUDGE BAER: So your position is more, whatever it is, we have

[REDACTED]

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1 lots of references to disclose it, rather than, this is where the prior art
2 discloses it, it's in Veselov at this point. Do I have that right?

3 MR. ARGENTI: My position is certainly that whatever the
4 definition is, you find it in the prior art.

5 JUDGE BAER: Fair enough.

6 JUDGE ZECHER: And just to be fair, Mr. Argenti, when they
7 -- when we get to these two fundamental principles, there is a piece of
8 evidence here that talks about it. It's an article that talks about agentless
9 versus agent-based scanning, and that's where we get these two fundamental
10 things. I mean, that is evidence we can look at to justify basically what we
11 believe to be the contours of that, right?

12 MR. ARGENTI: If you're referring to what they've raised as -- I
13 believe it's a Wiz marketing page.

14 JUDGE ZECHER: It's Exhibit 2026, at least in the 1109.

15 MR. ARGENTI: Right. So I think they're taking Wiz's statements
16 and saying Wiz acknowledges the fundamental principles. I'd point out that
17 that's a marketing document, not a technical, detailed discussion. So they're
18 talking about their own product in high levels. If you look a couple
19 paragraphs up, I think they're referring to agentless a different way in the
20 same document. But even if that is applied as the fundamental idea behind
21 the scanning captured in their claims, which the claims here don't even
22 require APIs. Again, it's in Veselov.

23 JUDGE GALLIGAN: Counsel, can I return to something? I think
24 you said that [REDACTED] Was the

[REDACTED]

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1 -- and I know I read something in the briefing that the Petitioner argued, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Can you clarify?

7 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

13 So everything Orca is SideScanning, and SideScanning is
14 everything Orca. As we explained last -- during the last hearing, there are a
15 lot of unclaimed features. So SideScanning goes well beyond anything that
16 could even plausibly be argued as -- is in these claims, [REDACTED]
[REDACTED]
[REDACTED].

19 I'll turn now to Slide 15, unless there were any other questions. So
20 even if Mohanty was limited to using agents, Patent Owner's argument about
21 different data types would still fail. The vulnerability scanners in Mohanty
22 and Veselov do analyze the same types of data. For example, they both talk
23 about CVE assessments that determine CVE IDs from the analyzed data.
24 They both talk about assessing applications and installed software. They

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1 both talk about analyzing operating system information.

2 If anything, Veselov is more comprehensive in describing the types
3 of data available for its analysis, saying it can copy all the data blocks
4 allocated to the storage and execution of the target VM, which includes
5 system and software patches, permission settings, and so on. There's no
6 support for Patent Owner's argument that Mohanty's teachings require data
7 that Veselov doesn't have access to.

8 So if we turn to Slide 16, that is also true for network location data
9 specifically. Patent Owner argues Veselov's snapshot wouldn't have
10 network location data that would allow for the kind of contextual analysis
11 that Mohanty use. But Veselov says otherwise. It says its snapshots can
12 include properties of the VMs, including configurations of network
13 protocols and services and properties of connections to other computing
14 resources.

15 Patent Owner does not dispute that that disclosure satisfies the
16 network location aspect of the claims. What Patent Owner says is that that
17 wouldn't be included in the snapshot that Veselov uses when it's analyzed as
18 a data file; or that if it was included, it wouldn't be analyzed in that type of
19 analysis. Well, they're wrong that it's not included in the snapshot. For
20 example, as we see here on this slide, it is explicitly in the snapshot
21 described with respect to Figures 1, 2, and 3. And as to Figure 5, Veselov
22 says that snapshot is the same as the one for Figure 3.

23 So we turn to Slide 17. They're also wrong that the network
24 location information wouldn't be analyzed, except when Veselov instantiates

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1 a VM. Their argument on this point is that Veselov describes a more limited
2 type of analysis of what they refer to as comparatively basic information
3 when analyzing the snapshot as a data file. But that's premised on a
4 misreading of Veselov.

5 Citing column 18, they say that Veselov's Figure 5 analysis is
6 limited to identifying the files and the software installed on the virtual
7 machine. But that cited paragraph of Veselov shows that isn't the actual
8 analysis. That's just a preliminary step to be able to look up the appropriate
9 types of analysis to subsequently run. It never says that those assessments
10 exclude the network location information that's included in the snapshot.

11 And why would it? Veselov broadly says that its assessments can
12 include any suitable security assessment to provide the same results as if you
13 were analyzing the target VM itself. And in any event, because the data is
14 there in the snapshot, applying Mohanty's teachings regarding how to use
15 that network location data makes sense, regardless of whether Veselov on its
16 own is analyzing it or not.

17 Now Slide 18 -- actually, I'm going to skip to Slide 19. Patent
18 Owner's other arguments against motivation to combine attack a
19 combination that we didn't propose. They say it's not possible to install an
20 agent on Veselov, so the combination with Mohanty doesn't make sense.
21 That's similar to arguments that we talked about at the last hearing and
22 should be rejected for the same reason, our combination doesn't require
23 installing agents on Veselov.

24 As already as I already mentioned, the Mohanty techniques that we

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1 apply are called out in the petition. And that's correlating vulnerabilities
2 with an asset's network location, determining risk based on the
3 vulnerabilities in the network location, and prioritizing and reporting based
4 on the risk. As seen on the lower left of Slide 19, our petition expressly
5 pointed out that Mohanty's techniques were applicable to snapshot-based
6 analysis because it considers the same types of data and security issues as an
7 agent-based analysis. The law says Patent Owner's attack on bodily
8 incorporation must be rejected.

9 Turning to Slide 20 and the claim elements that Patent Owner
10 argues are not satisfied by our combination. First, for Element 1.5 which
11 requires correlating vulnerabilities in the network location, Patent Owner
12 argues that Veselov on its own doesn't disclose the claimed correlation, but
13 that doesn't respond to the proposed combination. And they also argued that
14 we haven't shown how Mohanty's network location tags would work in
15 Veselov system. But that, again, attacks bodily incorporation.

16 We've shown that Veselov discloses, including network location
17 information in its snapshot. And Mohanty provides disclosure regarding
18 using network location information to improve vulnerability assessments.
19 It's the combination of those teachings that satisfies the claim element.

20 Slide 21, Element 1.8 requires reporting the vulnerabilities as
21 prioritized alerts. Both Veselov and Mohanty disclose alerts, and Mohanty
22 discloses prioritizing them. Patent Owner argues Veselov only discloses
23 reports, not alerts. We discussed that at the last hearing. It's a misreading of
24 Veselov and it's at odds with their own experts testimony about what alerts

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1 are. And the argument doesn't overcome Mohanty's disclosure.

2 JUDGE BAER: Mr. Argenti, can we explore just for a moment the
3 difference between alerts and reports? Can you articulate for me a report
4 that would not count as an alert, that would not suffice to be an alert? I
5 assume your position is, yes, reports are distinct from alerts; is that correct?

6 MR. ARGENTI: Yes. Well, I believe alerts are a subset of
7 reports.

8 JUDGE BAER: Alerts are a subset of reports.

9 MR. ARGENTI: Not mutually exclusive.

10 JUDGE BAER: Not complete --

11 MR. ARGENTI: Right.

12 JUDGE BAER: Not a perfect overlap. Could you articulate for
13 me a report that would not be an alert?

14 MR. ARGENTI: I think what we have in the record is that a report
15 that would not be an alert is something that is not a notification triggered to
16 inform stakeholders of a situation that needs attention.

17 JUDGE BAER: So if you had a system that was reporting all
18 greens, everything good, there are no problems, would that be an alert?

19 MR. ARGENTI: It's an interesting question, Your Honor. I think
20 it -- because there's no problem that they're trying to bring to the user's
21 attention, I think that probably would not be an alert. It's not something
22 that's been developed by the experts. And again, it's -- I think it's not
23 something that needs to be resolved in terms of the prior art mapping. All of
24 the prior art references that we're relying on are clearly looking for security

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1 issues that they want to bring to the user's attention.

2 JUDGE BAER: And your position is as soon as you bring
3 something to the user that is an attention that -- excuse me, as soon as you
4 bring something to the user's attention that is a problem, that's an alert; is
5 that correct?

6 MR. ARGENTI: As soon as you provide a notification to inform
7 stakeholders of a situation that needs attention, that's the closest thing we
8 have to a definition in the case, which was their expert's testimony. So it
9 rises to the -- and I think, again, exactly where the dividing line is, is not
10 exactly the question as much as, well, does Vaselov disclose bringing things
11 to the user's attention that require -- or bringing things -- problems to the
12 attention of the user that require it?

13 And it does, it talks about displaying vulnerabilities that are
14 detected, sending them to the user's display for display to the user, along
15 with a suggested remediation or the suggested remediation mitigation would
16 be part of what's brought -- the notification that's brought to the user's
17 attention. So Veselov on its own has it -- plenty of other references that
18 we're relying on in our various combinations have alerts as well, and those
19 aspects aren't even disputed.

20 JUDGE BAER: Thank you.

21 MR. ARGENTI: So turning to Slide 22, still with respect to
22 Element 1.8, Patent Owner argues that we haven't explained how the
23 combination would work because Mohanty is prioritized. Alerts, in their
24 view, have no place in Veselov's snapshot analysis. But that's largely a

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1 repeat of their arguments against motivation to combine that we've already
2 discussed.

3 As Dr. Stavrou explains, Mohanty's more detailed teachings
4 regarding alert prioritization are a natural fit with Veselov's more high-level
5 description of providing assessment results to users. Arguing that Veselov
6 vulnerabilities don't deserve alerts is at odds with Veselov itself, which says
7 that the whole reason for its security assessments is to identify
8 vulnerabilities that are a concern. So of course, it makes sense to prioritize
9 the results, to bring the most important ones to the user's attention.

10 So turning to Slide 23, that covers the independent claims in
11 Ground 1 for the '809 Patent. They also dispute our showing for dependent
12 Claims 15 and 22, which require querying a cloud management console over
13 the cloud computing environment for the location of the snapshot and the
14 location of the virtual disk.

15 JUDGE ZECHER: Mr. Argenti, a what's a cloud management
16 console in a cloud computing environment in this context? Is that just a user
17 interface?

18 MR. ARGENTI: It's a user interface that's specifically for the
19 cloud management -- the cloud environment. I think we're not -- I want to
20 be precise, we're not relying specifically on, like, the GUI interface on a
21 user's desktop as solely the cloud management console. We also pointed to
22 the interaction with the APIs, as well as management aspects that are present
23 in the cloud environment itself.

24 JUDGE ZECHER: So a console itself has got to be some sort of

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1 interaction with the cloud computing environment, whatever that may be. Is
2 that what you're saying?

3 MR. ARGENTI: That's right. And I don't think this is a disputed
4 issue.

5 JUDGE ZECHER: Okay.

6 MR. ARGENTI: We discussed equivalent claim language during
7 the last hearing regarding the '032 Patent. And the '809 claims are satisfied
8 by Veselov for the same reasons. Patent Owner argues that only the Figure
9 1 and Figure 3 embodiments in Veselov involve a cloud computing
10 environment, not Figure 5. But it's undisputed that Figures 1 and 2 both
11 involve a cloud environment and analyzing a snapshot as a data file. So
12 their Figure 5 argument doesn't help them. Moreover, Figure 5 has the same
13 virtual machine implementation as Figure 3, which is implemented in a
14 cloud computing environment. We talked about that last time.

15 Turning to Slide 24, Patent Owner argues, in addition for these
16 claims, that Veselov doesn't disclose querying a location of a virtual disk, we
17 discussed --

18 JUDGE BAER: Mr. Argenti, I'm sorry, could we go back a step?
19 Going back to this Figure 5 versus the other figures, one of Patent Owner's
20 arguments is that Veselov is specific to what features of Figure 5 are -- its
21 borrowing from Figure 3. And there's some gaps there. Could you just
22 address that?

23 Is it your position that, no, that's not a complete list of what's
24 missing, or is it your position that doesn't matter if it lists the things that are

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1 missing? Could you just articulate Petitioner's position as far as what's
2 missing on Figure 5, given that there is an articulation of things that aren't
3 described there?

4 MR. ARGENTI: Sure. Patent Owner's argument I believe you're
5 referring to on that point is that the list, the paragraph that Veselov provides
6 saying these elements are the same as in Figure 3, doesn't include the
7 computing resource service provider. What it does include are things like
8 the virtual machine. And it says that the virtual machine is implemented in
9 the same way as in Figure 3.

10 Well, how's the virtual machine implemented in Figure 3? It's
11 implemented in a computing resource service provider, which there's no
12 dispute that that's a cloud environment. And as if we needed further
13 evidence from Veselov, as we talked about last time, you go to the next
14 column after that paragraph and it specifically talks about the computing
15 resource service provider in the context of Figure 5, and it says it's not
16 disclosed in the figures. I don't mean it's omitted from the disclosure period.
17 It's not included in the figures.

18 JUDGE BAER: So your position would be that list of the specific
19 boxes that is repeated is not quite complete. Do I have that right?

20 MR. ARGENTI: I guess that's one way to look at it. But also, if
21 you look at what is included in that list, when it says it's implemented the
22 same way, you have to read that for what it means. So I'm not saying that
23 we're adding disclosure that isn't there. I'm saying we're just doing a straight
24 -- making a straightforward reading of what Veselov says.

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1 JUDGE BAER: I think implementations is the word. It's in that
2 implementations word?

3 MR. ARGENTI: It's implementations and interactions, yeah.

4 JUDGE BAER: Thank you.

5 MR. ARGENTI: So turning to Slide 25, Ground 2 for the '809
6 Patent adds the Czarny reference, which like Mohanty discloses,
7 determining risk levels after identifying vulnerabilities and providing
8 prioritized alerts. Czarny provides expressed disclosure that the prioritized
9 alert can communicate the risk level of the asset. How vulnerable is that
10 asset? Let's report that to the user. That's what Czarny is teaching.

11 Dr. Stavrou explains that this would allow system admins to make
12 more informed decisions about what to do with the vulnerable asset. Czarny
13 also describes a vulnerability detection technique that involves matching
14 binaries or hashes of software in the scan system to binaries or hashes
15 associated with known vulnerabilities, like you'll find in CVE databases that
16 both Veselov and Mohanty talk about. Czarny explains that this allows for
17 more robust and flexible assessments relative to just matching software
18 names or versions, which Dr. Stavrou explains would apply when the
19 teachings of the references are combined.

20 Slide 26, Patent Owner responds by attacking Czarny individually,
21 arguing that it isn't dealing with virtual machines, cloud environments, or
22 snapshots. Veselov is and our combination is. And again, Veselov's
23 snapshot-based analysis is analyzing the same types of data in the same
24 types of ways as what Czarny is doing. Patent Owner argues that neither

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1 Veselov nor Mohanty says anything about binary data, like what Czarny is
2 analyzing. Dr. Stavrou explains that the binary data is what is on Veselov's
3 snap -- excuse me, what is in Veselov's snapshot when it captures disk state.

4 Turning to Slide 27, Claim 11 of the '809 Patent requires
5 quarantining the asset to mitigate the vulnerability. Grounds 3 and 4 cite
6 Hutchins for relevant disclosure on this point. That reference teaches that in
7 response to detecting malicious code, you can place a virtual machine in
8 quarantine, almost exactly what the claim says. Patent Owner argues that
9 quarantining because of malicious code, like a virus, doesn't mean
10 quarantining based on a vulnerability. But Hutchins' evidence that
11 quarantining virtual machines was known.

12 Patent Owner argues Czarny steers away from quarantining based
13 on vulnerabilities, but Czarny actually teaches quarantining virtual machines
14 when vulnerabilities are detected. That said, column 1, line 16 through 35,
15 which is right after what Patent Owner cites for their argument. Patent
16 Owner's interpretation of these references is just wrong. So that's the '809
17 Patent.

18 Now, turning to Slide 28 in the '926 Patent. For this patent, we
19 again rely on the combination of Veselov and Mohanty.

20 Slide 29, with respect to motivation to combine, Patent Owner
21 makes many of the same arguments as they do for the '809 Patent. The
22 claims of the '926 Patent don't require correlating network location with
23 vulnerabilities. So their '908 arguments for that specific aspect don't carry
24 over here. But their other arguments are carried over and can be rejected for

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1 the same reasons that I already discussed.

2 As we've discussed, Mohanty explains the prioritized -- the
3 vulnerability reporting provides more accurate and meaningful results and
4 allows for improved identification of which vulnerabilities are the biggest
5 threats. Patent Owner has not rebutted our showing that those benefits
6 would also apply to Veselov's approach to VM analysis.

7 Turning to Slide 30, in the disputed '926 Patent limitations, for
8 Element 1.4 which requires analyzing a snapshot to determine cyber threats,
9 we've shown that Mohanty discloses detection of many of the types of cyber
10 threats recited in the claims. Patent Owner argues that showing should be
11 rejected because Mohanty doesn't analyze snapshots. The Federal Circuit
12 says that argument is misplaced, a combination involves Veselov which does
13 analyze snapshots, attacking Mohanty individually can't overcome that.

14 On Slide 31, similarly they argue that the claims require cyber
15 threats that are based on data stored on the virtual disk, whereas Mohanty's
16 threats are external to an asset. That, again, ignores Veselov, which is
17 analyzing data stored on the virtual disk. But in any event, it also
18 mischaracterizes Mohanty. That reference says that threat information can
19 be correlated with characteristics of the asset. So Mohanty isn't just looking
20 externally, it's looking at the virtual machine's data. And the ultimate threat
21 assessment is therefore based on data stored on the virtual machine.

22 Turning to Slide 32, Element 1.4 also requires that the data stored
23 on the virtual disk includes at least one of something from a list of particular
24 types of data. Two of those types of data are unencrypted, sensitive data and

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1 weak encryption schemes. Our petition shows that Mohanty discloses both
2 of these when it says the one possible remediation for a threat is to apply a
3 stronger encryption to sensitive data. So if the system determines that
4 stronger encryption would solve the problem, the asset has sensitive data
5 that is either unencrypted or weakly encrypted.

6 Patent Owner says that doesn't disclose determining the sensitive
7 data by analyzing an asset. It says that -- they say that Mohanty, at best,
8 describes detecting a sensitive data tag, not the data itself. But if we look at
9 this claim element, it doesn't recite detecting sensitive data or even
10 determining sensitive data. It is satisfied by determining a cyber threat,
11 where the cyber threat is based on unencrypted sensitive data stored on the
12 virtual disk.

13 There's no requirement there of detecting sensitive data as part of
14 the claimed method. So why isn't Mohanty's disclosure enough? And even
15 if the claims did require detecting sensitive data, Mohanty's disclosure of
16 applying stronger encryption, at minimum, suggests detecting the data that
17 requires that stronger encryption.

18 Patent Owner's arguments regarding weak encryption schemes are
19 even more transparently flawed. If you look here at the top right excerpt on
20 Slide 32, we see that they only argue we haven't identified anything in
21 Veselov that satisfies that aspect of the claims. They have no response to
22 our discussion of Mohanty's relevant disclosure. So they have not rebutted
23 our showing here that Mohanty discloses the weakly encrypted data
24 limitation.

[REDACTED]

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1 Turning to Slide 33, Patent Owner also argues that we haven't
2 shown how the combination would work and that [REDACTED]

[REDACTED]
[REDACTED]. But we explained in our
5 petition that the combination was a straightforward application of Mohanty's
6 techniques to a virtual machine snapshot assessment, which analyzed, again,
7 the same types of data and issues as an analysis that's run directly on a
8 virtual machine.

9 It was nothing new in 2019 to detect sensitive data in cloud
10 environments or virtual machines. We see examples of that here on this
11 slide, in the Czarny and the Hufsmith prior art. Czarny is even doing it in a
12 snapshot context. Patent Owner's argument that a POSO wouldn't have
13 understood this doesn't hold up.

14 Turning to Slide 34, we identified another way that the
15 combination satisfies Element 1.4, another type of data that the claim recites
16 is services to be run on startup. As we explained in the petition, both
17 Veselov and Mohanty broadly talk about performing CVE assessments.
18 That stands for common vulnerabilities and exposures. CVE assessments
19 typically included common startup services. A POSA would have
20 understood and expected that to be part of what Veselov and Mohanty
21 describe.

22 For example, as we see on this slide, Dr. Stavrou explained, with
23 reference to Exhibits 1100 and 1101 that CVE assessments typically
24 analyzed Linux startup services like system D. Both Veselov and Mohanty

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1 talk about analyzing operating systems. And Mohanty even expressly
2 identifies Linux. Similarly, Dr. Stavrou explained, with reference to
3 Exhibits 1102 and 1103, that another type of startup service CVE
4 assessments typically analyzed were web server services. Veselov expressly
5 identifies web servers as one use for its virtual machines. There's no
6 credible argument that a POSA reading Veselov and Mohanty would not
7 have understood them to involve startup services stored on their disk.

8 Turning to Slide 35, Patent Owner also argues that we have an
9 inconsistency in our mapping. They argue that for Elements 1.5 and 1.6, we
10 rely on Mohanty's threat score as the claimed cyber threat. And they say
11 that's different than the threat that we point to in Element 1.4. We don't rely
12 on the threat score, as the cyber threat recited in Elements 1.5 and 1.6. We
13 rely on the threat score as the risk associated with the cyber threat. They just
14 misread our ground.

15 We pointed this out in our Reply, and they didn't really have a
16 response. They say that we haven't remedied the problem, but they never
17 explained what the problem is. Mohanty describes threats that are correlated
18 with the data on the asset and used to calculate risk scores that satisfies the
19 claims.

20 Turning to Slide 36. Element 1.7 requires prioritizing at least
21 some of the threats as alerts according to their associated risks. Patent
22 Owner argues that the prioritization scores in Mohanty are associated with a
23 vulnerability, not threats. But they're wrong, the scores are associated with
24 both vulnerabilities and threats as well as contextual information. Mohanty

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1 even says the alerts can indicate the applicable threats. So that covers the
2 disputed issues for Claim 1. Beyond that, for Ground 1, Patent Owner only
3 raises arguments for dependent Claim 13, which has the querying a cloud
4 management console requirement. And I've already explained why that
5 argument should be rejected.

6 Turning to Slide 37, in Ground 2 where we add the Ranum
7 reference, Ranum describes determining cyber threats based on stored disk
8 data, including personally identifiable information like credit cards, weak
9 passwords, weak encryption schemes, and unencrypted sensitive data. Like
10 Czarny, Ranum also describes using hash comparisons to detect security
11 issues. In particular, it talks about using hashes to compare a scanned
12 system to an earlier version to identify suspicious files. And like Mohanty,
13 Ranum also describes reporting identified risks. Similar to Czarny, that
14 reporting can include a risk score for the asset.

15 Turning to Slide 38, attacking the combination, Patent Owner,
16 again, turns to rebutting an argument that we didn't make. Much like with
17 Mohanty, they say Ranum uses active network scanners, and you can't use
18 an active network scanner on Veselov's snapshot. Of course, we do not
19 propose running Ranum's active network scanner on Veselov. Rather, we
20 applied its teachings regarding the value of looking for stored personally
21 identifiable information or weak passwords or unencrypted data when
22 analyzing threats. Patent Owner doesn't argue that that has no applicability
23 to the security assessments in Veselov.

24 As we pointed out, we also pointed out the benefit of applying

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1 Ranum's teachings regarding hash comparisons for security assessments.
2 Patent Owner also does not argue that that's not relevant or helpful to what
3 Veselov describes. Veselov says to analyze file information. Ranum says
4 use hash comparisons to identify files that weren't there earlier or have been
5 changed. They go together quite logically.

6 Now, turning to Slide 39, Claim 2 of the '926 --

7 JUDGE GALLIGAN: Counsel, I had a question on generally the
8 rationale to combine before we move on to Claim 2. And your Slide 30, it's
9 a good, you know, I guess point of reference. So my understanding of the
10 Petitioner's argument is that -- and I think we touched on this last time, but I
11 wanted to delve in it a little more. So Veselov would teach -- and putting
12 aside any arguments, you know, whether it teaches SideScanning. It
13 teaches, you know, getting a snapshot. I don't think Patent Owner disputes
14 that you get a snapshot.

15 And then my understanding of Petitioner's argument is that once
16 you have a snapshot, you can run analyses. And these various things you
17 might look for PII or weak passwords or services on startup, if they're not in
18 Veselov, another reference may teach that. And basically, you know, all
19 these scans that could be done in the prior even if they're using agents or
20 active scans, as in -- as Patent Owner characterized in Mohanty, there's no
21 difference in applying them to a snapshot. Is that Petitioner's position?

22 MR. ARGENTI: Well, I think we need to be careful with there's
23 no difference applying them to a snapshot. I think --

24 JUDGE GALLIGAN: It's technical hurdle, I guess. Meaning

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1 they're all applicable to a snapshot just as they are to having a -- I'm trying to
2 define your -- trying to figure out your position. So, you know, you're
3 pointing to things that arguably were done with active -- I don't really want
4 to call it active scanning. Or Mohanty would maybe have a network scanner
5 on a live VM or a live disk or something. And of course, Veselov in the
6 claims used the snapshot. But my understanding of your -- of the
7 Petitioner's position is that those techniques from Mohanty would be
8 applicable and readily implemented in a snapshot environment, right?

9 MR. ARGENTI: Yes. I agree with that, that we are applying
10 those techniques, not necessarily the specific way of accomplishing them
11 using live agents. That's, again, the straw man argument.

12 JUDGE GALLIGAN: Great. Yeah, I guess that's the specific
13 manner between them is kind of what I was getting at. And you can respond
14 in rebuttal or look this up. I've read the decs and everything, and I was
15 looking at Dr. Stavrou's declaration and obviously Dr. Kaeli's response. But
16 what's your best evidence for the -- just the notion that, look, these are
17 techniques that are readily implementable in a snapshot scanning
18 environment, these techniques that are taught, for instance, in environments
19 where there isn't snapshot scanning, I think we would agree?

20 What's your best evidence? Like, where is the evidence? You
21 know, is there -- are there other references to teach this sort of thing? Is it a
22 declaration testimony? Because that's sort of the basis for the -- I believe the
23 basis for the combination in a lot of respects. Because arguably, these aren't
24 in snapshot analysis references, not all of them.

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1 MR. ARGENTI: Right. So I think we did point out during the last
2 hearing we -- specifically, when we were talking -- we've had a little bit of it
3 in the slides here in terms of this approach was known in agentless or this
4 approach was known -

5 JUDGE GALLIGAN: Czarny.

6 MR. ARGENTI: Czarny, references like that; Hufsmith which we
7 also discussed at the last hearing. So there are those references. We've also
8 talked about more extensive aspects of it when we're looking at nexus and
9 discussing nexus in terms of saying, but this approach, this technique, that
10 was known in an approach that used snapshots or an approach that was
11 agentless. So I think it's going to depend on the particular technique that
12 we're talking about in terms of what evidence we might have that that was
13 known.

14 But we also don't need evidence that it was known. We have our
15 expert explaining this was entirely technically feasible. It's using the same
16 types of data. It's accomplishing the same thing. It's doing it in a way that's
17 essentially the same approach; even if you're not using agents, you're doing
18 it in an agentless context. They have done their best to come up with
19 technical hurdles. And they've thrown a lot of stuff out there, and none of it
20 holds up.

21 JUDGE GALLIGAN: And on the point of declaration testimony,
22 so if I'm looking at Dr. Stavrou's declaration in -- I'm looking at the 1190
23 case I think we're on that right now, that would be his testimony on this
24 particular aspect would be the reasons to combine. For instance, reason to

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1 go on Veselov and Mohanty, that would be where I would find Petitioner's I
2 guess best evidence for that proposition that these are readily
3 implementable; is that right?

4 MR. ARGENTI: I would definitely think that that is one of the
5 places to look. I think also he addressed it in his reply declaration when he
6 was responding to particular alleged, you know, difficulties or
7 incompatibilities.

8 JUDGE GALLIGAN: Okay. Great. Thank you.

9 MR. ARGENTI: So I think we were now turning to Slide 39 in
10 Claim 2 of the '926 Patent, which requires that the data stored on the virtual
11 disk is detected by determining an unexpected change in the data. That's
12 exactly what Ranum describes, as I just explained. Patent Owner argues that
13 Ranum performs its hash comparisons to look for malware signatures which
14 is different than the data stored on the virtual disk that's recited in Element
15 1.4. But we cited Ranum and its hash comparisons for Element 1.4 in
16 Ground 2, Element 1.4 not just Claim 2. There is no disconnect.

17 One of the recited data types in Element 1.4 is a change in at least
18 one area of the virtual disk compared to an earlier point in time. It recited
19 Ranum for its disclosure of this and further explained how that satisfies the
20 Claim 2, unexpected change requirement. Whether Ranum is looking for
21 malware signatures is irrelevant. It is looking for changes in the disk.
22 Patent Owner has not responded to that.

23 Turning to Slide 40, we also showed how the combination with
24 Ranum renders Claim 4 obvious. Claim 4 requires detecting the data stored

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1 on the virtual disk by computing a cryptographic hash of an area of the
2 virtual disk and comparing it to an earlier hash of the same area. Patent
3 Owner argues that Ranum's initial scan is of a trusted file system, which they
4 say is different than the running system that's hashed later. But they
5 overlook that Ranum says, as we show on this slide, that the trusted file
6 system can be a previous scan of the same system, which makes sense
7 because the whole point is to run comparisons to look for changes in a
8 system.

9 Beyond that, their arguments again, attack bodily incorporation,
10 saying Ranum's analysis of an active system doesn't carry over to Veselov's
11 snapshot analysis. It doesn't respond to Dr. Stavrou's explanation of the
12 applicability of Ranum's teachings regarding using hash comparisons to look
13 for suspicious files, which is complementary to Veselov approach to
14 analyzing file information in snapshots.

15 If can turn to Slide 41 now, in Grounds 3 and 4 for the '926 Patent,
16 where we add the Seo reference. Claim 3 requires detecting the data on the
17 virtual disk by determining added or changed files without a corresponding
18 installation process. Seo discloses the importance of assessing whether a file
19 is legitimately installed. It says that applications that are not legitimately
20 installed are more likely to be malicious.

21 Dr. Stavrou explains that this well-known principle of considering
22 whether something is legitimately installed would have been appreciated by
23 a POSA as extending beyond just applications to other types of stored data.
24 The Mao reference that we cite here, Exhibit 1098, corroborates that with its

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1 broad discussion of looking at file system changes without corresponding
2 file system updates.

3 Turning to Slide 42, Patent Owner argues that we are cherry
4 picking the prior art with the benefit of hindsight. They say that we haven't
5 shown a POSA would have turned to Seo to modify Veselov and Mohanty
6 when Seo is directed to artificial intelligence systems. But again, we've
7 shown that the general idea of looking to system changes, including
8 installation records, to identify system files was well known. And we have
9 corroborating evidence for that.

10 Moreover, Patent Owner is just wrong when they say that Seo's
11 assessment processes are based on an artificial intelligence network. Dr.
12 Stavrou responded to Dr. Kaeli on this issue and explains that Seo does not
13 use AI to check for installation records. The AI aspect is part of an earlier
14 step. The installation record analysis is separate from the AI and
15 straightforward. There's no AI complication in applying it to the prior art
16 combination here. So that's it for the '926 Patent.

17 I'll move on to the '326 Patent, Slide 43 -- yes.

18 JUDGE BAER: Before you move on to that one, I think this is a
19 good time that I need to address this issue. On the claim construction of
20 analyzing a snapshot and whether that includes analyzing an instantiated -- a
21 VM instantiated from a snapshot, has Petitioner taken any position in the
22 related District Court matter? And does that claim -- that specific claim
23 construction issue, that one on which we punted, have any potential
24 implications of District Court that you're aware of?

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1 MR. ARGENTI: So we have submitted the claim construction
2 briefing. So that record is there for the Board. The parties are construing
3 related terms. Snapshot, I don't actually remember if analyzing is a
4 particular term for construction. I don't think it's been -- the issue has been
5 teed up in the District Court in precisely the same way that it's been teed up
6 in the IPRs here in terms of where do we draw the box around the claim
7 limitation at issue. Certainly, we've pointed out that we believe Patent
8 Owner's arguments are inconsistent with their positions in the District Court
9 case.

10 Beyond that, I think -- I don't think either side has raised any
11 argument beyond what we've pointed out in our briefing as to the relevance
12 of the District Court case. I don't think they've raised any point in terms of
13 inconsistencies or relevance of our positions in one form versus the other.

14 JUDGE BAER: And I remember the alleged inconsistency
15 argument as it existed at the time of institution, is that -- is there anything
16 new on that? Is there anything additional beyond what was in the initial
17 papers on that issue?

18 MR. ARGENTI: There's nothing new on that in terms of the
19 District Court case because the District Court case was stayed basically at
20 the time of institution. So to the extent that there is new information on that
21 in the record, it's what we pointed out in our briefing. And I've included in
22 the slides here, which is their expert's testimony under cross examination
23 looking at embodiments in the specification and agreeing that, yeah, that is
24 an example of instantiating the VM. The specification does describe that as

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1 an example of analyzing a view or snapshot, which was -- we were asking
2 them about the '031 Patent in particular. So the language there is a view or a
3 snapshot. The other specifications don't have the view. It's just the
4 snapshot. They've never articulated any reason why the view is significant
5 relative to the snapshot.

6 JUDGE BAER: Do you have a slide on that particular issue that is
7 the cross-examination of Patent Owner's expert on particularly this point --

8 MR. ARGENTI: Sure. Let me --

9 JUDGE BAER: -- of where that was? If you could --

10 MR. ARGENTI: Oops, I think I --

11 JUDGE ZECHER: Yeah. And Mr. Argenti, is it language in the
12 '326, is it - in column 5, it says the security system may instantiate a copy of
13 the VM 119 and/or a subset of applications at the VM on the server or
14 separate server monitor all activity performed by the instance of the VM. Is
15 that --

16 MR. ARGENTI: So I misstate, Your Honor, which -- what are
17 you --

18 JUDGE ZECHER: This is the '326. It seems like a lot of these
19 have very similar language. But it's column 5, about line 56.

20 MR. ARGENTI: Yeah. I believe that's right. Because if we look
21 here at Slide 9 that I just flipped to --

22 JUDGE ZECHER: Okay.

23 MR. ARGENTI: -- this is where we have quoted both the Dr.
24 Kaeli in cross-examination testimony, that's on the left, page 36 of his

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1 transcript. We've also pulled out the relative -- relevant part of the '809
2 specification, which is from about the middle of column 5. And I think in
3 the '326, it's in the same spot.

4 JUDGE ZECHER: I know in your briefing it seems like you didn't
5 really push this alternative reading of it. But you still stand by your initial
6 construction in the Petition; is that correct?

7 MR. ARGENTI: We do.

8 JUDGE ZECHER: Okay.

9 MR. ARGENTI: Certainly to the extent that we think they -- that
10 is their position, that they are attempting to preserve in the District Court
11 case. We're not sure how they're preserving it. But again, it's based on their
12 arguments -- they're pursuing this argument in the District Court case that
13 analyzing the snapshot encompasses indirect analysis of the snapshot. So
14 they've come out here in the IPRs and they say, no, it doesn't encompass
15 instantiating a VM, which is one very narrow example relevant to their
16 broad construction that it encompasses indirect analysis of the snapshot. I
17 have no idea how they would reconcile those two.

18 JUDGE BAER: And again, just to be clear, I understand the
19 alleged inconsistency. But there's nothing that has happened or gone on at
20 the District Court that is not clear in our record as far as whether that
21 construction, that is a construction that includes analysis of a VM
22 instantiated from a snapshot, how that would affect the District Court.

23 MR. ARGENTI: That's correct, Your Honor. To the best of my
24 knowledge, there haven't been any developments at the District Court. I'm

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1 aware of the director's memo, recent memo, saying that the parties need to
2 keep the Board apprised of any developments of fact or legal determinations.
3 I don't think there have been any, given that the case has stayed.

4 JUDGE BAER: All right. Well, then I'll just ask the question
5 directly, do you know whether the alleged or the accused infringing
6 products, that is whether Wiz's products instantiate -- do analysis of an
7 instantiated snapshot? Do you happen to know the answer to that?

8 MR. ARGENTI: I do not know that, Your Honor. And I think
9 that would probably be something that would be argued.

10 JUDGE BAER: Fair enough. Thank you.

11 MR. ARGENTI: So jump back now to -- I'll scroll down to slide
12 -- I think we were on Slide 42. I'll pick up there where I left off, unless
13 -- oh, did I get through that? Yeah, we're turning to the slide -- the next
14 Slide 43, in the '326 Patent. For the '326 Patent, our Ground 1 combination
15 relies on Veselov plus Basavapatna. As you see summarized here, Patent
16 Owner disputes motivation to combine those two references, but doesn't
17 raise any other arguments that the references don't disclose the elements of
18 the independent claims of the '326 Patent. They only dispute the mappings
19 for certain dependent claims.

20 If we get down to Slide 44, Basavapatna describes computer
21 security assessments that provide risk metrics. It's similar to Mohanty and
22 the Hufsmith reference that we discussed quite a bit during the last hearing,
23 in that Basavapatna teaches considering contextual information when
24 assessing security issues. It describes using configuration data for the

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1 assessment and determining threat metrics and vulnerability metrics that can
2 all play a factor in an aggregate risk metric for the asset.

3 Turning to Slide 45. For the combination, Dr. Stavrou explains
4 that POSA would have appreciated that applying Basavapatna's teachings
5 regarding determining risk levels for particular vulnerabilities and assets and
6 communicating that information to users via filtered and prioritized alerts
7 would provide helpful, useful results quantifying the potential harms
8 discovered by the security assessment. Basavapatna itself says risk metrics
9 help illustrate or assess vulnerabilities.

10 As to prioritizing specifically, as we've shown with the other
11 challenged patents and prior art combinations, prioritizing the results of
12 security assessments was a well-known approach that helps bring the most
13 significant risks to a user's attention. Again, like many of our other
14 references, Basavapatna itself explains the benefit of doing this. It says it
15 helps you to quickly identify which assets are the most at risk or which
16 vulnerabilities are the most dangerous for a system; it's not hindsight.

17 Turning to Slide 46, in response, Patent Owner says Basavapatna's
18 host-based memory system -- sorry, its host-based sensors don't apply to
19 Veselov's snapshot analysis. They say in their briefing that we are falsely
20 accusing them of bodily incorporation arguments that they didn't make. But
21 let's look at their expert, Dr. Kaeli's testimony here. He says it wouldn't
22 have been obvious to incorporate Basavapatna's teachings of determining
23 risk because those teachings require installation of host-based sensors.

24 That sounds like an argument against bodily incorporation to me.

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1 It certainly doesn't address all that the reference teaches to a POSA. A
2 POSA reading Basavapatna would not understand it to be saying that the
3 benefits of asset risk assessments and prioritized alerts are dependent and
4 using host-based sensors.

5 Turning to Slide 47, to try to limit the applicability of
6 Basavapatna's teachings, Patent Owner argues the references risk
7 assessments are inextricably tied to the outputs of its active sensors. They
8 say we haven't shown how you would modify Veselov to get the data needed
9 to arrive at risk assessments like Basavapatna offers. Once Basavapatna
10 detects a vulnerability, though, it's essentially looking at two types of data.
11 One, it's looking at the severity of the vulnerability, and it's looking at asset
12 configuration to determine potential impact. That data is already there in
13 Veselov.

14 As to vulnerability severity, Veselov talks about CVE assessments.
15 And the CVE database provides CVSS severity scores. That is exactly what
16 Basavapatna talks about using for its assessments. As to asset
17 configurations, Veselov also expressly talks about assessing those. We see
18 that here on this slide.

19 And then if we turn to Slide 48, we see on the left, like Veselov,
20 Basavapatna uses asset configuration data for its analysis. And when we
21 asked him, Patent Owner's expert admitted that he didn't consider whether
22 Basavapatna's configuration data would be stored. We see that here on the
23 bottom right. But he then conceded that it could be stored in the disk of the
24 asset, which is exactly how Veselov gets access to its configuration data.

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1 There is no merit to the argument that Basavapatna's approach doesn't apply
2 to Veselov.

3 Turning to Slide 49, those are the disputed issues for the
4 independent claims. Again, they don't argue that any particular limitation of
5 the independent claims is not satisfied by our combination; which gets us to
6 the dependent claims, in particular Claims 6 and 8, which require various
7 application use determinations. Claim 6 requires determining that a
8 vulnerability corresponds to an application that is in use. Whereas Claim 8
9 requires checking configuration files of installed applications to determine
10 whether an application is not in use.

11 We cite disclosure in Basavapatna that satisfies these claims. The
12 reference discloses that its vulnerability assessments take into account
13 whether the software at issue is running on the asset, and it teaches checking
14 configuration files to make those determinations. In response, Patent Owner
15 argues once more that Basavapatna's application usage determinations are
16 dependent on agent-based analysis of a running machine and that
17 Basavapatna doesn't teach analyzing configuration files to determine
18 application usage.

19 But Basavapatna plainly teaches assessing configuration data. If
20 there is a meaningful distinction between configuration data and
21 configuration files, Patent Owner has not explained what that might be. And
22 Veselov, likewise, teaches analyzing configuration data. So Patent Owner is
23 wrong that Basavapatna's teachings are not relevant or useful.

24 Turning to Slide 50, as another example of ways that Veselov

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1 system has access to data that would enable the type of use determinations
2 Basavapatna describes, Patent Owner's expert admitted during cross-
3 examination that an OS package manager -- operating system package
4 manager -- has files that keep track of whether applications have been used.
5 Well, Veselov says its snapshot can contain that information. It talks about
6 including a package manager database which lists all software installed on
7 the VM and their configurations. So again, Patent Owner is not correct that
8 you would need active sensors like agents to provide data for the use
9 determinations that Basavapatna describes; Veselov has it too.

10 Turning to Slide 51, for Ground 2 of the '326 Patent IPR, Orca
11 relies solely on the arguments that they raise for Ground 1. So there aren't
12 any additional disputed issues there. For Ground 3, we turn to the
13 Giakouminakis reference, which discloses analyzing configurations for a
14 plurality of connected assets in a cloud environment. And like Basavapatna,
15 it also teaches waiting a takeover risk for a particular asset, including based
16 on proximity to other assets. Patent Owner, again, attacks the references
17 individually, arguing Giakouminakis uses agents and therefore can't satisfy
18 these claims. But that ignores the combination of references.

19 And they say that our rationale to combine is to be generic and
20 insufficient. But Dr. Stavrou explained in his opening declaration that the
21 advantages of applying Giakouminakis global view of asset risk and
22 consideration of things like the data stored on an asset and its location
23 relative to other assets in the network would improve risk assessments.
24 Patent Owner has no substantive response.

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1 So that concludes the '326 Patent and brings us to secondary
2 considerations. Turning to Slide 52. We spent a fair amount of time
3 discussing this topic during the last hearing. I explained that they had failed
4 to show nexus as a general matter and, further, that their arguments for the
5 various categories all suffered from shortcomings as well.

6 JUDGE BAER: Mr. Argenti, can you just -- as a summary, are
7 there any issues to secondary considerations that are unique to the patents at
8 issue here? In other words, is there any argument or anything that we talked
9 about last time in secondary considerations that is different for the previous
10 patents as compared to the patents at issue? In this case, is the evidence the
11 same? Are the arguments exactly the same?

12 MR. ARGENTI: You're getting where I'm going, Your Honor. I
13 am planning on addressing what I think are the few distinctions in this case.
14 I'm not going to go through all the arguments against the individual
15 categories because they are presenting the same evidence and the same
16 arguments largely. So I'm not going to repeat myself. If there are questions
17 to address or if there's rebuttal that I want to address after they address
18 secondary considerations, I might do that. But I'll go ahead and talk about
19 what I think are the more unique issues here.

20 JUDGE BAER: Thank you. That would be helpful.

21 MR. ARGENTI: So as in the last three IPRs, they began
22 -- conceded -- turning to Slide 53, they have again conceded that they are not
23 arguing for a presumption of nexus. So same as the last, but definitely worth
24 mentioning again here because it's important to the analysis. That means

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1 that their heavy reliance on cases like WBIP and Medtronic in their Patent
2 Owner Responses, that's misplaced. Those are cases involving a
3 presumption of nexus, and there is no presumption here.

4 If we turn to Slide 54, absent a presumption of nexus, Patent
5 Owner has to show that the evidence of secondary considerations is the
6 direct result of the unique characteristics of the claimed invention. As we
7 see in the Janssen decision here, if the evidence results from something other
8 than what is both claimed and novel in the claim, there is no nexus to the
9 merits of the claimed invention. Secondary considerations can't be tied to
10 just a feature or even a combination of features that's found in the prior art.
11 That's what Yita says. And the evidence has to be the direct result of a novel
12 feature or combination of features.

13 And that creates a problem for Patent Owner. The Patent Owner
14 Responses did not identify what their novel feature or combination of
15 features is. What they've argued for the first time in their sur-replies here is
16 that the novel combination of features is what you see in the claims as a
17 whole. They say that their objective evidence in each of the IPRs is tied to
18 the claims as a whole. Well, that creates a problem for them.

19 If we turn to Slide 55, we need to remember that there are six
20 different patents challenged in these related IPRs. It's not just the '809, the
21 '926, and the '326 that we're talking about today, but also the '031, the '032,
22 and the '685 that we discussed at the last hearing. Those six patents are
23 related. But as we've explained in our briefing and as we see here on Slide
24 55, they all have distinctive claim sets. As we see here, they all claim

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1 different inventions. Patent Owner has not argued otherwise. Patent Owner
2 relies on essentially the same set of objective indicia evidence in all six
3 IPRs. But they haven't shown that that evidence is tied to the claims as a
4 whole for each patent, for these patent's claim distinct inventions.

5 Turning to Slide 56, that explains why they aren't arguing for a
6 presumption of nexus. They argue that their SideScanning product
7 embodies the claims of all six patents. But even if that were true -- and it's
8 not -- we refuted that in our replies, cases like Janssen explained that in
9 those circumstances, you can't have a presumption of nexus if the patents
10 cover different inventions. That's what we have here.

11 And that's not just a problem for a presumption analysis. *Fox*
12 *Factory*, which we cite here on Slide 56, makes clear that when you have
13 multiple patents with different combinations of features, it doesn't just
14 preclude a presumption of nexus. It means that "the Patentee has the burden
15 of proving the degree to which evidence of secondary considerations is
16 attributable to a particular claimed invention." It's right there in the *Fox*
17 *Factory* excerpt on the slide.

18 JUDGE BAER: Could you just articulate that point one more
19 time? I'm not sure I followed. That might not be your failure, that might be
20 mine. It's a nuanced point. Could you just make that point?

21 MR. ARGENTI: So what we see in the *Fox Factory* excerpt on
22 Slide 56 says "the same evidence of secondary considerations cannot be
23 presumed to be attributable to two different combinations of features." So
24 they've said, we're not arguing for a presumption. We have different

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1 combinations of features, we're not arguing for a presumption. *Fox Factory*
2 goes on to say, in such situations, "the Patentee retains the burden of proving
3 the degree to which evidence of secondary considerations tied to a product is
4 attributable to a particular claimed invention." They have six patents, they
5 need to tie their evidence to one of those patents, all six of those patents,
6 whatever they choose to do, which they haven't done. But it needs to be tied
7 to a particular invention because they have different inventions in the
8 different patents.

9 JUDGE BAER: I understand your point. I guess how having six
10 patents undermines their claim. I certainly understand when you have
11 unclaimed features and how that can affect the *Fox Factory* analysis for a
12 presumption, but I understand your point to be the mere existence of six
13 different patents undermines their claims to nexus. And I'm not sure I'm
14 following your point on that with the *Fox Factory* case, which is a nexus,
15 which is a presumption case. Could you articulate that again?

16 MR. ARGENTI: So my point is that the existence of six patents
17 claiming six different inventions heightens the burden for them, such that
18 they need to tie their secondary -- under any circumstances, whether it's one
19 patent, multiple patents, whatever, the evidence needs to be tied to the
20 claimed invention.

21 JUDGE BAER: I agree with that point. So how does having six
22 patents undermine that claim? Or does it just make the job harder?

23 MR. ARGENTI: That's it, I think it heightens the burden. I'm not
24 saying that you cannot have nexus for multiple patents. That's not what *Fox*

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1 *Factory* says. That's not what these others say. If you have multiple patents
2 covering the same invention, if there's a core aspect of the invention that the
3 Patent Owner identifies, then you can have secondary considerations
4 evidence that goes to that invention and therefore goes to those multiple
5 patents. If you have multiple patents that are covering different inventions,
6 which is the case here, then they have the burden of showing that their
7 secondary considerations evidence is tied to one of those inventions,
8 multiple of those inventions. It's a burden that's created.

9 JUDGE BAER: Well, I assume their response is going to be there
10 are common features to all these inventions, and our secondary
11 considerations are tied to those common features. So my question to you
12 would be, what specific secondary considerations evidence have they
13 asserted that is not common to some of the patents at issue here or there? In
14 the previous cases, that's fine. Can you identify any of that specific
15 information? In other words, something that is evidence of a secondary
16 consideration that relates to something not at issue in these patents.

17 MR. ARGENTI: So my -- well, first I would say they have not
18 satisfied their burden. *Fox Factory* is clear that it is their burden. They're
19 going to stand up and they're going to say that's exactly what we did. It's not
20 there. It's certainly not there in the Patent Owner Response.

21 JUDGE BAER: So what's an example of a secondary
22 consideration -- a piece of secondary considerations evidence that is tied to
23 something that is not claimed in one of these patents?

24 MR. ARGENTI: All of their secondary considerations evidence

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1 that refers to SideScanning generally, which is a lot of it. So we showed and
2 we talked about at the last hearing that SideScanning has multiple, multiple
3 unclaimed features. It has the control plane path. It has aspects beyond
4 vulnerability analysis. That's one reason why they didn't try to make out a
5 presumption showing because SideScanning is not coextensive with any of
6 the claims of any of these patents.

7 JUDGE BAER: Right. But I understand that point to apply to all
8 the cases. So what I'm asking you, is there something that's particular to the
9 patents at issue in this case where you'd say, look, their secondary
10 considerations evidence that works for one patent, but it doesn't work for
11 these patents -- this other patent? So what I'm asking for is --

12 MR. ARGENTI: Right.

13 JUDGE BAER: So my initial question, is anything specific to
14 these cases or any one of these cases that doesn't apply to all of them?

15 MR. ARGENTI: First, my answer is it should not be taken as a
16 concession that it does apply to any of the patents. But certainly, I would
17 point to the fact that these patents that we are talking about today do not
18 require API usage, which they are saying is part of their special sauce, that
19 they're -- that the fundamental invention is using APIs to access a cloud
20 environment and then getting snapshots to scan and analyze. You don't see
21 that required in their claims here.

22 JUDGE BAER: So the API -- I think we have three patents that
23 involve specifically that call out APIs and three that say there's a service or
24 an API. And you would say, yeah, that some of their evidence that ties

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1 particularly to APIs that would apply to some but not all of these patents.
2 I'm not asking you to concede it, but that would be different for these cases.

3 MR. ARGENTI: Well, the case that they're laying out is that when
4 their evidence is talking about agentless scanning, oh, it's talking about these
5 two factors, APIs and snapshots. So it's not just evidence that specifically
6 refers to APIs. Their theory now is that if the evidence refers to agentless
7 scanning, Orca's agentless approach, SideScanning, agentless scanning,
8 they're saying that's really talking about these two fundamental features that
9 we contributed to the field. Well, they didn't because Veselov had both of
10 those first. But also, it's not even required by the claims that we're talking
11 about today.

12 JUDGE BAER: Thank you. That's helpful.

13 JUDGE ZECHER: And just to be clear, I did go back and check, I
14 think four of the involved patents use the "or" language to require the API.

15 MR. ARGENTI: So getting back to Slide 56 and *Fox Factory*. So
16 as I explained, *Fox Factory* says that the Patentee has the burden of proving
17 the degree to which evidence of secondary considerations is attributable to a
18 particular claimed invention. And they have not done that here. In fact,
19 they've done the opposite. They present essentially the same evidence of
20 secondary considerations across all six IPRs.

21 When they say that their nexus is tied to the claimed combination
22 of features as a whole, it not only creates a disconnect with their secondary
23 considerations evidence that doesn't refer to those groupings of features. It
24 also creates a problem when you look at the other challenged patents that

[REDACTED]

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1 recite different combinations of claimed features. So they haven't shown
2 nexus based on the claims as a whole.

3 Now, elsewhere in their sur-replies, they say that the claims
4 embody two fundamental principles. And this is what we were just talking
5 about. One, privileged access to the customer's cloud environment via APIs;
6 and two, snapshot scanning. They didn't argue nexus on that basis in their
7 Patent Owner Responses. So to the extent that that is what they are
8 attempting to do in their sur-replies, plus that's belated, and they've waived
9 it. But in any event, the claims in the three IPRs at issue today, as we've
10 discussed, don't require API usage. And more importantly, if they're going
11 to characterize those two features as their novel combination, it's nothing
12 more than what Veselov discloses. Any way you look at it, they are unable
13 to establish nexus.

14 So turning to Slide 57, the problems with their nexus showing are
15 compounded by their unclaimed features in their product. As we've
16 explained in our briefing and discussed at the last hearing, Orca's
17 SideScanning has many unclaimed features, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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1 That not only knocks out their evidence about SideScanning
2 generally, it also creates problems for some of their evidence that gets a little
3 more specific. Some of what they cite in their objective indicia evidence is
4 referring directly to these unclaimed features. [REDACTED]

[REDACTED]

8 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In any event, Patent Owner has the burden to
19 show which of their patent claim statements refer -- like this refer to and to
20 what degree. They haven't done that.

21 Now we're going to move to Slide 63. I mentioned that other new
22 argument in their sur-replies where they argue that their claims embody two
23 fundamental principles, privileged access to a cloud environment via APIs
24 and snapshot scanning. That cannot provide nexus not only because the

[REDACTED]

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1 claims don't require APIs, but also because cases like Yita say that if the
2 evidence relates to a feature or combination of features found in the prior art,
3 that evidence lacks nexus.

4 And again, this is in Veselov. As we see at the top right of Slide
5 63, referring to columns 4 and 5 of Veselov, the scanning service accesses
6 the cloud environment via APIs. And it does so in order to obtain and
7 analyze snapshot data. And a lot of other features found in their evidence or
8 referred to in their evidence are found in Veselov. For example, analyzing
9 -- accessing and analyzing block-level storage, as referred to in 2076,
10 [REDACTED] which we've excerpted on this slide; and also,
11 accessing cloud workloads at the runtime storage level, as referred to in
12 Exhibit 2076; and also, reconstructing file systems and scanning operating
13 systems and applications in a read-only mode for analysis, as referred to in,
14 again, Exhibit 2076; and also, [REDACTED]

[REDACTED].

16 All of those are things Patent Owner sites in support of secondary
17 considerations, but you find them all in Veselov. So whether they're
18 purported novel combination of features is the claimed subject matter as a
19 whole, or these two allegedly fundamental features of agentless scanning,
20 they have not shown nexus.

21 Now, they also have problems with their arguments regarding the
22 individual categories of secondary considerations, as we've pointed out in
23 our briefing and discussed at the last hearing. So because we discussed them
24 the last time, I'm not going to go through them again. So unless the panel

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1 has any questions, I'm going to reserve my remaining time for rebuttal.

2 JUDGE ZECHER: Yeah. I do have a question on the copying
3 evidence. I think I understood you last time to argue that there was a
4 meeting -- a purported meeting that Mr. Shua had with, I believe, the
5 founder of Wiz and that there was some information shared and -- is all the
6 evidence we have in that meeting Mr. Shua's testimony? Is there any
7 indication of what was shared during that meeting, such as slides, technical
8 documents, anything like that?

9 MR. ARGENTI: There's no other evidence in the record about
10 what was shared or discussed at that meeting, beyond Mr. Shua's testimony.

11 JUDGE ZECHER: And is that -- am I viewing this correctly as
12 kind of the precipice for how this copying story got started, that meeting?

13 MR. ARGENTI: Certainly how it got started, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

18 So there's no evidence that Wiz copied anything at all. And really, yeah, it
19 -- the beginning -- and the only thing they can hang their hat on is that
20 meeting.

21 JUDGE ZECHER: And so another kind of question or concern I
22 had about that evidence was this whole notion of similarity with Wiz's
23 product. And I read that over a couple times. And I guess I struggled with it
24 because it seems to be asking us as a Board to kind of engage in

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1 infringement analysis. How would you address that?

2 MR. ARGENTI: So I would actually agree with Patent Owner that
3 the law doesn't require an infringement analysis. And they say, well, that's
4 not what we did, we weren't trying to do an infringement analysis. But if
5 you look at their briefing, if you look at their Patent Owner Response, that is
6 exactly what they were explicitly doing. Their allegation is that Wiz
7 practices the challenged claims. So certainly, it's an improper infringement
8 analysis. They're trying to litigate infringement at the wrong place and the
9 wrong time.

10 JUDGE ZECHER: So what do you suggest we do with that?

11 MR. ARGENTI: Well, we've pointed out -- I am not suggesting
12 that the basis to reject their arguments is because it's an infringement
13 analysis. Because the law doesn't require that. So the fact that they have
14 failed to show Wiz's infringement is really beside the point. What we
15 pointed out in our Petitioner replies, what we discussed at the last hearing is
16 that they failed to make out even a substantial similarity case. They have
17 their argument -- it's predicated on their argument that SideScanning
18 -- Orca's SideScanning practices the claims. And then from that, they go to,
19 and Wiz was copying Orca's SideScanning and is substantially similar.

20 They've failed to show that Orca's SideScanning practices the
21 claims. We pointed that out in our replies. I think they've had slides that say
22 Wiz doesn't dispute it. We absolutely dispute that. They have failed in their
23 showing that Orca, that they themselves practice the challenged claims. And
24 as a result, they've not only failed to show that Wiz copied anything, they've

[REDACTED]

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1 failed to show substantial similarity to the invention. Because the necessary
2 chain in that is that they practice the invention.

3 JUDGE ZECHER: Okay. I'll have to think about that. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

9 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

14 MR. ARGENTI: Well, a couple points there, Your Honor. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 [REDACTED]

[REDACTED]

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1 [REDACTED]

[REDACTED]
[REDACTED] So that's one big failure. Second, we've
4 also cited the -- I believe it's the *Wrigley* decision from the Federal Circuit
5 that stands for the proposition that even if the evidence does show copying,
6 that's not necessarily copying as an objective indicia, because sometimes
7 that's just what competitors do. That's just what people do when they're
8 marketing.

9 So from a factual standpoint, their case doesn't stand up. They
10 haven't satisfied the burden. From a legal standpoint, they haven't shown
11 how all of this evidence that they've cited -- they have -- their theory is
12 going for quantity over quality. They're trying to overload the record with
13 hundreds of exhibits. They scoured their document production improperly.
14 They scoured their District Court document production for every Wiz
15 document that mentions Orca, and then they put it into the record here. That
16 does not show copy.

17 JUDGE BAER: Okay. Any questions for my colleagues? That
18 puts us right about -- stop your clock. Let's go ahead and go off the record.
19 So Mr. Argenti, you're going to have 21 minutes when we come back on the
20 record.

21 MR. ARGENTI: Understood, Your Honor.

22 JUDGE BAER: It's 12:45, we're off the record.

23 (Whereupon, the above-entitled matter went off the record at 12:45
24 a.m. and resumed at 1:40 p.m.)

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1 JUDGE BAER: We'll go back on the record. Mr. Davis, are
2 you ready to begin? You need a little time?

3 MR. DAVIS: Give me just one minute so that I can make sure that
4 I've got the right things --

5 JUDGE BAER: Mr. Argenti, housekeeping matter for you.
6 Several times during our discussion, we obviously referenced the previous
7 argument, the previous oral argument. It seems like it might be useful if we
8 entered the transcript in that case, in this case, and vice versa. Is that
9 acceptable to Petitioner?

10 MR. ARGENTI: That would be acceptable, Your Honor.

11 And Mr. Davis, any problem with us doing that?

12 MR. DAVIS: No problem, Your Honor.

13 JUDGE BAER: Great. Thank you. Whenever you're ready. But
14 take your time.

15 MR. DAVIS: Not too much space up here. Okay, Your Honors.

16 JUDGE BAER: Before we start, Mr. Davis, would you like to
17 reserve time for rebuttal?

18 MR. DAVIS: Yes, 20 minutes.

19 JUDGE BAER: That will put us at 1:15 and 20. I'm going to put
20 99 on the clock, but I will adjust it as need be. And you can begin whenever
21 you're ready.

22 MR. DAVIS: Thank you, Your Honors. This is Blake Davis for
23 Patent Owner Orca. And what I want to do to start is address nexus and
24 some of the questions that I think were raised during Your Honors' questions

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1 of Petitioner regarding agent versus agentless and the claims at issue here,
2 referring to an API or service. After I address that, I'm going to turn it over
3 to Ms. Bruner, who's going to address claim construction, as well as the law
4 relating to mixing and matching embodiments for an obviousness
5 combination.

6 And then I will jump back in, and I'll address the prior art grounds,
7 focusing on Ground 1 of each of the different IPRs, then addressing
8 objective indicia, focusing on arguments that are different and how the
9 analysis has changed from IPR to IPR. And then I will -- with what time I
10 have left, I'll address some of the secondary grounds, the IPRs.

11 So what do I want to what I want to address first is agent-based
12 versus agentless scanning. Your Honors had a question of, you know, what
13 does agentless scanning mean in this context. And I think that the Board
14 pointed out that -- which is on Patent Owner's Slide 116, which is that
15 agentless scanning -- and this is Exhibit 2026, at 3. It is Wiz's
16 (INDISCERNIBLE) on agentless versus agent-based scanning and which
17 one is better for the cloud. And as Wiz explained, agentless analysis
18 approaches are based on two fundamental principles, privileged access to
19 customers cloud environment via APIs and snapshot scanning.

20 Now I think what the Board indicated is that the claims of the '926
21 Patent, the '809 Patent, and the '326 Patent, I think it was said that they don't
22 require APIs. And I would adjust that slightly, which is that APIs are
23 certainly one of the embodiments that are -- that satisfy each of the claims
24 because the APIs or services are alternatives. As to the services, I think

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1 there was a question as to what those are. The '809 Patent, for example,
2 describes those services in column 4 at lines 21 through 23, which explains
3 that the service would be something like --

4 JUDGE BAER: Mr. Davis, can you give us just a moment to pull
5 that up, unless you have a slide that --

6 MR. DAVIS: I don't just because this question didn't come up.

7 JUDGE BAER: That's fine, give us --

8 JUDGE ZECHER: You said column 4, what line?

9 MR. DAVIS: Column 4, lines 21 through 23 --

10 JUDGE ZECHER: Okay.

11 MR. DAVIS: -- where it explains that what is meant by sort of the
12 API or service, the service would be something like a cross account policy
13 service in AWS. At issue here, Wiz has not introduced any evidence that it
14 specifically ties to the service as compared to the API. I think all of their
15 sort of prior art arguments are based on the cloud competing APIs and
16 whether those were known, which we of course addressed. I do think that
17 the -- at least what I took from some of the Board's questions about whether
18 the claims require an API as it pertains to nexus, the answer for that question
19 -- and this is -- these are -- Wiz did not raise an argument that there's no
20 nexus because the claims are not limited to APIs. And they include the
21 service, and so these cases weren't cited in the briefing.

22 But the Federal Circuit has actually specifically addressed the
23 question of whether objective evidence needs to be tied to every possible
24 embodiment of the claim and has specifically answered that question no.

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1 One example is the Federal Circuit's decision in Rambus, Inc. v. Rea, 731
2 F.3rd 1248 and specifically at page 1257. The Federal Circuit explained that
3 the "Board had erroneously found that Rambus' evidence relating to high-
4 speed memory systems was not commensurate with the scope of the claims
5 because the claims do not recite a specific clock speed and therefore
6 embrace slow memory devices." The Federal Circuit said "such a strict
7 requirement was improper. Objective evidence of nonobviousness need
8 only be reasonably commensurate with the scope of the claims, and we do
9 not require a Patentee to produce objective evidence of nonobviousness for
10 every potential embodiment of the claim."

11 Another case which is cited within Rambus but also separately
12 stands for this proposition, is In re Glatt Air Technologies, Inc., 630 F.3rd
13 1026, at 1030, another Federal Circuit opinion from 2011, "We have
14 consistently held that a patent applicant need not sell every conceivable
15 embodiment of the claims in order to rely upon evidence of commercial
16 success."

17 JUDGE BAER: Now, Mr. Davis, are those presumption cases or
18 are those not presumption cases? And if you don't have an answer to that
19 right away, that's --

20 MR. DAVIS: Neither of the cases reference a presumption of
21 nexus.

22 JUDGE BAER: So this is not about a presumption. This is just on
23 the question nexus; is that correct?

24 MR. DAVIS: That's right.

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1 JUDGE ZECHER: I guess I'm struggling a little bit. What do you
2 mean by embodiment of the claim? Because here we have two alternatives,
3 right? We have an API or a service. So if we just read it as having a
4 service, effectively there's no API there, right?

5 MR. DAVIS: That's right. And so I think that would be -- the fact
6 that there are multiple ways that this claim could be practiced, that's the
7 point. And what the Board is saying -- or sorry, what the Federal Circuit is
8 saying is you don't need objective evidence that ties to every possible
9 implementation of the claims, so long as you do show direct nexus, which is
10 that there is a tie between what is expressly claimed, what does fall within
11 the scope of the claim, and the objective evidence itself. And I think that
12 that is where I think a lot of what Wiz's arguments have been directed to.

13 JUDGE ZECHER: So effectively, you're arguing because you
14 have evidence that falls within the first alternative in these claims that that's
15 enough for us to consider it as objective, in addition for the purposes of
16 establishing nexus?

17 MR. DAVIS: That's exactly right. That is enough to show the
18 direct tie between the objective indicia evidence and each of these claims.
19 Because as we show on Slide 116, each of claims of the '926, the '809
20 Patent, and the '326 Patent expressly require the use of an API or service
21 provided by the cloud computing environment, as well as analyzing the
22 snapshot which are these two requirements. I do think that the Board also
23 asked about the concept of privileged access. That's also reflected in the
24 claim. I don't believe that I have it on this Slide 116. But if you go to, for

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1 example --

2 JUDGE ZECHER: Can we stay on slide 116 real quick before we
3 move to the next one?

4 MR. DAVIS: Sure.

5 JUDGE ZECHER: I just want to make to get some clarity here.
6 You keep saying that this is Wiz's position as to what agentless requires. Do
7 you agree with this position?

8 MR. DAVIS: Yes.

9 JUDGE ZECHER: Okay.

10 MR. DAVIS: To be completely clear, yes, we agree that these are
11 the two fundamental principles of agentless scanning. It's also reflected in
12 Exhibit 2067 which is the CNAPP guide, the future of cloud security, which
13 --

14 JUDGE ZECHER: I'm looking at 267 here, it says SideScanning
15 inside the engine.

16 MR. DAVIS: I'm sorry, 2076.

17 JUDGE ZECHER: 76, that's Dr. Stavrou's deck.

18 MR. DAVIS: Exhibit --

19 JUDGE ZECHER: No, it's not. Yeah, it's redefining CNAPP.
20 Yeah, got it.

21 MR. DAVIS: If you look at, for example, page 7 of Exhibit 2076
22 where it talks about Orca introducing the concept of agentless SideScanning,
23 and this -- I think part of the quote is on 120 -- Slide 124 of Orca's slides,
24 where it refers to the genuinely genius innovation of utilizing the nature of

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1 Cloud APIs being accessible to vendors. And I want to make sure that I
2 address both the snapshot scanning as well as.

3 And so if you look at Exhibit 2076, at pages 11 to 12, which are on
4 Slide 95 of Patent Owner's demonstratives, it discusses, "Agentless solutions
5 are easy to deploy since they do not require installing software on each
6 workload. They leverage cloud APIs to snapshot underlying instance hard
7 disks, copy them to the security vendor's account where they're hooked up
8 on the vendor side, and scan. This creates an elegant 'like magic' approach."
9 So again, we're tying agentless scanning to mean snapshot scanning, as well
10 as privileged API access, which are reflected and required in each of the
11 '809, the '326, and the '926 Patent claims.

12 I think the Wiz's arguments as to nexus and much of its evidence in
13 rebuttal to Orca's objective evidence -- objective indicia evidence conflates
14 the requirements of a presumption of nexus with direct nexus, which the
15 Federal Circuit has plainly shown are two separate analyzes. Wiz pointed
16 out that, for example, there are six patents that are at issue in these
17 proceedings. Wiz would collapse all of them together. They would say all
18 six should be considered. You cannot have six patents have nexus to any of
19 the same pieces of objective indicia evidence.

20 That is true if you are presuming nexus. But where you're not
21 presuming nexus, what you need to do is you need to do a patent by patent
22 analysis, looking at it individually. And that's what we did in each of the
23 Patent Owner's responses and each of the Patent Owner's sur-replies is we
24 showed where the objective evidence had direct ties to the particular claim

[REDACTED]

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1 requirements in each of the -- for example, the '809, the '926, and the '326
2 Patent.

3 JUDGE ZECHE: I guess, Mr. Blake, I'm a little confused. I
4 thought you relied on essentially same evidence, objective indicia in each of
5 the six cases. Are you seeing now it's slightly different for all six cases? I
6 know the nexus mapping may change, I get that. But I'm talking about
7 commercial success. Isn't that all the same evidence?

8 MR. DAVIS: It is not all the same evidence. There are certainly
9 some exhibits that are relied on, for example, on the '926 Patent that relates
10 to detecting cyber threats based on stored data, like detecting unsecured PII,
11 where there are actually different exhibits entirely that are being relied on
12 there. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

23 JUDGE ZECHE: What record are you referring to? Because I'm
24 looking at the 1109, I don't see that exhibit number.

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1 MR. DAVIS: Right. That's because it is only in the '926 Patent.

2 JUDGE ZECHER: Which is which case number, just so we can
3 follow along?

4 MR. DAVIS: Yes. It's 1190.

5 JUDGE ZECHER: That's the 1190?

6 MR. DAVIS: Yes, that's right.

7 JUDGE ZECHER: Okay. Thank you.

8 MR. DAVIS: And before I jump -- get too far into sort of each of
9 the different objective indicia and how they apply to the different patents,
10 what I also want to address is just the legal requirements of nexus. Because
11 I think that both the Volvo and the Lectrosonics cases that Wiz sites provide
12 a lot of really helpful guidance, specifically where there is no presumption of
13 nexus. Because in both Volvo, from the Federal Circuit, and Lectrosonics
14 which has been designated presidential by the PTAB objective indicia
15 evidence specifically, both found that there was no presumption of nexus but
16 still that there was nexus that overcame obviousness cases based on direct
17 nexus.

18 And if we go to Slide 104, we have the Volvo case which explains
19 that "a nexus analysis need not be limited to a discussion of only novel
20 features. It is instead important to consider the invention as a whole, rather
21 than on limitation by limitation basis." Again, that's something that we
22 addressed. And I think that for Wiz, what they counter with is really trying
23 to attack sort of each of the limitations and can I find any one of the
24 limitations in the prior art, which is not the right analysis.

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1 To show direct nexus, what the Volvo case tells us -- and this is on
2 Slide 105 -- is where documents clearly reference a particular feature or
3 product that the Patent Owner argues -- and the Petitioner does not dispute
4 -- practices the claim of the patent and also discuss objectives that are
5 directed to aspects of the challenged claims, then those documents
6 demonstrate the connection between the claim elements and the objective
7 evidence of nonobviousness.

8 So what you need to show is that the documents that are cited for
9 objective indicia referenced features of the product that are tied to the
10 elements of the challenged claim in combination. Because that's what we
11 are showing was novel about the claim conventions, it was the claimed
12 combinations.

13 Turning to Slide 106, this is also reflected in the Lectrosonics'
14 presidential PTAB decision, where the Board explains, for direct nexus,
15 "that evidence that are generally referring to claim limitations has probative
16 value in establishing that the asserted objective evidence is tied to the
17 proposed substitute claims." And the substitute claims were what were
18 being addressed by the Board in this context.

19 Go to Slide 107, the Board also explains what is strongly probative
20 of a direct nexus, and that's where the evidence refers specifically to
21 particular limitations of the patent that are recited by the claims. And we see
22 at the end of the quote here from the Lectrosonics opinion at page 63 that
23 where, for example, Mr. Wexler refers specifically to the replacing
24 limitation of the '902 Patent that was recited, that evidence was strongly

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1 probative in establishing that the asserted objective evidence is tied to the
2 invention recited in the proposed substitute claims.

3 Now, I think that, again, this is where there's a strong difference
4 between presumption of nexus, where unclaimed features can show that
5 there is no presumption in a direct nexus analysis. And on Slide 108, what
6 the Board explained is that in a direct nexus analysis, the fact that there is,
7 for example, some evidence of industry praise that are directed to features
8 that are not explicitly recited by the substitute claims, that evidence of
9 features that are not recited by the proposed claims weighs neither for nor
10 against obviousness. Because what you are focused on in a direct nexus
11 analysis, it's whether the objective evidence is tied -- and that's in the sort of
12 middle of the quote on Slide 108 from Lectrosonics at 69 to 70, what you
13 need to look for is does the Patent Owner provide evidence of objective
14 -- one of the objective indicia here was industry praise related to the
15 particular limitations or the claimed combination. In our case, that
16 specifically addresses that claimed combination. And so that's -- yes.

17 JUDGE GALLIGAN: Right. But finish your thought. I didn't
18 mean to interrupt. I had a question on that thing.

19 MR. DAVIS: No. I'm ready for your question, Your Honor.

20 JUDGE GALLIGAN: So Petitioner points out that -- I want to get
21 a couple terminology issues out of the way. So a SideScanning, as we read
22 in the briefs, is that, as Petitioner characterized, the Orca product? Isn't what
23 they called SideScanning?

24 MR. DAVIS: That's it. I would say it's sort of the engine. It is the

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1 agentless scanning feature that sort of drives all of the analysis that the
2 product can do. I think they also refer to it as the Orca cloud security
3 platform.

4 JUDGE GALLIGAN: Okay. So Petitioner says, look, there -- this
5 is the product. It's, you know, a big product. There's numerous features. So
6 I think that my understanding of their point is that it may be -- and they
7 actually dispute the embodiment prong of it, whether it practices the claim.
8 And we can get into that if you want. But there -- I think further than that,
9 they're saying, who's to say what the phrase is. Because, for instance, there's
10 quite a bit of evidence about this control plane. It's in the copy. I don't see
11 the control plane anywhere in the claims.

12 But if that's a key feature of Orca that Wiz was copying, I don't see
13 how that implicates secondary considerations that would go against the final
14 obviousness. And this is where it's difficult maybe with software where we
15 don't look at a physical, you know, baseball glove, if you compare it to
16 baseball gloves. We're looking at software, which is just a compilation of
17 features. Please respond to Petitioner's argument that, look, there's just a
18 -- when you're saying it's all SideScanning, that could be any -- that's just a
19 massive product that has all kinds of unclaimed features, so it's not tied to
20 the, you know, unique characteristics of the invention. That's what I took
21 their argument to be.

22 MR. DAVIS: So I think I would address that in a couple of
23 different ways. So I think the first point as to the control plane -- the control
24 plane is recited. The control plane for Orca SideScanning is part of how

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1 Orca practices the claim. Mr. Shua specifically addressed how and where
2 the control plane is relevant in his declaration. I'd be happy to point to
3 specific paragraphs where Mr. Shua addresses that it's different across each
4 of the different IPRs. But I think that the control plane is part of the use of
5 the APIs to get the cloud data. That's part of the control plane.

6 JUDGE GALLIGAN: I definitely would like you to address that.

7 MR. DAVIS: Okay. Yeah. And then the data plane is where the
8 analysis steps take place. And so what I'll do is I'll likely come back on the
9 -- on rebuttal and identify that, just to make sure that we're sort of clear on
10 what that is. I think the other aspect of this is you asked, well, how do we
11 know what part of SideScanning this objective evidence is really directed to.
12 And that's a good question. And that's what the Board needs to address here.

13 And the way that you do it is not by looking, oh, well, what is
14 SideScanning, what features do they have. But you look at what are the
15 aspects that were actually praised in, for example -- and let me use Slide 92
16 as an example, which is the Forbes Award, which is in Exhibit 2120, that
17 named Orca the year after it was founded in November 2020 as one of the
18 top 20 cybersecurity startups to watch in 2021 based on CrunchBase.

19 And in Forbes' explanation of why is Orca a top 20 cybersecurity
20 to watch, it says that "Orca Security is noteworthy for its innovative
21 approach," and then it explains what that innovative approach is. And what
22 we've done on Slide 92 is highlight text that goes directly to -- at least text
23 that is highlighted but not underlined goes to all three of the patents.

24 Because, again, there are common features across these different -- across

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1 the different patents. For example, the integration with cloud platforms, the
2 prioritizing risk, and the reading workloads, runtime, block storage, out-of-
3 band are all referring to common features of each of the '809, the '926, and
4 the '326 Patent claims.

5 But then you can also see that Forbes emphasized features that are
6 unique to just one patent or a set of patents. So for example, the
7 interconnected web of assets is part of determining the risk elements in the
8 '809 and the '326 Patents, at least it is generally or specifically referring to
9 those aspects. Detecting vulnerabilities of course is not an aspect of the '926
10 Patent claims, it is part of the '809 and the '326 Patent claims. Lateral
11 movement risk, we showed that the way that Orca's SideScanning performs
12 lateral movement risk is as part of determining the risk based on network
13 location and associating that with vulnerabilities. And then for the '926
14 Patent, the analyzing the workloads, runtime, block storage, out-of-band to
15 detect weak and leaked passwords and unsecured PII is an aspect of the '926
16 Patent claims.

17 And so what we are looking at here is, is there a tie between, for
18 example, the Forbes article and the Forbes praise and the claimed
19 combination of features that are in each of the '809, '326, and the '926
20 Patent? And that's what we did. We showed that each of the patents -- and I
21 think the Board needs to conduct a similar analysis to the one that is -- that
22 we took on, which is if I'm looking at the '809 Patent and I'm looking at the
23 '809 Patent claims, is there nexus between the evidence -- and or the
24 objective evidence and that patent, irrespective of the '926 Patent or the '326

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1 Patent. Then the same analysis needs to be conducted on the '926 Patent and
2 the same one on the '326 Patent.

3 If we were relying on the presumption of nexus, then you would
4 need to look at all of them. That's not what the case is here. It's direct
5 nexus. And we know from Lectrosonics, we know from Volvo that we need
6 to look at how the evidence ties to the particular claims. And we need to
7 look at it holistically, even if some of the features might not be claimed in
8 every patent.

9 With that, I'm going to transition and let Ms. Bruner address claim
10 construction and the legal requirements, and then I'll come back up.

11 JUDGE GALLIGAN: Before you go, I had one question on the --

12 MR. DAVIS: Yes.

13 JUDGE GALLIGAN: I might have lost it now. You, I believe,
14 said that you agreed that agentless is using APIs and privileges. And you
15 said the privileges are in the claim. Where are the privileges and the claims?

16 MR. DAVIS: Yeah. So for example, in the '809 Patent, the first
17 limitation where it refers to the protected virtual cloud assets.

18 JUDGE GALLIGAN: Okay.

19 MR. DAVIS: So in order to have access to the protected virtual
20 cloud assets, then you would need to have privileged access. And so that's
21 the correlation of sort of protected to privilege. And that's reflected in each
22 of the three claims.

23 JUDGE GALLIGAN: I only see privilege mentioned one time in
24 the entire -- I believe in all the patents and in the specification. It just says

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1 something about over privilege roles. I guess I would have expected some
2 discussion in the patent of how to use these privileges, if that is a key to this
3 whole case.

4 MR. DAVIS: So --

5 JUDGE GALLIGAN: Privileges, the word doesn't come up and
6 it's not in a claim. So it just seems like an odd thing to hang your hat on
7 when they're -- it's not anywhere.

8 MR. DAVIS: So the word privilege might not be, but that's the
9 word protected virtual cloud assets. Because the point is that you're
10 accessing a protected cloud environment. And I think the word protected is
11 referred to throughout the specification, but also in every single one of the
12 claims.

13 JUDGE GALLIGAN: But in that respect, I guess if I'm taking a
14 snapshot of something using AWS or whatever, I kind of by definition have
15 access to it. I mean, I have some kind of privilege to get that. So I don't see
16 how that's really a distinguishing feature over anything.

17 MR. DAVIS: It is when you're looking at it from the perspective
18 of the assets being protected. And that's why you would need to
19 -- particularly, I think, if you look at the application of this that Mr. Shua
20 described for Orca's SideScanning, it's about having to have permissions in
21 order to access the protected virtual cloud assets. And that's why sort of
22 where the a lot of the innovation was and where there's specific praise for
23 Orca's SideScanning approach is recognizing that they could actually use
24 these cloud computing APIs to get that privileged access to each of the

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1 assets they're scanned.

2 JUDGE GALLIGAN: And we can talk about this more when you
3 return to the podium. And that's one of the hesitations I have is I would
4 expect, you know, if this is how the patent -- how all of this operates, this is
5 how everything's done, I would expect that to be in the patent. And I don't
6 see it, but maybe it is. I mean, we can talk about that more. But I would
7 expect some explanation of how this is done. Otherwise, when you say
8 something like (INDISCERNIBLE - TECHNICAL DIFFICULTY) Patent
9 Owner is just Wiz copying Orca, maybe Wiz looked at a feature and said we
10 should do it, and Wiz had to figure out on its own. But anyway, we can talk
11 about it more. It's just something to think about and I'm grappling with
12 myself. So thank you.

13 MR. DAVIS: Yeah. And I will address that. I do think that that's
14 where -- particularly for copying, what the Board -- or what the Federal
15 Circuit and what the law says you look at is not whether there's really
16 expressed direct evidence of copying because frankly that would be
17 challenging to show. And so the law is not so exacting for that. What you
18 look at is you look at whether there is a -- whether there was access. And
19 that could be access to public documents. It doesn't have to be some
20 nefarious purpose where I go and I steal everybody's information that's
21 confidential. It's is there access, and then I look, well, look, are the products
22 the same. And it's not an infringement analysis. It's an analysis of are the
23 products -- was there copying of a product.

24 And I think that here -- and I'll get into a little bit more later

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1 -- everybody agreed that these products are virtually identical at their core.

2 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9 I'm going to turn this over to Ms. Bruner. And then I'll come back
10 up and I'll address the prior art and then get back into this objective indicia
11 after.

12 JUDGE BAER: Thank you, Mr. Davis.

13 MS. BRUNER: Hi, I'm Nicole Bruner. Thank you for letting me
14 speak today. As Blake -- or I'm sorry, as Mr. Davis said, I am here on behalf
15 of Patent Owner Orca to discuss claim construction and then the law on the
16 motivation to combine. There we go.

17 I'd like to begin by addressing questions from Your Honors from
18 Petitioner's presentation. Your Honors asked about was this claim
19 construction position in the District Court briefing in Exhibit 1117, which is
20 the party's claim construction briefing from the District Court at page 64,
21 which is cited in the Reply at page 1.

22 JUDGE BAER: Give us just a moment, if you would, unless --

23 MS. BRUNER: Sure.

24 JUDGE BAER: Do you have it on a slide with you?

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1 MS. BRUNER: I don't, I apologize.

2 JUDGE BAER: 1117?

3 MS. BRUNER: 1117.

4 JUDGE ZECHER: 64?

5 MS. BRUNER: Yes, page 64.

6 JUDGE BAER: Go ahead.

7 MS. BRUNER: And this again is cited in Petitioner's Reply at
8 page 1. And Exhibit 1117, at page 64 shows that Wiz went back to the
9 District Court and took a complete 180 to argue that analyzing a snapshot
10 should be construed only as analyzing a snapshot itself. And in contrast, as
11 we see on pages 67 and 68 of Exhibit 1117 and that's also cited in the same
12 page of the Reply, Orca maintained its position in District Court and in the
13 PTAB and maintained more specifically that analyzing a snapshot does not
14 encompass analyzing instantiated VM. So Orca expressly stated this in the
15 District Court briefing on pages 67 and 68, and the only party who changed
16 its position between District Court and the PTAB is Wiz. Now -

17 JUDGE BAER: Now, I guess I'm not so concerned with who's
18 changing their position, but just to make sure, Patent Owner's position here
19 and at the District Court is that analyzing an instantiated snapshot doesn't
20 -- excuse me, an instantiated VM does not count as analyzing the snapshot;
21 is that correct?

22 MS. BRUNER: Yes, Your Honor. And the District Court and in
23 the PTAB tab, as you stated, Orca has maintained analyzing a snapshot does
24 not encompass analyzing an instantiated VM.

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1 JUDGE BAER: So can you help us with -- and I apologize if I'm
2 the only one who's getting lost here.

3 JUDGE ZECHER: Give just a moment to pull up the reference.

4 JUDGE BAER: Can you help us there with -- it was on
5 Petitioner's Slide 9.

6 MS. BRUNER: Yes, Your Honor.

7 JUDGE BAER: Is there some sort of distinct distinction between
8 indirect analysis and indirect analysis doesn't count as analysis? Or what am
9 I missing here?

10 MS. BRUNER: Yes -- or I'll address that, Your Honor. Thank
11 you. That's exactly where I was going. So as we heard, Mr. Argenti placed
12 emphasis on the mention of indirect analysis. And what we've stated in both
13 District Court and in the PTAB is that analyzing the at least one snapshot
14 encompasses analyzing a snapshot or snapshot data. And this is where in the
15 District Court Orca used the phrasing indirect analysis to describe, for
16 example, analyzing a copy of a snapshot - and that's in the dependent claims
17 of the '809 Patent; Claim 23, more specifically, or parsing a snapshot. And
18 that's in Claim 9 of the '326 Patent.

19 So when Mr. Argenti references indirect on Slide 9 of his
20 presentation, that was pulled out of context. And we state very clearly, on
21 page 64 of Exhibit 1117, that indirect analysis means, quite simply,
22 analyzing the snapshot data as described in Orca's patent claims. And then
23 on pages 67 and 68, we state again clearly that analyzing the at least one
24 snapshot does not encompass analyzing instantiated VM.

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1 JUDGE BAER: So the difference is not whether it's an analysis of
2 the snapshot or not, it's whether it's analysis of a snapshot versus analysis of
3 snapshot data. Do I have that right?

4 MS. BRUNER: Yes, Your Honor.

5 JUDGE BAER: And what is it that's disclosed in the spec itself
6 when it discusses this embodiment? Is there -- is this language reflected in
7 the specification?

8 MS. BRUNER: So specification -- and I'm happy to provide those
9 expressed cites at a later time. But the specification, it doesn't expressly
10 distinguish snapshot data versus snapshot. But it does describe what I've
11 just described in the dependent claims, for example, parsing a snapshot or
12 analyzing a copy of a snapshot.

13 And I can also, if I may, direct you to Slide 15 of Orca's
14 presentation where the specification, there's an excerpt from Dr. Kaeli's
15 declaration. And it shows that the specification specifically distinguishes
16 analyzing a snapshot, which as we've discussed would include the snapshot
17 or snapshot data from other embodiments where the system instantiates a
18 copy of the VM.

19 JUDGE BAER: And I guess it's that another embodiment that I'm
20 having trouble with. Because it looks like when it says another embodiment,
21 it looks to me or at least when I read this the last time -- and I'm in column 5
22 of the '809 Patent, it looked like it was another embodiment of analyzing the
23 snapshot. So my question to you is, can you explain to me how column 5 is
24 discussing another embodiment that something different than analyzing the

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1 snapshot? And in particular, sort of allowed around lines 14 through line 20
2 or so, if you could help me understand that language and whether that's
3 referring to including something -- another embodiment that's something
4 other than analyzing the snapshot or another embodiment of analyzing the
5 snapshot.

6 MS. BRUNER: Yes, Your Honor. So Dr. Kaeli addresses this
7 more specifically because -- I mean, as an initial matter, Dr. Kaeli, for
8 example, in paragraph 46 of his '809 Patent declaration, first discusses how a
9 snapshot is -- and I apologize, this isn't expressly on the slide. But in
10 paragraph 46, he describes that the '809 Patent explains that a snapshot
11 represents a point-in-time capture. And so that's where Dr. Kaeli relies on
12 the intrinsic record and the specification to show that even throughout the
13 columns and the lines that, Your Honor, referenced, the discussion of
14 analyzing a snapshot or analyzing snapshot data -- so for example, analyzing
15 that point-in-time capture or the data from that point-in-time capture -- is as
16 claimed is separate from any embodiments where the system would
17 instantiate a copy of the VM and perform an execution of that instance. And
18 that makes sense because when you instantiate the VM and perform an
19 execution of that instance, you're no longer analyzing at that point-in-time
20 capture.

21 JUDGE BAER: I understand what you're saying as far as the sort
22 of plain language of what we're talking about. But in the specification itself,
23 it says various techniques can be utilized to analyze the snapshot. In an
24 embodiment, we have direct analysis. And yet another embodiment, the

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1 security system is configured to verify whether the vulnerability is relevant.
2 But we're talking about very -- these are embodiments of various techniques
3 to utilize the snapshot according to the patent itself. And I want to make
4 sure my read of the patent is correct. Isn't that what we're talking about?

5 MS. BRUNER: So Your Honor, you're correct that the
6 specification does discuss multiple embodiments. But as Dr. Kaeli explains
7 in his declaration, it doesn't -- the specification does not treat analyzing an
8 instantiated VM as a subembodiment or as an embodiment of analyzing a
9 snapshot. It treats those as separate. And that's what Dr. Kaeli explained in
10 his declaration to the '809 Patent, and that's what Orca explained in its Patent
11 Owner Response.

12 JUDGE GALLIGAN: Counsel, in Dr. Kaeli's declaration, it refers
13 to paragraph 46 there, and at the very end of it he cites column -- and this is
14 '809 Patent, he cites column 7, lines 42 to 52. And when we look at column
15 7, it describes Figure 2 and Step S240, which says the snapshot is analyzed.
16 And then it says -- where he refers us to, it says, in an embodiment, S240
17 may include various things, including instantiating a copy of the VM and
18 executing the instance. So to me, that's showing that instantiating a copy is
19 actually subsumed within Step S240, analyzing a snapshot. How would you
20 characterize that?

21 MS. BRUNER: I'm sorry, Your Honor, I missed the end of your
22 question. It trailed -- you said how would I characterize?

23 JUDGE GALLIGAN: Yeah. How would you respond to that?
24 Because I'm looking --

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1 MS. BRUNER: Sure.

2 JUDGE GALLIGAN: I'm reading this, it's just -- it looks like
3 S240, which is analyzing the snapshot, encompasses various things,
4 including instantiating a copy of the VM.

5 MS. BRUNER: Sure. So thank you, Your Honor. So I would
6 characterize and Dr. Kaeli would also characterize that column and line -- so
7 it's a different analysis technique in addition to the snapshot analysis. And
8 so even though I know it references Step 2, but it's not saying that -- again,
9 it's not stating that analyzing the snapshot encompasses or includes
10 instantiation. It's just stating that there is another analysis technique. It's
11 just not analyzing a snapshot.

12 And so what's key here is that the spec doesn't say anywhere that
13 the step of analyzing a snapshot includes analyzing instantiated VM, nor
14 could it because analyzing a snapshot encompasses that aspect of analyzing
15 a point-in-time capture. But at the -- and Dr. Kaeli also reinforces this point.
16 So again, to answer your question very directly, it's just a different analysis
17 technique that could also take place, but it's still distinct.

18 And if I may continue, the -- so notably, turning to Slide 13, Orca
19 asked Wiz's expert, Dr. Stavrou, during his deposition whether anywhere in
20 his declarations there is evidence or analysis to demonstrate that was his
21 constructions correct. And Dr. Stavrou explained, "I don't believe so. I do
22 not have an opinion because I didn't look into that subject. I was instructed
23 to perform that analysis under this assumption, and I did."

24 And then we see on Slide 12, that Wiz on reply, when I had the

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1 opportunity to rebut Orca's positions, it declined to do so and instead said the
2 petition doesn't depend on the assessment VM or instantiated VM approach.
3 And we see that again on Slide 16 where consistent with reply, Dr. Stavrou
4 similarly assumed that Dr. Kaeli's positions would be adopted. So Wiz's
5 arguments now, we heard from Mr. Argenti, are that there's inconsistencies.
6 We've addressed now that the indirect analysis is not an inconsistency, and
7 that is in accord with Orca's position.

8 We also heard Mr. Argenti say that Dr. Kaeli admitted that an
9 embodiment for analyzing instantiated VMs is a technique for analyzing a
10 snapshot. We discussed that that's not the case, and Dr. Kaeli addressed that
11 in paragraph 46 of this declaration. And the takeaway here is that there are
12 no poses of this proceeding that support Wiz's his construction. And the
13 intrinsic record and Dr. Kaeli demonstrate that Wiz was wrong. The Board
14 should therefore reject Wiz's construction.

15 JUDGE BAER: I hear your -- heard you say and heard your
16 explanation for why the passage that we've been discussing actually may
17 not, by your reading, mean that the instantiation embodiment is not one of
18 these various techniques. I understood that. I just heard you say that the
19 spec actually supports your construction, which I think is a little bit different
20 than doesn't support their construction. Can you show me where the spec
21 actually supports your construction?

22 MS. BRUNER: And Your Honor, thank you for the clarification.
23 So Orca is going off the plain reading of the limitation. So I misspoke when
24 I said our construction. The takeaway is that, as you noted, the specification

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1 in the places we discussed does not support Wiz's construction, nor does it
2 anywhere else.

3 JUDGE BAER: So you would say the specification is somewhat
4 agnostic as to whether the instantiated copy counts as analyzing the
5 snapshot, but the language of the claim is clear enough that it doesn't. Do I
6 have that right? And this is not a trick question, I'm just trying to make sure
7 I have your position correct.

8 MS. BRUNER: So the specification supports that analyzing the at
9 least one snapshot means analyzing the at least one snapshot or snapshot
10 data, not analyzing instantiated VM.

11 JUDGE BAER: So the specification -- I apologize, I don't mean to
12 go around in circles, but I want to make sure we have this clear. Your
13 position is that the specification actually affirmatively says or indicates that
14 the instantiated version does not count as analyzing the snapshot. So what
15 I'm looking for -- I want to make sure I'm not missing some affirmative
16 language to that end. I didn't understand there to be any affirmative
17 language to that end. But I want to make sure I'm not missing it.

18 MS. BRUNER: Sure. And I can point Your Honor to Slide 15.
19 So the affirmative language I believe you're looking for is where the spec
20 expressly says another embodiment. It points to the instantiated VMs as a
21 separate embodiment. And so that's where the spec makes clear that
22 instantiated VM analysis is a separate embodiment from analyzing the at
23 least one snapshot.

24 JUDGE BAER: And the other "in an embodiment" statements, the

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1 problem I have with that position -- it's certainly, you know, one way to read
2 this when we say in an embodiment, in another embodiment, and another
3 embodiment. The problem is if we say -- if that holds true that in those and
4 other embodiments applies to sort of all the way through, so is it your
5 position that the only version of analyzing a snapshot is that first "and an
6 embodiment statement" and that all the other and yet another embodiments
7 don't count as analyzing the snapshot?

8 MS. BRUNER: Your Honor, I'd want to read every recitation
9 clearly to make -- or closely to make sure that I'm following. But I can say
10 now that where it says in another embodiment for the instantiated VM and
11 every instance where the specification references an instantiated VM, it's
12 describing an analysis that is separate from the analysis of a snapshot that's
13 reflected in Dr. Kaeli's declaration as well.

14 JUDGE BAER: Okay. And I think I have your position there. I
15 just want to make sure I'm not missing anything. Is there anything else other
16 than the passages that we've so far discussed that is an affirmative indication
17 that analyzing an instantiated VM doesn't count as analyzing the snapshot? I
18 just want to make sure I'm not missing anything.

19 MS. BRUNER: So Your Honor, I would refer you to the Patent
20 Owner's response where we set forth all the evidence. And I apologize, I
21 believe I'm out of time.

22 JUDGE BAER: First of all, we gave you additional time. You're
23 welcome to take more time. You don't need to sit after -- you're welcome to,
24 but you don't need to sit after the additional time. And I understand your

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1 position that it's in the papers, and that's just fine.

2 MS. BRUNER: Thank you, Your Honor.

3 JUDGE BAER: Thank you.

4 MR. DAVIS: Thank you, Your Honor. Just to follow up I think
5 on a couple of points, I think that on claim construction, I think that as to the
6 actual, what is in the record, as a person -- we have to construe the claims as
7 a person of ordinary skill in the art. The only evidence that we have from
8 persons of skill in the art supports that analyzing an instantiated VM is not
9 encompassed by analyzing a VM instantiated by snapshot. And so I think
10 that that's where we are and that's the - just the plain record that we have in
11 front of us. I think that --

12 JUDGE ZECHER: You're talking about the expert testimony,
13 right?

14 MR. DAVIS: The expert testimony.

15 JUDGE ZECHER: Because the intrinsic evidence is really what's
16 going to drive home the construction of this term, don't you think?

17 JUDGE BAER: Well, it's the intrinsic evidence that is interpreted
18 as a person of ordinary skill in the art would interpret it. And the only other
19 thing that I would also point Your Honors to is where it actually does
20 discuss -- for example, when it describes what a snapshot is, which is the
21 '809 Patent at 460 through 61, a VM snapshot is a copy of the machine.

22 JUDGE BAER: Give us just a second, Mr. Davis. 460 through
23 61?

24 MR. DAVIS: Yes.

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1 JUDGE BAER: Okay. Go ahead.

2 MR. DAVIS: A VM's snapshot is a copy of the machine's virtual
3 disk or disk file at a given point in time. In the embodiment, the another
4 embodiment where the -- it talks about an instantiated VM, it uses the
5 language of -- I just want to make sure that I find it. It refers to activity and
6 executing the VM, which is changing the data. It's no longer a point-in-time
7 data. And that's what -- how Dr. Kaeli explained it as well.

8 JUDGE BAER: I'm sorry, I just wasn't following there. What's
9 part of the spec were you just referring to?

10 MR. DAVIS: Yeah.

11 JUDGE BAER: I was going to let you close the computer, but I
12 just wasn't following where you were. I followed the discussion where you
13 said at column 4, line 60 through 61, it says a VM snapshot is a copy of the
14 machine's virtual disk or disk file at a given point in time. I was with you
15 there. I just didn't follow your next point. If you wouldn't mind making it
16 again.

17 MR. DAVIS: Yeah. So at column 5, 55 through 59, for example,
18 it talks about the in yet another embodiment the security system may
19 instantiate a copy of the VM, 119, and or a subset of applications of the VM
20 and monitor all activity performed by the instance of the VM. And then it
21 refers to the execution of the instance of the VM. All of those are referring
22 to changing the data, which means it is no longer a snapshot.

23 JUDGE BAER: That's helpful. Thank you. I appreciate the
24 clarification.

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1 MR. DAVIS: And just so that I understand my time --

2 JUDGE BAER: Yes. You have nearly 50 minutes. That will put
3 you at 99 minutes. So you have 44 and 135 are roughly 70 some left for
4 your entire argument.

5 MR. DAVIS: Yes.

6 JUDGE BAER: You said you wanted to reserve 20, so 50 some
7 left for your --

8 JUDGE ZECHER: Yeah. Our clock line goes to 99.

9 MR. DAVIS: Yeah. That's why I was asking. I appreciate it.
10 Thank you.

11 JUDGE ZECHER: Yeah.

12 MR. DAVIS: I'd like to get into the prior art, and I'll start with the
13 -- oh, actually, let me address Judge Galligan, you asked about control plane.
14 And I just want to make sure that I address that. So the '809 Patent, if you
15 look at Mr. Shu's declaration, which is Exhibit 2074, he refers to the use of
16 the control plane. And for example, paragraph 34, as part of practicing
17 Limitation 1.1, likewise for the '926 Patent, it refers to the control plane and
18 part of Limitation 1.1 and 1.2, as well as referencing it in part for Limitation
19 1.7, that's paragraphs 33, 37, and 56. Again, that's all part of Exhibit 2074 in
20 -- for that claim. And then for the '326 Patent, for Limitation 1.1, again,
21 paragraph 33, as well as for Limitations 1.2 and 1.2(a) in paragraph 37.

22 Okay. So now I'd like to go to slide --

23 JUDGE GALLIGAN: I guess let me just follow up on that. So
24 this -- on this control plane issue, for instance, I can see where Dr. Shua

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1 provides -- or Mr. Shua -- Dr. Shua provides some testimony that there's a
2 control plane path and data plane path, and that's how we implement
3 something. But that's not required for the claim. I mean, the claims, I don't
4 see anything about a control plane path. I mean, maybe there's control. I
5 mean, there's -- where there's data that's analyzed.

6 But this is where I wonder if -- you know, thinking about
7 Petitioner's argument, it seems to be that, well, there's a lot of features in this
8 control plane path feature, it was -- Orca's way to do it was amazing. That's
9 really what garnered the praise, but that's not required in the claims. It's just
10 a feature. That's a cool feature. And so what are we to do with all this
11 evidence that isn't really necessarily tied to the features of the claimed
12 invention other than their SideScanning and there's some gathering of
13 snapshot? And that's where I'm grappling, like, with the control plane
14 copying, for instance, and all that.

15 MR. DAVIS: I see. So I think that --

16 JUDGE GALLIGAN: Alleged copying -- evidence of copying is
17 what I meant.

18 MR. DAVIS: Yeah. So I think that, with respect to the control
19 plane, I think that the evidence that Wiz points to as emphasizing what the
20 control plane could do is just focused on Orca SideScanning technical brief,
21 which does describe the control plane and sort of what the control plane can
22 do. But that's not what we are relying on for purposes of any of the
23 objective indicia, other than to show that Orca practices the claims. Again,
24 what you would look at is, what is it that was actually being copied or what

[REDACTED]

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1 led to praise?

2 And we would look to the actual awards and what the persons said,
3 industry professionals said. And what they emphasize is not -- at least I
4 can't recall off the top of my head. I can't say that it doesn't exist. But I
5 don't recall any evidence that we were relying on specifically for objective
6 indicia that emphasized it's Orca's control plane that really did it. Like, that
7 was the most novel feature of this where it isn't reflected in the claim.

8 They just -- it's a little bit of a distraction where it says like, well, if
9 you look at what the product does have, like, what other features could
10 possibly have led to the commercial success, you know, they point to a user
11 manual and they say, oh, well, look, there's other things that are recited in
12 here. But then when you actually look at what the industry remarked as
13 being the novelty, the innovation, what changed the game, all of it ties to the
14 elements that are actually claimed, which is --

15 JUDGE GALLIGAN: Okay. So let me follow up on that.
16 Because for instance, I'm looking at the 1190 case in Patent Owner
17 Response [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] So the control plane path is something that was stressed in
6 the secondary considerations. And I'm trying to figure out how it's tied to
7 the claims.

8 MR. DAVIS: Got it. Okay And this is sort of looking at [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

19 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

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[REDACTED]

2 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11 We have to -- again, we're looking at direct nexus. So do we have
12 substantial similarity with respect to the features that are claimed? And we
13 have shown that. I think that it's totally possible they also copied more stuff
14 from the control plane that isn't in the claims. But that doesn't diminish any
15 of the copying evidence that's relevant and that has a direct nexus to each of
16 the '809, the '926, and the '326 patent claims or the other three IPRs that we
17 addressed in the prior hearing.

18 Unless there's additional questions there, I'm going to quickly try
19 to address some of the prior art analysis, just to go back to that. So --

20 JUDGE BAER: Mr. Davis, I'm sorry, just one more clarification
21 because I want to make sure I didn't miss something.

22 MR. DAVIS: Yep.

23 JUDGE BAER: This is going back to the instantiated version of
24 whether that counts as analyzing the snapshot. Did I understand -- are there

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1 claims that specifically articulate analyzing an instantiated version of a
2 snapshot in the patents at issue? I thought Ms. Bruner referenced that, but I
3 was -- I might have missed it. Are there claims that specifically articulate
4 either dependent claims or other independent claims that specifically
5 articulate analyzing a snapshot -- that specifically articulate analyzing an
6 instantiated version of a VM from a snapshot?

7 MR. DAVIS: Not in the patents that are at issue in these
8 proceedings.

9 JUDGE BAER: Are there other patents elsewhere, do you know,
10 that address this? If you don't know, that's okay.

11 MR. DAVIS: So the issue here is that Wiz, they didn't advance
12 this as an actual claim construction. They abandoned it. They gave
13 completely contradictory claim construction in the District Court
14 proceedings. Like, it doesn't seem like they were trying to really advance
15 this position, so we didn't spend the time to refute it. They also --

16 JUDGE BAER: That's fine.

17 MR. DAVIS: And so --

18 JUDGE BAER: I'm not holding it against you. I just want to
19 know if you know affirmatively if those things exist. And if the answer is I
20 don't know, that's just fine.

21 MR. DAVIS: I believe that there might be in related patents in
22 dependent claims, but never as part of analyzing a snapshot.

23 JUDGE BAER: Okay. Thank you.

24 MR. DAVIS: Okay. So turning to a Slide 30. And I'm taking

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1 -- oops, I apologize. Turning to Slide 17, which is the start of addressing for
2 the '809 and the '926 Patent, the motivation to combine and reasonable
3 expectation of success of combining Veselov and Mohanty. Although some
4 of the arguments differ between the '809 and the '926 Patent, generally there
5 are similar arguments and similar reasons why Wiz's arguments fail.

6 Turning to Slide 18, one reason why their motivation to combine
7 fails is that a POSA would not be motivated to combine Veselov and
8 Mohanty sort of generally speaking because Mohanty emphasizes the need
9 for continuously monitoring changing workloads, and then specifically
10 disparages snapshot approaches that are obsolete in minutes. That would
11 have discouraged the combination of Mohanty's risk-based determinations
12 with Veselov's snapshot-based vulnerability assessments.

13 I think the Wiz's counsel mentioned, oh, well, the only time you
14 would have a drawback of a snapshot-based approach is if you were looking
15 at it on a month-by-month. Like, if I took one snapshot a month, what
16 Mohanty says, it's minutes. We're looking at minutes or hours. And I think
17 it's really critical, particularly when you're looking at the '809 Patent, with
18 the network location that they are trying to take from Mohanty and doing
19 risks that are correlated with a network location. Because if you look at
20 Mohanty at 17 through 22, the reason why it is disparaging the snapshots of
21 vulnerability assessment reports is specifically because workloads change
22 position within a virtualized environment.

23 And so if I'm relying on a snapshot of a VM or a snapshot analysis
24 and then I were to link that snapshot with a network location, then under

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1 Mohanty I might have the wrong network location associated with a
2 vulnerability because the location could change. In contrast, if I use an
3 agent-based approach, that is providing the continuous analysis and it's
4 constantly updating that network location so that you know exactly where
5 the vulnerability is within the system, which is where Mohanty emphasizes
6 the need for continuous snapshotting. And if I go to Slide 19, Wiz tried to
7 do a workaround. They said, well, Mohanty's disparagement is that it
8 doesn't apply because Veselov's snapshots could be taken continuously. I
9 can just do continuous snapshots.

10 The problem with that is, one, it wasn't the theory that they
11 advanced in the petition. The second is that it would actually render
12 Veselov inoperable for its intended purpose, which is described in Veselov
13 242 through 47, at the bottom of Slide 19, which is Veselov is directed to
14 overcoming drawbacks of systems that would make resources unavailable
15 that are part of the assessment. And if you look at Exhibit 1007, Veselov at
16 650 through 55, it tells you what happens when you're taking snapshots.
17 And when you're taking snapshots, according to Veselov, the snapshot data
18 maybe point in time consistent, but that may require that all rights the disk
19 are queued until a complete copy of the virtual machine may be generated.
20 And queuing the rights may cause the rights the disk to be deferred or
21 otherwise stalled until generation of snapshot is completed.

22 So if I have continuous snapshots and all of a sudden I have a
23 virtual disk of a virtual machine that can't be used, it's because I'm going to
24 take all of its resources doing this continuous snapshot.

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1 JUDGE BAER: So if we could, I think we had a similar
2 discussion last time. But you used discouraged the combo. You used the
3 word disparagement and interoperability. Are we talking about non
4 analogous art, are we talking about a teaching away, or are we talking about
5 a reasonable expectation of success or something else? So what I'm asking
6 you to do is to put those arguments you just articulated into a particular
7 doctrine of patent law that would be helpful to me, if you could do that.

8 MR. DAVIS: So I think that with respect to this sort of continuous
9 snapshotting, a POSA -- that Wiz has not shown that a POSA would be
10 motivated to combine a risk assessment from Mohanty that focuses on
11 continuous analysis to a snapshot-based approach. There's no motivation to
12 combine.

13 JUDGE BAER: But there is a motivation to combine, and I don't
14 think you've disputed that. I think you said, well, there's something that cuts
15 against this motivation to combine. So I want to know when you have
16 something, you have a reason to combine, and you don't dispute -- as I
17 understand it, you don't dispute that, well, that -- what they said may be true,
18 but this other fact means what -- this other fact outweighs that reason to
19 combine such that there would -- you actually wouldn't have a reason to
20 combine because the drawbacks cost more than the benefits. Or are you
21 saying, okay, fine, there's a reason to combine, but you're not going to have
22 these sets? Or are you going to say, no, these are actually because there's a
23 disparaging statement, it's so bad that it disparages against this combination,
24 so it completely undermines it or something else?

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1 So I think that the motivation to combine, the obviousness analysis
2 is -- obviously, it's viewed holistically. And so I think that this is sort of one
3 factor that the Board should be considering in whether there would be
4 motivation. Obviously, you would also take into account the objective
5 indicia. I think here, what -- I think that there's a number of sort of different
6 doctrines, one of which is the personal web, which is the combination that
7 they've proposed you wouldn't -- in order to, for example, like, do the
8 Mohanty techniques and apply them to Veselov, it couldn't be the way that
9 it's applied. And I think I might be confusing an argument that's subsequent
10 to this.

11 I think here there is a teaching away. I think that it does take away
12 from what Wiz's argument is with respect to why you would combine them.
13 Because I think that there's a -- there are also plenty of doctrines that say that
14 your motivations to combine can't be generic and that they need to sort of
15 address -- for example, where there's fundamental differences in techniques,
16 I do think that this is a place where Veselov and Mohanty together are
17 teaching away from what they are proposing to do. And I just don't --

18 JUDGE BAER: Just to be clear, the teaching away, could you
19 articulate that disparagement or teaching away again?

20 MR. DAVIS: Yeah. So the teaching away is that Mohanty is
21 saying, don't use snapshot-based approaches. I think what Wiz said is like,
22 oh, well, the snapshot that's being addressed in Mohanty isn't the same
23 snapshot. Because Mohanty is discussing a snapshot of a report, a
24 vulnerability report, as compared to a snapshot of a virtual disk. As I think

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1 we explained in the Patent's Owner's Sur-reply, that argument doesn't really
2 work because it's not -- if you're taking -- if the source of your analysis is a
3 snapshot, it's not possible to get anything other than a snapshot of a
4 vulnerability report. You're using stale data to create your report. It's not
5 clear how you could get a non-snapshot assessment report. And so there is a
6 disparagement against making a combination like this.

7 I think also for the '809 Patent, it is specifically teaching away
8 from doing the combination that they are proposing, which is to take
9 network location based risk assessments from a continuous agent-based
10 technique and then apply it to a snapshot-based technique from Veselov.
11 And I think that those just don't -- there isn't a motivation combined when
12 -- for a person of skill in the art, they would not have been motivated to put
13 these things together. And you wouldn't get the benefit that Wiz is -- has
14 tried to articulate about better prioritizing risk. Because frankly, you
15 wouldn't have a better prioritized risk based on what Mohanty is teaching
16 because your workload could change locations. And then all of a sudden,
17 I'm -- I have a risk that's prioritized for the wrong location because I'm using
18 what Mohanty said not to use, which is the snapshot-based approach.

19 And I think that we also have objective third-party evidence about
20 the idea of whether snapshots can provide and agentless approaches can
21 provide continuous assessments. And the answer is they can't. POSAs
22 understood that -- and this is Slide 20 from Exhibit 2106, agentless solutions
23 are not continuous real-time solutions. They rely on a point-in-time view or
24 snapshot of what's running at any given time. They cannot capture the

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1 dynamic evolution of workloads or provide runtime attack prevention and
2 policy enforcement.

3 JUDGE BAER: And you wouldn't dispute, would you, that there
4 is -- I understand you're saying there's disadvantages to that. There is an
5 advantage to that as well, correct?

6 MR. DAVIS: Sorry, an advantage to what?

7 JUDGE BAER: An agentless approach. In other words, an
8 advantage of taking a snapshot. It was all over your patent.

9 MR. DAVIS: Yes.

10 JUDGE BAER: So when you have an advantage to something and
11 it's also a drawback -- it seems to me that's what we have going on here.
12 You've got -- can you sort of take a picture of something and do the analysis,
13 and then you don't burden the system with it, but you run the risk of the
14 system sort of going on. When you have a benefit and a drawback, how
15 does that undermine obviousness?

16 Isn't that point that you have a that you have a benefit and a
17 drawback on -- and either way, you can do this. You can do it real time on a
18 machine that's running with an agent, or you can do it off the machine
19 without an agent. And there are benefits and drawbacks to both. Isn't that
20 the point that that's what was known in the art? Or is there actually teaching
21 away in one of the references that says, whatever you do, don't do this for
22 some other reason?

23 MR. DAVIS: So --

24 JUDGE BAER: It isn't the most efficient question. But if you

[REDACTED]

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1 need clarification, please try again.

2 MR. DAVIS: So I think that this goes to the holistic approach to
3 obviousness. Of course there could be advantages and disadvantages. I
4 don't think that when a motivation combine is not found is not found it's
5 because you can't think of any possible reason why this could be beneficial.
6 But that's also not the standard for showing that there is obviousness. It's not
7 enough to show that you just have -- like, there is a benefit and therefore it
8 would be obvious. You do have to look at this holistic view of the factors.

9 And I think here, what a POSA understood at the time is that
10 you're just not going to -- you just -- persons of ordinary skill in the art
11 would not apply and would not think that agent-based approaches and agent-
12 based risk assessments are going to be applicable to point-in-time snapshot-
13 based assessments. Because really, I mean, we see that all over the objective
14 indicia evidence, which is that people just didn't really think that this was
15 possible. They didn't think you could get enough information from the
16 snapshot. They thought that the information would be stale. Like, there's
17 skepticism.

18 And when we look at when Orca introduced this, including from
19 Wiz's own documents, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And then when we look at the actual -- like the Forbes article, it's
24 not just about, oh, well, I used APIs and detected and analyzed snapshots,

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1 but it's the whole -- it also talks about being able to prioritize risk.

2 And prioritizing risk is the thing that Veselov is missing. There's
3 no dispute from Wiz that Veselov does not have prioritizing risk. That's
4 why it has to add these different references to it. The problem is that
5 nothing in Veselov indicates that you're getting enough information from the
6 snapshot or that the snapshot data is sort of good enough to make that real-
7 time assessment, which is where -- if you go to Slide 21 and we just look at
8 what is Veselov all about, Veselov is not saying you can do a holistic risk
9 assessment with a complex monitoring and assessment system. It was
10 saying the point of this whole system is to avoid the complexity of
11 installation and monitoring of the assessment system and instead to just do a
12 individualized assessment.

13 A user can say, I want to pick this VM and I want to do this
14 assessment on it. And that's what Veselov does, it does mention snapshots,
15 but it is in the context of a simple assessment system that doesn't get into all
16 these complex additional things, which, again, sort of weighs against what
17 the combinations seem to be which is to add all of these additional features
18 from Mohanty that's shown, for example, in Figure 2. You know, they're
19 just adding to Veselov when Veselov says, I want it to be simple.

20 JUDGE BAER: And is your position that Mohanty teaches away
21 from Veselov or that Veselov teaches away from Mohanty or some
22 combination of those things?

23 MR. DAVIS: It's probably a combination of those things. I think
24 that really where Veselov is -- would be teaching away -- and I don't know

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1 that it needs to rise to the level of teaching, like the teaching away in order to
2 counsel against the combination. I think the law says that as well. It doesn't
3 -- you don't -- teaching away is sometimes a more expressed requirement.
4 But again, the holistic analysis looks at what are the drawbacks, what are the
5 benefits, what outweighs everything, taking into all consideration all four
6 Graham factors. And so here, I think what Veselov is really counseling
7 against is the particular combination that Wiz is proposing, which is to add
8 specifically to the monitoring system of Veselov, to add all these different
9 risk assessments, when Mohanty is saying this doesn't apply.

10 JUDGE BAER: Where does Veselov counsel against risk
11 assessments again, please?

12 MR. DAVIS: It's counseling against the complexity of installation
13 and monitoring of the assessment system, which is Veselov at 242 through
14 46, on Slide 21.

15 JUDGE ZECHER: So I guess I'm just curious, how would you
16 balance that against other disclosures in Veselov? And I think Mr. Argenti
17 pointed to this, but Veselov says it contemplates implementing any suitable
18 security assessment, and then it gives some examples. I mean, that's pretty
19 broad, right? It doesn't say that you can only do this security assessment,
20 you can only do this one. It says any suitable one. I mean, that's a very
21 open-ended term.

22 MR. DAVIS: So I think that the term in that statement that you're
23 referring to and quoting from Veselov, that I think Wiz brushes past
24 completely, is suitable. So without any security assessment, it's any suitable

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1 one. And Wiz -- or in Veselov itself, if you look at Slide 23, it doesn't say,
2 oh, every assessment is equally applicable to each different type of analysis.
3 Veselov itself has an agent-based approach in the Figures 3(a), 3(b). And I
4 think this really also goes -- so this is -- it goes to the reasonable expectation
5 of success on Slide 23. Veselov tells us that there are certain sources of data
6 that cannot be captured in snapshot data.

7 And it says that for the Figures 3(a) and (b) analysis, where it uses
8 scanning service 310 -- so that was 14, 2 through 12, and then 1541 through
9 47, where it's describing the Figures 3(a) and 3(b) with an assessment virtual
10 machine, it describes a different set of analyses that can be done where you
11 cause processing activity to occur within the assessment virtual team
12 -- virtual machine in order to apply tasks of the security assessment to real-
13 time, dynamic, or static data, network connections, communications, or to
14 computing resources and other computational activities of the assessment
15 virtual machine.

16 That is nowhere to be found in the discussion of Figures 5(a) and
17 5(b) where you analyze the snapshot as a data file, where it -- and that's on
18 the right side of Slide, 23, for example, 1832, through 38, the suitable
19 security assessment that Veselov describes for Figures 5(a), 5(b) is to do
20 reading the files of the mounted volume image to identify files, software
21 packages, application versions, the like. Wiz just collapses all of these
22 different embodiments together and says, well, look, they all have the same
23 data, so you can just perform any security analysis on any of the different
24 techniques.

[REDACTED]

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1 But I actually think that, fundamentally, a lot of Wiz's arguments
2 go directly against this. I think that Wiz mentioned [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] But if Wiz was right that agents and agentless detect all of
7 the same information, why would you ever have both? Wiz never answers
8 that because they just collapse all the things and say they all look at all the
9 same data, all of the different analyzes can figure out all the same things.
10 And fundamentally, the evidence is ubiquitous that that's not true, that Wiz
11 is painting with too broad of a brush.

12 We have that -- for example, on Slide 24, Exhibit 2104 at 3, where
13 its agentless access does not have the depth of visibility that agent-based
14 solutions do. Agent-based software can see vulnerabilities hidden from
15 remote solutions because it has privileged access to the OS. So the
16 vulnerabilities are different in an agent versus agent-based approach.

17 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 [REDACTED]

[REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

9 And Wiz is conflating the target of the assessment, which is a
10 virtual machine, in both cases with the actual data that is analyzed by the
11 particular technique. And those are not the same. And that is a fundamental
12 argument that Wiz has raised as an underlying premise in every single one of
13 its combinations with any different number of different techniques, whether
14 it be agent-based scanners in Mohanty, agent-based and network scanners in
15 Basavapatna. In Ranum, it uses active scanners and passive scanners, which
16 again are network scanners, all of which are completely different techniques
17 that are used for different purposes that are not just substitutes for one
18 another. There's a reason why there are so many companies that are in
19 cybersecurity.

20 JUDGE BAER: Do any of their combinations actually rely on the
21 scanning method of the secondary reference? Or are you saying, no, they
22 don't -- whether they rely on them or not, they're just incompatible? You
23 follow my question?

24 MR. DAVIS: Yes. And so let me address that, I'll -- I'm going to

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1 do it by addressing, in particular, the Basavapatna reference, which is for the
2 '326 Patent combination.

3 JUDGE ZECHER: If you could give us the slide number.

4 MR. DAVIS: Yeah. So if we go to Slide 57 -- oops. So Wiz
5 during its presentation today said, we're not relying on Basavapatna's sensor-
6 based techniques. That's what they're saying now. But if you actually look
7 at the petition and what the ground -- what is the argument they made in the
8 petition, what they said about applying Basavapatna is not, oh, well, we take
9 parts of it. It said you would apply Basavapatna's teachings involving
10 identification of vulnerabilities, determining risk levels, and prioritizing
11 reporting vulnerabilities and assets accordingly.

12 If we go to Slide 58, Wiz in the '326 petition says that applying
13 Basavapatna's techniques would not change their function or result. If we
14 could then go to Slide 59, they tell us what they are relying on. This is Slide
15 59, '326 Patent looking at each of the different elements. They offset each
16 element by telling us what are they relying on for -- what reference are they
17 relying on for each limitation. And in gray we have where it has Veselov
18 alone, in blue it's where Wiz says that it's relying on a combination. And
19 then you can see for Element 1.2(d) that they are relying on Basavapatna
20 alone.

21 And then -- and I know I'm going through this kind of quickly. If
22 you go to Slide 60, we have the expansion of that description of Element
23 1.2(d). They do not reference a combination at all. They only reference
24 Basavapatna. And they specifically talk about a vulnerability centric risk

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1 metric and determining a threat centric risk metric. And that's all they rely
2 on. They don't say it would be modified or changed in some way and then
3 applied to Veselov. They just say, do the analysis in the same way as
4 Basavapatna.

5 JUDGE BAER: That key step you just made, where do they say,
6 do it with Basavapatna's -- maybe that it's silent on it. Do they say
7 affirmatively that we're doing this with Basavapatna's scanning method?

8 MR. DAVIS: So that is where, if you look -- we can only go so far
9 as what Wiz's this petition says.

10 JUDGE BAER: And that's what I was talking about.

11 MR. DAVIS: And so --

12 JUDGE BAER: I'm asking you to -- but I don't see what I
13 understood you to be saying is here. And I want to make sure I'm not
14 missing it. Do they say that affirmatively or is it just silent or is it something
15 else?

16 MR. DAVIS: So I think that it is -- if we look at the Slide 58,
17 which is the Petitioner 22, they're saying, apply Basavapatna's techniques in
18 snapshot-based VM assessments, and they say it would not meaningfully
19 change their function or result. So --

20 JUDGE BAER: Right. That's talking about their techniques.
21 Now that, to me, is relatively unclear what technique we're talking about.
22 And I appreciate -- I think you did a nice job of laying this out in your slides.
23 When I look at how this is laid out in the slides, I see only on your Slide 59
24 what they're relying on Basavapatna teaches affirmatively, which is

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1 determining a risk associated.

2 MR. DAVIS: Right.

3 JUDGE BAER: They're determining the associated risk. I don't
4 understand that to be Basavapatna's scanning method. But if I'm missing
5 something --

6 MR. DAVIS: Right. Okay. And I apologize because this just is
7 -- there's a couple of steps to it. So Dr. Kaeli explains -- so going to 61
8 -- that to get those risk metrics that Basavapatna says, to get the threat
9 centric, risk metric, and the vulnerability centric risk metric, you have to use
10 -- like what Basavapatna teaches as a fundamental element of that is what's
11 called the countermeasure score that's on Slide 62. It's the vulnerability
12 centric risk metric. And you can see that the key component in the equation
13 is the letter C at the bottom.

14 Going to Slide 63, the same thing for the set threat centric risk
15 metric. The bottom, the way that it is actually determining that risk is the
16 letter C. And if we go to Slide 64, the countermeasure detection data that
17 creates that countermeasure detection score is from the countermeasure
18 sources, 214, which are a network-based sensor and a host-based sensor.
19 The host-based sensors are the things that monitor the asset themselves. The
20 network-based sensors are the ones that monitor the network traffic to and
21 from the assets. Dr. Stavrou admitted that those techniques, those host-
22 based and network-based sensor techniques, don't work for a snapshot-based
23 approach. That's on Slide 65 and Slide 66, with Dr. Stavrou's testimony,
24 Exhibit 2172 at 53, 14 through 20, as well as Exhibit 2172, at pages 256 to

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1 257.

2 Now I think what I heard Wiz say during its argument is that it's
3 not relying on the vulnerability centric risk metric and the threat centric risk
4 metric, but maybe that what it's actually relying on -- and if you look at Slide
5 60 in the middle, there's an un-highlighted sentence under vulnerability
6 centric risk metric where they say, this risk metric is based on a standard
7 vulnerability score and a composite vulnerability score. And it seemed like
8 what Wiz -- and Wiz can certainly correct me if I got it wrong. That they're
9 saying actually, no, that's what we're pointing to as being the risk for
10 Element 1.2(d). If that is their argument -- it doesn't seem like that was the
11 argument that they raised. But if it is, then it fails all of the rest of the
12 elements.

13 Because if you look in the petition at elements 1.3, the only thing
14 that Wiz relies on in that element is the threat centric risk metric or -- it
15 might be the vulnerability centric. But it's the risk metric, not just the
16 subscores of that metric. And the reason why is because if you just look at
17 the component scores, it doesn't satisfy the Element 1.3. Element 1.3 that
18 requires determining a risk associated with each of the determined potential
19 cyber vulnerabilities. And then 1 -- or sorry, that's 1.2(d). 1.3 is for each of
20 the requested plurality of protected virtual cloud assets with the determined
21 potential cyber vulnerabilities determining a risk level to the cloud
22 computing environment.

23 What Wiz has to rely on for the risk to the cloud computing
24 environment is that detection score that is directly dependent on the

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1 countermeasure score. But Wiz does not explain how you would get a
2 countermeasure detection score in the combination when you're analyzing a
3 snapshot. That's where -- what Wiz has presented. I know that Wiz has said
4 bodily incorporation is improper, you can't look at bodily incorporation.
5 Bodily incorporation is not required, but that doesn't mean that a Petitioner
6 cannot rely on bodily incorporation and put that forward as its theory. And
7 when a Petitioner relies on bodily incorporation, when that is the theory that
8 they advance, then it is absolutely appropriate to address that theory and
9 explain why it's wrong. And Wiz cannot then come back and revise its
10 theory at the end. They need to put forward their case at the beginning, and
11 they didn't do it here.

12 JUDGE GALLIGAN: Counsel, can we go back to the discussion
13 of the -- I guess, the purported conflict between Mohanty's techniques and
14 Veselov's? And I can understand in certain instances an agent-based
15 approach may be preferable and certain instances an agentless approach may
16 be less intrusive or whatever. I understand Petitioner's position to be
17 Veselov teaches an agentless snapshot approach or agentless isn't in the plan
18 to teach a snapshot approach. You can apply various techniques to analyze
19 some of which are suggested or -- you know, there's mention of CVEs.

20 In your argument, I appreciate that there are some pieces of
21 information that may not be able to be analyzed in a snapshot-based
22 approach because there isn't an active agent. But then Petitioner's relying on
23 Mohanty for things like sensitive data detection or figuring out there's a risk
24 with respect to sensitive data. And I wouldn't think that's incongruous with,

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1 you know, using a snapshot-based approach. It certainly isn't suggested in
2 the patent that there's any -- that you can't do it and the patent just says do it
3 -- the challenged patent. So what's wrong with Petitioner relying on certain
4 techniques or certain disclosures or teachings of Mohanty like sensitive data,
5 for instance, that certainly can be implemented in a snapshot-based
6 approach?

7 MR. DAVIS: So in Mohanty, the sensitive data detection -- so this
8 is for the '926 Patent -- the issue is that the sensitive data in the claim is that
9 you need to analyze the -- you're analyzing a snapshot. And I don't want to
10 emphasize that just because Mohanty doesn't have analyzing a snapshot that
11 that's the issue. But what you need to do is you need to perform a security
12 assessment that is actually detecting the sensitive data that's on the asset as
13 part of the security assessment. And Mohanty doesn't teach that. So that's
14 what Wiz has argued.

15 And so if you go to Slide 41, for example, what sensitive data is
16 referred to as is a static tag, which is just something that gets defined for the
17 assets when it's created. And I think they pointed to, like, it can answer
18 questions like is sensitive data on the asset. That's not something that's part
19 of a security assessment that is analyzed. That is something that is answered
20 by the person or administrator who is actually creating the asset to assign it a
21 static tag. And so there is, like, nothing in Mohanty that suggests or teaches,
22 I should actually perform an analysis to determine whether there are cyber
23 threats based on data on the virtual disk. It just accepts what a tag is that got
24 set by the environment.

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1 And so Wiz's argument that, oh, well, it mentions sensitive data
2 and it mentions that sensitive data could affect the problem of an external
3 threat, and so therefore there's some suggestion that that would also teach
4 you to apply detection of sensitive data separately, it's just -- it's drawing a
5 number of inferences that really only come from the actual '926 Patent itself
6 rather than what the reference is teaching. Because what Mohanty is
7 teaching for the perspective of what should I look for a security assessment,
8 is it's looking at the dynamic tags which are the changing information of
9 interest regarding security, the asset.

10 The things that it provides, for example, that you can see in Figure
11 2 is that there's a virus or that there's an intrusion. It's not looking at
12 analyzing a snapshot for sensitive data. And again, we have a lot of
13 objective indicia that are directed sort of contrary to what Wiz is saying as,
14 oh, well, everybody thought you should detect sensitive data and you could
15 just analyze a virtual machine, you could analyze a different thing.

16 When Wiz introduced its own sensitive data scanning in 2022 three
17 years after Orca's patent, they described sensitive data detection as being
18 new. They described it -- so for example, on page 45, and this one -- this is
19 discussing Wiz's release of its DSPM product that included detecting
20 sensitive data and other database security threats. And what they said is that
21 less than 1 percent of companies around the world use a DSPM solution.
22 And that was three years after Orca's patent.

23 Likewise on Slide 46, Exhibit 2154, at page 3, Wiz is talking about
24 the increased strength of adding DSPM, where it allows them to combine the

[REDACTED]

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1 analysis of sensitive information with the mapping they do of the entire
2 environment. Again, they're not saying, oh, well, everybody's been doing
3 sensitive data detection for years and years and years. They're saying, it's a
4 hard problem, and they just added it and it's a big advantage for them that
5 they've now added it. The idea that three years before this it was so obvious
6 to do, that anybody would do it because there's reference to sensitive data
7 somewhere in the document is just -- it is hindsight. And I think that when
8 you look at holistically the evidence that's in the record, it's very apparent
9 that it's hindsight.

10 JUDGE GALLIGAN: Counsel, let me ask about that because
11 -- with respect to the objective indicia in Wiz, [REDACTED]
[REDACTED]
[REDACTED]

14 And then the response from Patent Owner is, well, it's really hard to do and
15 it took them a long time to do it. And then I look at the patent, and the
16 patent just says do it. It actually doesn't. It just says, like, things like look
17 for whether sensitive data might not be encrypted. I mean, where's the
18 patent telling you how to solve this problem, other than it just says to do it?

19 So I look at that and I think, well, that's probably something that,
20 you know, the Federal Circuit might say what's known in the art may not be
21 -- preferably is omitted, need not be described. You seem to be saying, well,
22 the prior art teaches this, but it doesn't really tell you how to do it. But I
23 don't see where the patent tells you how to do it. So, like, point me in the
24 patent where it tells you the step-by-step way you would implement

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1 sensitive data detection. And I can't -- I don't know where it is.

2 JUDGE BAER: Mr. Davis, can I pause you for a moment?

3 MR. DAVIS: Yeah.

4 JUDGE BAER: Let me just clean up the clock if we could. Give
5 me just a moment. All right. I put 36 minutes on the clock, that's your total
6 time.

7 MR. DAVIS: Okay.

8 JUDGE BAER: But that way you know where we are. Please
9 proceed.

10 MR. DAVIS: Thank you, Your Honor. So I don't -- I think that
11 what the patent describes is that you can use a snapshot because you're
12 getting the disk level data to be able to do that analysis. And I do think that
13 the patents-- the '926 Patent describes using a snapshot in order to perform
14 that analysis. I think what was unique about Orca's patent invention
15 -- again, what it received praise for -- is realizing how much you could do
16 with a snapshot that is just not there with these various other approaches.
17 What I don't want to necessarily say is that there were no techniques that
18 were known anywhere, separate from Mohanty, that you could detect
19 sensitive data.

20 But again, Wiz needs to put forward its theory in the petition, and
21 it shows the Mohanty reference. And Mohanty doesn't detect sensitive data.
22 And so the idea that you are going to, as part of a security assessment, apply
23 Mohanty's nonsensitive data detection techniques that -- to the extent it even
24 had them -- it used agents to a snapshot-based approach based on what

[REDACTED]

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1 Veselov teaches, there's no linking there other than just saying, well, look, a
2 more comprehensive security assessment is better, which is the type of
3 generic motivation behind that isn't sufficient to show that you could do this.

4 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

13 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 JUDGE GALLIGAN: Yeah. But this is where I think it's

[REDACTED]

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1 fascinating kind of the cross between, you know, the teachings and the
2 references and the objective indicia. And it is important -- or as part of the
3 Graham factors, we need to consider them. Yeah, there was this initial
4 meeting, and we don't know what the substance of it other than there was a
5 discussion of SideScanning. And we'll take (INDISCERNIBLE) just if we
6 take that as true, I think -- I don't know if Shua got into too much detail in
7 his dec about what was discussed.

8 [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] Personally, I don't -- I'm not an expert in that. I imagine
12 you could do some searches for Social Security numbers or something. It
13 was probably a not trivial problem to solve. The patent, though, says just to
14 do it. And you said it was the recognition that you could do these in the
15 context of snapshots. That was sort of the embedded feature here.

16 Well, that -- for the sake of copying, [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] And the disclosure is pretty much commensurate

20 with the patent which is to say do it. And that's where I don't think this
21 discussion -- like, I don't think the copying helps too much here for Patent
22 Owner's case of they were just ideas -- it was just features that were going to
23 be implemented. There was really no -- there was no discussion how one
24 would do it. It was just -- a lot of it was just copying feature in the same

[REDACTED]

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1 way.

2 And whether or not there's copying access, whatever, it was just
3 when someone does something we're going to do it too. But that's just a
4 feature that's not -- I mean, Federal Circuit tells us that there's -- there can be
5 -- in the *Wrigley* case, there might be competitors that just copy a lot of
6 things, whether they're patented or not. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11 MR. DAVIS: Yeah. And I think that this goes to the evidence of
12 copying can be based on access and similarity. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] I'm not sure whether it doesn't exist, but
17 it's not in the record.

18 What is in the record, though, is that there was access to Orca's
19 SideScanning technology before then. And then frankly, [REDACTED]

[REDACTED]

[REDACTED], is actually
22 the substantial similarity point, which is all of a sudden no one -- they don't
23 have any other reference where they talk about specifically analyzing a
24 snapshot for sensitive data, where you're doing it sort of in this agentless

[REDACTED]

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1 approach. I know that they referenced Czarny. I'm sure that Wiz's counsel
2 get up and talk about Czarny. Czarny's not one of their combination
3 references, but more so it requires actually interacting with the machine
4 itself, which we talked about in the prior proceedings.

5 With respect to Wiz, though, what we have is sort of a direct tie of

6 [REDACTED]

[REDACTED]

8 JUDGE GALLIGAN: There a couple things I wanted to just
9 clarify. And I didn't mean to imply that the patent was repeated in that
10 document. I just went to level of disclosure. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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1 JUDGE GALLIGAN: Yeah. And let me follow up on that.
2 Because your point about whether Mr. Costica was produced or not, I mean,
3 if we -- if I look at Mr. Shua's testimony in this declaration, around the
4 paragraph 113, and following about what was discussed at that meeting, it
5 just says, you know, [REDACTED]

[REDACTED]

13 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22 MR. DAVIS: So I think that what we have is the sort of the start
23 of the story, that SideScanning was there. I don't think that there needs to
24 -- again, this is where you look at access and similarity, not just access or not

[REDACTED]

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1 just similarity but look at them both. And when we look at Wiz's product
2 and what -- and we look -- not, again, just at sensitive data detection, not just
3 analyzing the snapshot to protect sensitive data but looking at the claim
4 holistically and the claim combination, it's that that was copied by Wiz and
5 that there is access -- both access and substantial similarity.

6 I think that for the question of what else do we have other than the
7 meeting, I think the other part that is -- which we addressed in our Sur-reply
8 is there's a lot of public documents that Orca was also putting out in the
9 interim time period, between May 2019 [REDACTED]

[REDACTED] One example that we have,
11 for example --

12 JUDGE ZECHER: Mr. Davis, I believe you on that. But I guess
13 doesn't that cut both ways, right? So for example, if you're relying on public
14 documents to demonstrate that they had accessibility, that they could copy,
15 and you have this case law -- I think it's *Wrigley* that says, well, you have
16 competitors that can monitor one another to see what they're doing, and
17 they're looking at the stuff you're putting out in public. So how do we
18 balance that, right? How do we say on the one hand it was publicly out
19 there, they looked and incorporated in their product? Or two, were -- you
20 know, these are two competitors closely aligned. We're looking at what
21 they're doing, they're looking at what we're doing, and together we're trying
22 to provide enhancements for our product because we want to keep
23 revolutionizing to meet the market need. How do we do that?

24 MR. DAVIS: Yeah. So I think that in the *Wrigley* case, that was

[REDACTED]

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1 where there was an industry that factually everybody copied each other.
2 And that was not just like was an industry where -- I think it was about gum,
3 where every time people release features, everybody would kind of just
4 accept it and figure it all out. I think that this is a different scenario because
5 -- particularly Orca's product, while certain things were described about it, it
6 wasn't actually a specifically publicly available product.

7 And I think that -- look, Wiz says that there was also monitoring of
8 Wiz's product. One, temporally, none of that is relevant to this analysis. I
9 also think that it has -- if you look at the actual substance of what they are
10 arguing, I could certainly -- if we had more time or if that was elaborated on
11 other than in a footnote or a one sentence, oh, and they also looked at us too,
12 I think all they point to is their infringement intentions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

5 So we did in each of the different Patent Owner Responses Patent
6 Owner sur-replies. And when we looked further into that document, like,
7 what they are looking at is -- for example, on Slide [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

21 JUDGE GALLIGAN: Is there some -- like, is it Patent Owner's
22 position that Petitioner couldn't have [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

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1 MR. DAVIS: So I don't think that that is the standard that we're
2 trying to meet. I think that the question is looking at the circumstantial
3 evidence of [REDACTED]

[REDACTED] I guess it's the question I would ask in return.

5 JUDGE GALLIGAN: [REDACTED]
[REDACTED]
[REDACTED]

8 MR. DAVIS: Yes.

9 JUDGE GALLIGAN: Okay. I think they already had -- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20 MR. DAVIS: So I think that this is where we can't overly focus on
21 the timeline. I know that Wiz has tried to do that. That's why they
22 introduced those different documents.

23 JUDGE GALLIGAN: That's the access point, right?

24 MR. DAVIS: So the access started in May of 2019.

[REDACTED]

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1 JUDGE GALLIGAN: Right.

2 MR. DAVIS: And so what the rest of the evidence is showing is
3 -- and I think what we describe -- [REDACTED]

[REDACTED] I can tell you, if Wiz would have produced the
5 documents that they now rely on as [REDACTED] we
6 could have in our Patent Owner Response or in our Sur-reply -- or in our
7 Patent Owner Response, we would have been able to actually address that
8 timeline with additional evidence.

9 But based on the evidence that is in the record, what we have is a
10 -- like, Wiz would like you -- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15 With that, I'm going to reserve the rest of my time. I'll note that for
16 the secondary grounds for each of the '809, the '926, and the '326 Patent,
17 none of those sort of fix the problems of the Veselov grounds. And so all
18 those would fail for the same reasons as for the Ground 1.

19 JUDGE BAER: Thank You, Mr. Davis.

20 Mr. Argenti, you've got 21 minutes. Whenever you're ready.

21 MR. ARGENTI: Thank you, Your Honor. I'm going to jump
22 around a little bit. There are a lot of points that we just heard that I want to
23 respond to, some of them are pretty specific. I mean, I think at a high level,
24 the problem is that the evidence they've presented doesn't back up their

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1 allegations. We see that across the board with respect to their objective
2 indicia evidence, and then they also have problems with their arguments as
3 to the prior art references and the combinations being disconnected from the
4 references themselves.

5 To start, I want to address Slide 92, this is Orca's Slide 92 which
6 has this Forbes article. This is something I wanted to point out and clarify
7 for a while now. They've addressed-- they've argued in their briefing that
8 this is an award; it's an article. In what way is this an award? And I don't
9 want to quibble over semantics there. But they also say that this is based on
10 -- you know, whether it's an award, whether it's an article, it's praised for the
11 invention. If you look at the heading right here on the slide, top 20
12 cybersecurity startups to watch in 2021 based on Crunchbase.

13 You read the article, they did a search of a Crunchbase database,
14 looking for who was getting investments. This has nothing to do with the
15 patented technology. And then you look at the blurb below that that the
16 author included for this blog article, and it's repeating Orca's own marketing
17 statements. You can find that in their other documents they've submitted.
18 You can find it on their website today. This is not something that the Forbes
19 author wrote. This is just pulling what he could from Orca marketing
20 information after he learned that they were past a threshold on Crunchbase
21 for investments.

22 Also, I want to point out that the underlining and the designating of
23 relevance to particular patents, that's some new argument there. We've
24 heard a lot of new argument and evidence today. We didn't get a chance,

[REDACTED]

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1 just due to the timing, to really go through their 200, almost 300 slides and
2 identify all the problems. But as we've seen which ones they're addressing
3 today, I don't think you're going to find all that identification, all that
4 mapping to particular patents of these particular quotes in their briefing, at
5 least not all of it.

6 Another one that I would point out is their Slide 99 where they're
7 addressing [REDACTED]

[REDACTED] were not
9 cited in their briefs. This just kind of illustrates that their nexus showing this
10 is all going to their secondary considerations in attempts to show nexus. It's
11 been a moving target the entire time, and it remains so today.

12 As to the copying allegations -- generally, we just heard a lot about
13 copying -- I think Your Honors were raising good points. The things that
14 they say we copied from them were in our product before their evidence that
15 we copied it from them -- their alleged evidence. They don't have any
16 evidence. They've now pivoted and fallen back to publicly available
17 information. But I want to get to -- they're asking you to make inferences.
18 They're asking you to make circumstantial findings.

19 The most direct evidence here is Mr. Luttwak's testimony. Mr.
20 Luttwak is Wiz's CTO, as I said last time. He was the lead designer on
21 Wiz's workload scanner. He has the most knowledge about how Wiz
22 developed the product that is under attack by Orca. And if you look at the
23 deposition testimony, which is Exhibit 2190 -- actually sorry, is it Exhibit
24 2173 or 2196? I'm seeing different numbers here. It's Mr. Luttwak's

[REDACTED]

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1 deposition in cross-examination testimony.

2 JUDGE ZECHER: Which case?

3 MR. ARGENTI: It should have the same exhibit number in all
4 three cases.

5 JUDGE ZECHER: 2173?

6 MR. ARGENTI: 2173. I apologize.

7 JUDGE BAER: That's the 2196.

8 MR. ARGENTI: Okay.

9 JUDGE ZECHER: Yep, there you go.

10 MR. ARGENTI: There we go, 2196. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14 JUDGE BAER: If you can give us the page.

15 JUDGE ZECHER: Yeah. Give us the page.

16 MR. ARGENTI: Sure. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

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[Redacted]

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[REDACTED]

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[REDACTED]

2 As to their theory about inferences, about ability to access Orca's
3 product, I think we heard here today that the record shows they were able to
4 access Orca's SideScanning technology. And I think what they're referring
5 to is their publicly available YouTube videos. That's what they're pointing
6 at. [REDACTED]

[REDACTED] One, those are marketing documents. So, like,
8 there's they're trying to infer that -- or imply that that's access to the
9 SideScanning technology, to what's in the patents, to what's in their
10 products. It's YouTube videos. That's the closest thing they have. And they
11 don't have any evidence that they actually were accessed, let alone that they
12 had any impact in Wiz's is product development. [REDACTED]

[REDACTED]

14 They also cite for the proposition that you can make inferences
15 based on publicly accessible product information. They cite the Medtronic
16 case. Medtronic is distinguishable from our circumstances here. In
17 Medtronic, it was the product itself that was publicly accessible. I think it
18 was some sort of a medical device. And there was -- there the Court allowed
19 an inference that publicly-accessible product, given the similarities, must be
20 -- not must be, but they allowed an inference of copying under those
21 circumstances. Here, again, Orca's -- the best allegation that they have is
22 that it was publicly accessible marketing documents. So definitely different
23 than the actual product that was available in Medtronic.

24 When they get anything more specific than that, right, remember

[REDACTED]

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1 that the basis of their substantial similarity case is these [REDACTED]
[REDACTED] And when they get to more specific information than that, they're not
3 saying that was publicly available. And we've shown independently that we
4 use those and developed the use of those on our own. Moreover, those were
5 widely known, and they can't claim anything proprietary about them.

6 Also, Medtronic, I believe, is a presumption of nexus case. So you
7 still have to show nexus under the circumstances. If you're trying to show
8 similarity between products and infer copying that way, there still needs to
9 be nexus. That was a presumption case, this is not. And they've failed to
10 show nexus both -- I mean, across the board, they've failed to show nexus.
11 But it's a problem with their copying and their substantial similarity case as
12 well.

13 JUDGE GALLIGAN: Counsel, I wanted to follow up on the
14 -- just the nexus considerations and putting aside the embodiment aspect.
15 We talked a little bit with Patent Owner's counsel about the control plane
16 and -- what's your understanding of how that relates to the claims, this
17 evidence that [REDACTED]
[REDACTED]

[REDACTED] Where do you see -- how do you see
20 that as relating to some or all of the claims?

21 MR. ARGENTI: So I'm not aware of any evidence in the record
22 that -- where they even alleged that we had access to any documentation,
23 whether it's control plane path, data plane path, anything before the dates
24 that we've shown we independently developed our products. So that's a big

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1 problem for them. Beyond that, getting to -- I think we heard them say
2 today that the control plane path is implicated in the claims somehow.
3 Whether or not the control plane path is part of what is used to practice the
4 claims, there's no dispute that the control plane path goes far, far beyond
5 that. So they still have a nexus problem with unclaimed features.

6 In terms of the control plane path, as it might relate to Wiz and
7 copying, I don't even remember seeing that in your briefing, Your Honor. I
8 apologize. I don't think that's been a keystone of their -- so they did cite that
9 they raised the control plane path in certain elements of their patents. I
10 guess they pointed that out today, Elements 1.1 and 1.2. If that's what we're
11 talking about, I don't think they made any showing that Wiz does something
12 similar to that functionality based on the control plan path. But again, the
13 problem is that their case has been so nebulous and poorly made out that we
14 shouldn't be in the position of responding to arguments that really you can't
15 discern from their briefing.

16 JUDGE GALLIGAN: I think Patent Owner's argument that in
17 Mohanty, the sensitive data are not really detected. There are tags given to
18 -- you know, static tags given, and therefore you're not -- if we look at the
19 1190 patent (sic), you're not determining cyber threats based on data that
20 include unsecured or unencrypted sensitive data, one of the two. What's
21 your response to that?

22 MR. ARGENTI: I addressed that earlier today, Your Honor. It's a
23 mischaracterization both of the reference as well as our contentions. We did
24 not rely on the sensitive data tags. And Mohanty is accessing sensitive data

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1 beyond the tags.

2 JUDGE ZECHER: Counsel, can we go back and visit this
3 analyzing the snapshot claim construction? Do you think that we need to go
4 beyond the intrinsic record to get to the proper construction of this term, or
5 can we just settle it based on what the specification discloses? I mean, that's
6 kind of same question. But my point is, do we have to go to the expert
7 testimony?

8 MR. ARGENTI: No, Your Honor. Well, I think the expert
9 testimony is instructive as to their inconsistent positions on that. But I also
10 think that --

11 JUDGE ZECHER: Even if we got there, though, I mean I don't
12 think it really helps anybody. The Federal Circuit is going to ask us what is
13 a legally operable meaning of this term, and they're going to look to see if
14 we analyzed the specification and its disclosure. I think whether or not
15 you're arguing this or that in the District Court, we don't have a Markman
16 order right? Correct?

17 MR. ARGENTI: Correct.

18 JUDGE ZECHER: So we don't have the benefit of the District
19 Court's analysis to really understand what they're going to rely on to get to
20 the construction. We're kind of the first to construe it; is that fair?

21 MR. ARGENTI: That is -- as far as I know, Your Honor, yes.

22 JUDGE ZECHER: Okay. Well, I'm just giving my experience
23 with the Federal Circuit. I'd rather stick with what I know.

24 MR. ARGENTI: I think so. Claims in the specification are the

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1 best guide for how to construe claims in any patent.

2 JUDGE ZECHER: All right. Thank you.

3 JUDGE BAER: And just to repeat the question that I asked, Patent
4 Owner, are you aware of any claims in related patents or here that
5 specifically address the instantiated VM embodiment?

6 MR. DAVIS: I'm not, Your Honor.

7 MR. ARGENTI: There were questions or statements earlier about
8 the two aspects that they're now arguing are fundamental. One, of their
9 nexus theories. Again, I think they're all over the place, and they remain so
10 in terms of what exactly they are alleging is the basis of the nexus. On one
11 slide, they're going to say that it's the claim as a whole. And on another side,
12 they're going to say that it's these two fundamental aspects of agentless
13 scanning.

14 As to those two fundamental aspects, I think we heard them argue
15 that that they have the prioritized access aspect of -- one of the fundamental
16 aspects is prioritized access to a cloud environment via APIs. And I think
17 they said they have that in their documentation and Veselov doesn't.
18 Veselov does have it, column 4, lines 45 to 48, where it talks about requiring
19 a user to provide credentials in order to access the environment via API. So
20 again, if those two elements are what they're saying are the basis of nexus,
21 it's all there in Veselov.

22 So now, turning to the prior art, turning away from some of the
23 nexus issues, if we look at Orca's -- I believe it's Orca Slide 19 here. This is
24 where they argue that the combination with Mohanty renders Veselov

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1 inoperable for its intended purpose. That is certainly not the case. I
2 mentioned it a little bit earlier. I'll go back and revisit it right now. Veselov
3 certainly gives solutions and has an approach that is consistent with applying
4 Mohanty's application of network location or correlation with network
5 location. As I mentioned earlier, Veselov's on-demand snapshots are
6 reasonably current. For example, you see the on-demand assessment aspect
7 at Veselov, column 6, lines 30 to 31. Column 9, lines, 18 to 22, is one of the
8 spots where it talks about reasonably fresh assessments. I'm not sure if that's
9 the terminology he uses, but that's what it's talking about.

10 The other thing that I didn't mention earlier is that Veselov -- to the
11 extent there's any concern about continuously taking snapshots and that
12 taking snapshots is somehow a burden on Veselov, Veselov gives a solution
13 for that. It talks about taking snapshots that only capture what has changed.
14 So if the thing that's changed is the network location or if it's anything else,
15 you can capture just the snapshot of the aspect that's changed. That's the
16 delta.

17 It talks about that, for example, at column 6, line 55 to column 7,
18 line 1. And Dr. Stavrou explained that's the standard way of generating
19 snapshots. That's what snapshots typically are. It doesn't need to be the
20 entire disk. It can be just a little sliver of whatever has changed. So you
21 combine that with Veselov's disclosure of both on demand and periodic
22 snapshotting, and there's really -- there's no disconnect between what
23 Veselov is doing and what Mohanty is doing.

24 And to the extent there is any problem with having snapshots that

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1 are slightly less current than monitoring with an agent that is, again, just
2 weighing the benefits that are lost and gained, the only expert who's done
3 that here is Dr. Stavrou. Dr. Kaeli did not address that. I think on one of
4 -- let's see, I didn't make a note of our slide. But one of our slides, I believe
5 it might be Slide 18, addresses that point. It shows Dr. Stavrou's testimony
6 where he's saying Dr. Kaeli didn't consider the net benefit here. All their
7 analysis got to, oh, well, you can't do continuous snapshotting. So that's the
8 end of the question.

9 In their Slide 24, they cited Exhibit 2104 trying to make a
10 distinction between the types of data that agents can capture versus
11 agentless. I think if we look in that same exhibit at the previous page, there's
12 a statement regarding the data collected is similar to an agent-based
13 approach. And that's what it's referring to, agentless. So again, these
14 distinctions that they're trying to make, they're not nearly so significant as
15 they argue.

16 JUDGE BAER: Mr. Argenti, you have a little over a minute. We
17 will need you to wrap it up and you're out of time.

18 MR. ARGENTI: Thank you, Your Honor. Understood. While I
19 go through my notes, if anybody had any specific questions they wanted to
20 ask me about, we could do that. Other than that, I think as to Basavapatna
21 and the combination with Basavapatna and Veselov, I think Your Honors
22 were getting the issue there. They're trying to say that we were
23 incorporating the specific formulas from Basavapatna, except there was
24 nothing in their slides that said that.

[REDACTED]

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1 To the extent that they're making arguments about the specific
2 vulnerability detection data and the countermeasure detection data, the
3 vulnerability detection data, that's just the CVSS scores that they're getting
4 from a database. Well, actually, that's the severity data, I think. The
5 vulnerability detection data is just detecting the presence of a vulnerability,
6 which Veselov does.

7 As to the countermeasure detection data, we didn't propose
8 bringing in the formulas. You're not going to find that in our petition. To
9 the extent there is any problem with saying, well, those countermeasures can
10 only be detected by sensors, then they're not part of the combination. So
11 what's the problem? It doesn't, I don't think, render the formula as obsolete
12 in Basavapatna, which we again weren't even trying to incorporate into our
13 petition. They just drop out of the calculation.

14 JUDGE BAER: Thank you, Mr. Argenti.

15 MR. ARGENTI: Thank you.

16 JUDGE BAER: Mr. Davis, you have 13 minutes. Whenever
17 you're ready, you can begin.

18 MR. DAVIS: Thank you, Your Honor. I want to first address, I
19 think, that Wiz alleged that they didn't have a chance to review our slides
20 and that we were including arguments in our slides that are not present. I
21 think the one example that he -- we dispute that. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED] Not only do we cite the page, we quote exactly
2 what's highlighted. And so the idea that we were trying to sort of sneak
3 things in is just wrong.

4 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

13 JUDGE BAER: Do you have a slide number with that material,
14 Mr. Davis?

15 MR. DAVIS: You know, I --

16 JUDGE ZECHER: This is just a deposition transcript.

17 MR. DAVIS: Yeah. It says deposition transcript, Exhibit 2196, at
18 column 253 through 262. And frankly, I didn't think that the argument was
19 going to be made that [REDACTED]
[REDACTED]
[REDACTED]

22 JUDGE GALLIGAN: I didn't -- yeah, I mean I thought the
23 argument was [REDACTED]
[REDACTED]

[REDACTED]

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1 MR. DAVIS: Right. Oh.

2 JUDGE ZECHER: Uh-oh.

3 JUDGE BAER: I'm going to pause your time, Mr. Davis.

4 JUDGE GALLIGAN: I wouldn't, you know --

5 JUDGE BAER: Judge Galligan, we lost you there for a minute, if
6 you want to start up again.

7 JUDGE GALLIGAN: You know, I didn't understand him to be
8 saying that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

12 MR. DAVIS: Yeah. And I think it would have been pretty
13 surprising if [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] For example, in the District Court case, again, we were
18 limited in these proceedings by what documents were actually produced.

19 Again, the only time that this timeline came into play were based
20 on a collection of 13 documents that had never been provided to Orca. It's
21 not like they produced these in the District Court case, we knew they were
22 coming, and so we should pre-address that, [REDACTED]
[REDACTED]

[REDACTED]. If we would
24 have had that, then obviously we could have presented the evidence a

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1 different way. But that's just not how it played out here.

2 JUDGE ZECHER: We did grant a discovery request here, though,
3 didn't we?

4 MR. DAVIS: Yes, as to the specific documents that have been
5 cited in the interrogatory, which had been disputed by Wiz. And obviously,
6 Wiz could have produced the documents that it now relies on at that same
7 time. Instead, they waited until the Reply.

8 JUDGE ZECHER: Right. I just want to make the record clear
9 there was a discovery request; we granted it.

10 MR. DAVIS: Yes.

11 JUDGE ZECHER: Okay.

12 MR. DAVIS: Absolutely

13 JUDGE ZECHER: That wasn't part of it.

14 MR. DAVIS: Yes.

15 JUDGE ZECHER: Okay.

16 JUDGE BAER: You're making the point that they -- I think you're
17 implying that they should have produced those documents earlier. And I
18 didn't understand you to request those documents. Was there a document
19 request that they didn't respond to in a timely manner?

20 MR. DAVIS: No, except only if it would have been as part of
21 routine discovery, they would have had to produce documents.

22 JUDGE BAER: I mean, I appreciate the difficulty. I appreciate
23 the speed of our schedule. But I just want to make sure that I'm not missing
24 something. So was there -- did you all request a document that they didn't

[REDACTED]

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1 produce in a timely manner?

2 MR. DAVIS: No. Because those -- these documents that Wiz
3 ended up relying on in the IPRs that -- [REDACTED] had never been
4 produced in the District Court case either. And so they weren't cited in an
5 interrogatory response. They just -- we didn't know that they existed. I
6 mean, frankly, for purposes of this proceeding, we did everything we could
7 not to address anything that was covered by the protective order. And that's
8 why in what we provided, we stayed with redacted versions. And we just
9 said, look, there's an interrogatory that addresses copying that's relevant
10 here.

11 JUDGE BAER: Which is fair enough, and I appreciate that
12 strategy. But I don't think it's fair to then fault them for not producing it on
13 their own. And I want to make sure I'm right on that, that there was no
14 request for it.

15 MR. DAVIS: That's right, there was no request for it.

16 JUDGE BAER: Fair enough.

17 MR. DAVIS: Yeah. Wiz mentioned the Medtronic case. I think
18 the Medtronic case does (INDISCERNIBLE) the proposition that even if
19 you have undisputed evidence that there was publicly accessible materials
20 on the market that are tied to the patent claims, that that can be sufficient
21 evidence to provide copying. And I don't think that that's something that can
22 be disputed here. Because there is undisputed evidence of publicly available
23 materials that even predate [REDACTED].

24 JUDGE BAER: Just to clarify one point on that, I think the public

[REDACTED]

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1 accessibility can be enough to presume access, you would still need
2 similarity. Do I have that right?

3 MR. DAVIS: That's absolutely right, you would still need to have
4 substantial similarity. And that, I think that we have effectively undisputed
5 evidence for. For example, if you look at Slide 160, we referenced Dr.
6 Kaeli's very extensive analysis, which is also reflected in Orca's Patent
7 Owner Responses as to the substantial similarity between Orca's
8 SideScanning product and Wiz's implementation of its workload scanning.

9 JUDGE BAER: There's been a little point that I'd like to clarify on
10 this access plus similarity. I understand the law to require the similarity to
11 be -- the similarity between the access and the accused infringer's product,
12 not between two products. In other words --

13 JUDGE ZECHER: Hold on. Judge Baer, can you pause it? We
14 lost connection. Give us a second, sorry about that.

15 JUDGE BAER: Do we have Judge Galligan?

16 JUDGE ZECHER: No, we don't.

17 JUDGE BAER: We're off -- we can go off the record.

18 (Whereupon, the above-entitled matter went off the record and
19 resumed.)

20 JUDGE BAER: Judge Galligan, do we have you back?

21 JUDGE GALLIGAN: Yep. I can hear you. Thanks. I think I
22 dropped off about 30 seconds or a minute before when we were talking
23 about -- I think the last thing that I heard was Mr. Davis saying that there
24 was -- the documents -- [REDACTED] -- the

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1 public work documents, I think what I was hearing was preceded [REDACTED]
[REDACTED] is that right? Did I hear that?

3 JUDGE BAER: Right. And then we were starting a conversation
4 about the overlap between access and similarities. So before I start up the
5 clock, the question at hand is whether the similarity needs be to be between
6 products or whether the similarity needs to be between the accused
7 infringer's product and the access. If you could address that, Mr. Davis.

8 MR. DAVIS: So I think that there needs to be -- I think that if you
9 access a product, then you would -- or access documentation regarding a
10 product, then you would also have -- and then you would show substantial
11 similarity. I guess I'm having trouble understanding --

12 JUDGE BAER: Fair enough. Well, an access to a product and
13 then there's similarity to a product, fair enough, there's an exact overlap
14 there.

15 MR. DAVIS: Yes.

16 JUDGE BAER: I don't understand there to have been access to a
17 product. I understood the earliest access to have been access to a
18 conversation about a product and then similarities. So what I'd like to know
19 is, does the similarity have to be between what was actually accessed or is
20 just general similarity enough?

21 MR. DAVIS: And I think actually that's what the Medtronic case
22 addresses. Because there, there was undisputed that there was publicly
23 available information about the product in the market but actually no
24 evidence that the Petitioner or the Patent challenger had actually gotten that

[REDACTED]

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1 product. Then they looked at the substantial similarity, and they said that
2 that was circumstantial evidence that was more than enough to draw the
3 conclusion of copying based on -- because there was I think a dispute,
4 frankly, as to the timing of when access occurred.

5 And what the Federal Circuit found -- what the Board found and
6 then what the Federal Circuit found was that because -- even if there isn't
7 direct access -- direct evidence of access to the product, the undisputed
8 evidence was that at least that documentation existed publicly that they
9 could have accessed. And then they looked at the substantial similarity.
10 And I think that's the same thing that you could certainly apply here. And I
11 think once we get to that substantial similarity and what was similar, the
12 evidence here is overwhelming.

13 We have, for example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

We

4 believe that that is a more reliable determination and shows that the
5 objective indicia is tied to each of these patents, that each of the '809 Patent,
6 the '926 Patent, the '326 Patent claims are nonobvious, and that a proper
7 consideration of Graham factors should result in the Board rejecting each of
8 Wiz's petitions and finding the claims nonpatentable.

9 JUDGE BAER: Thank you, Mr. Davis.

10 All right. That will conclude our hearing. We certainly thank the
11 parties for the time. We appreciate it very much. We are going to go. If
12 you all would stay around. If our court reporter has any questions about
13 spellings or that sort of issue, you can address those.

14 With that, we are adjourned. Thank you.

15 (Whereupon, the above-entitled matter went off the record at
16 approximately 2:31 p.m.)

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PETITIONER:

Matthew Argenti
Michael Rosato
Wesley Derryberry
Joseph Baillargeon
Tasha Thomas
WILSON SONSINI GOODRICH & ROSATI
margenti@wsgr.com
mrosato@wsgr.com
wderryberry@wsgr.com
jbailargeon@wsgr.com
tthomas@wsgr.com

PATENT OWNER:

Raghav Bajaj
Kristina McKenna
Douglas Lumish
Blake Davis
Nicole Bruner
LATHAM & WATKINS LLP
raghav.bajaj@lw.com
krissy.mckenna@lw.com
doug.lumish@lw.com
blake.davis@lw.com
nicole.brunner@lw.com