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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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WIZ, INC.,
Petitioner,

v.

ORCA SECURITY LTD.,
Patent Owner.

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Case IPR2024-01191
Patent No. 11,775,326

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**PETITIONER'S OPPOSITION TO MOTION FOR ADDITIONAL DISCOVERY**

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## I. INTRODUCTION

Petitioner Wiz, Inc. ("Wiz") respectfully requests the Board deny Patent Owner Orca Security Ltd.'s ("Orca" or "PO") motion for additional discovery ("Mot.") requesting Wiz produce certain materials from a parallel district court litigation (*Orca Security Ltd. V. Wiz, Inc.*, No. 1-23-cv-00758 (D. Del.)) (the "Delaware Litigation") where Orca alleges that Wiz infringes the same patent that Wiz challenges here. The Board should deny PO's motion because of at least *Garmin* Factors 1, 3, and 5. *Garmin Int'l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Paper 26 ("*Garmin*") (precedential). As described in detail below, PO's motion fails to even attempt the threshold showing of nexus required by *Garmin* Factor 1. Moreover, PO provides only vague, overbroad allegations and mischaracterizations to support its contention that the Requested Documents are "useful." Regarding *Garmin* Factor 3, PO fails to inform the Board that it has an alternative means to obtain the discovery—seeking relief in district court—despite expressly preserving that option when negotiating the litigation stay. Finally, as to *Garmin* Factor 5, Wiz is and will be prejudiced by the burden of both responding to PO's overbroad request and preserving the confidentiality of the non-public information in future filings in this IPR. Accordingly, PO's motion should be denied.

## II. THE *GARMIN* ANALYSIS WEIGHS IN FAVOR OF DENYING DISCOVERY

### a. *Garmin* Factor 1 – PO Provides Only Speculation Regarding The Usefulness The Requested Documents

*Garmin* Factor 1 weighs heavily against granting discovery. PO has failed to show the "usefulness" of the Request Documents for at least two reasons. First, PO—by its own admission—neglects to provide even a nominal showing of nexus between PO's technology and the claims-at-issue. Second, PO supports its contentions of usefulness with nothing more than "mere allegation[s]" based on mischaracterizations and misapprehensions. *Id.*, 8.

Under *Garmin* Factor 1, PO must show "beyond speculation that something useful will be uncovered" with its discovery requests. *Id.*, 7. "Useful" "does not mean merely 'relevant' and/or 'admissible,'" but "favorable in substantive value to a contention of the party moving for discovery." *Id*. Where, as here, a party seeks alleged secondary considerations evidence, it "must provide a threshold showing of nexus between the claimed invention and the evidence sought." *Ashworth Bros., Inc. v. Laitram, L.L.C.*, IPR2020-00593, Paper 15, 7 (citing *Garmin*, 8); *Microsoft Corp. v. Proxyconn, Inc.*, IPR2012-00026, Paper 32, 5 (interest of justice standard requires some showing of nexus). For example, in *Palo Alto Networks v. Juniper Networks*, the Board held that "[a]lthough a conclusive showing of nexus is not required at this juncture, at least some showing of relevance is necessary to

ascertain what constitutes the [allegedly patented] feature, and how the claims for which trial was instituted embody the [allegedly patented] feature." IPR2013-00369, Paper 36, 4 (denying discovery motion); *Ashworth Bros.*, Paper 15, 7 ("Patent Owner has not provided even a threshold showing that its [allegedly patented] system includes the features recited in the claims.").

PO's motion fails to even mention nexus, let alone make the requisite showing. PO alleges that Wiz copied its "SideScanning" technology but fails to explain—even at a high level—what constitutes SideScanning technology. Moreover, PO concedes it does not explain how SideScanning technology embodies the challenged claims as required, opting to wait and do so until a later filing. Mot., 6 (discussing "Orca's SideScanning™ technology, ***which Orca will show in its Patent Owner Response … embodies the challenged claims***.") (emphasis added). Thus, to the extent PO touches on the issue at all, it serves as an admission that its motion is deficient. Accordingly, in line with previous decisions, the Board should deny the discovery request. *Palo Alto Networks*, Paper 36, 4; *Ashworth Bros.*, Paper 15, 7.

Additionally, PO's failure to establish a threshold showing of nexus is in direct contrast to the facts of *MOM Enters., LLC v. Veith*, relied on heavily throughout the motion. *E.g.*, Mot., 5, 8, 9 (citing IPR2023-00726, Paper 45). In *MOM Enters.*, the Board predicated its analysis on the patent owner's prior

showing of nexus between the claims and the allegedly copied product. *MOM Enters*., Paper 45, 1 n.2 (preliminary record, including evidence demonstrating product's "composition, dose, and instructions for use," established that product "embodies the claimed invention"). PO effectively admits it did not make the requisite showing, as explained above, so *MOM Enters*. only serves to reinforce the motion's deficiencies.

Second, beyond the motion's silence regarding nexus, PO fails to establish that its request is reasonably tailored to obtain useful information. A "mere allegation" of usefulness is insufficient. *Garmin*, 8; *see also, Polygroup Ltd. v. Willis Electric Co., Ltd.*, IPR2016-00800, Paper 28 ("*Polygroup I*"), 13 (*Garmin* Factor 1 dispositive where movant only "alleg[ed] that certain documents are 'highly probative'"). This remains the case even when a protective order prevents a moving party from discussing documents it seeks. *Duncan Parking Techns., Inc. v. IPS Group Inc.*, IPR2016-00067, Paper 18, 3 (holding "circumstance does not weigh in [Patent Owner's] favor" when protective order prevents "substantive discussion of the content").

Here, PO admits it does not explain the usefulness of the Requested Documents by reference to their contents and instead asks "the Board to rely on Orca's representations from the Wiz Litigation"—self-serving characterizations of ***other***, publicly available documents and PO's own heavily redacted Interrogatory

No. 11 ("Rog 11") response. Mot., 5-6, 8; EX2056. Such characterizations do not establish usefulness of the documents at issue in PO's motion and should be given no weight. *See Duncan Parking*, Paper 18, 3.

Regardless, PO's characterization of its Rog 11 response, and thus the Requested Documents, is facially inaccurate. For example, Rog 11 is not directed to the more limited contention that Wiz copied Orca's SideScanning technology, but rather that Wiz "copied ***anything from, or related to, Orca,*** including ***but not limited to*** the Asserted Patents." EX2056, 2. Moreover, Rog 11 is completely untethered from PO's further, unsubstantiated contentions regarding skepticism, industry praise, and commercial success. Mot., 1.

Moreover, while PO contends it explained the relevance of the Requested Documents "in its detailed narrative response" to Rog 11 (Mot., 5), the Requested Documents include additional documents not cited in PO's Rog 11 response. EX2059, 6. PO's blanket reliance on a redacted interrogatory response, which fails to support even its request for the documents cited in that response, cannot justify discovery of additional documents unmentioned in the response. PO's motion does not even address those documents.

Lastly, PO's usefulness allegations improperly equate district court and PTAB discovery standards. Mot., 7-8. PO alleges that the Requested Documents are a subset of documents that were deemed "facially relevant" by the district court

and thus, should be deemed "facially useful" by the Board. *Id*. Orca fundamentally misapprehends the PTAB's discovery standard. Discovery in *inter partes review* proceedings is by design more limited than the district court and utilizes an "interest of justice standard" that is more "conservative in its grants of discovery." *Intex Recreation Corp. v. Team Worldwide Corp.*, IPR2018-00859, Paper 41, 4. Thus, what is "facially relevant" in district court does not define what is "useful" in an IPR. *Garmin*, 7 ("'Useful' in that context does not mean merely 'relevant' and/or 'admissible.'").

**b. *Garmin* Factor 2 – Lack Of Litigation Positions Is Not Dispositive**

Even if the Board finds that PO is not seeking litigation positions, such a finding is not dispositive. *See., e.g.*, *Polygroup I*, 10-11 (not seeking litigation positions), 13 (discovery denied due to *Garmin* Factor 1); *Intex*, Paper 41, 6-7, 17 (similar).

**c. *Garmin* Factor 3 – PO Has Other Means of Generating Equivalent Information**

*Garmin* Factor 3 weighs heavily against granting discovery. As explained below, PO has the ability to generate equivalent information by approaching the district court for permission to use the Requested Documents in the IPRs. Indeed, PO itself ensured the ongoing availability of those means during the litigation stay and expressly identified the district court's process as the appropriate mechanism for seeking submission of protected documents in the IPRs.

PO's refusal to pursue available means in district court is dispositive. Under *Garmin* Factor 3, PO must show that it lacks the ability to obtain equivalent information by other means. *Garmin*, 6, 13-14. When, as here, the party seeking protected documents can seek relief from the district court that issued the protective order, "approaching the district court for permission to use the documents was, and is, 'other means.'" *L'Oreal USA, Inc. v. Liqwd, Inc.*, PGR2017-00012, EX2019 (redacted version of order on discovery motion), 9-10; *Polygroup Ltd. v. Willis Electric Co., Ltd.*, IPR2016-01610, Paper 54, 6 ("*Polygroup II*") (same); *Duncan Parking*, Paper 18, 3-4 (same). The Federal Circuit has confirmed that denial is appropriate in such circumstances. *Wildcat Licensing WI LLC v. Atlas Copco Tools & Assembly Sys. LLC*, No. 2022-1304, 2024 WL 89395, at *4-5 (Fed. Cir. Jan. 9, 2024) (no abuse of discretion); *Atlas Copco Tools & Assembly Sys. LLC v. Wildcat Licensing WI LLC*, IPR2020-00891, Paper 37, 15 (denying request where party could have sought relief in district court). As in those cases, PO was and is able to ask the district court for permission to use the Requested Documents. This stands in stark contrast to *MOM Enters.*, cited by PO (Mot., 9), where it was undisputed that "no other means" were available. *MOM Enters.*, Paper 45, 8. PO's refusal to pursue other means—despite having known for months that it would be seeking these documents (*e.g.*, EX2059, 11-12)—does not make those means any less available. *E.g.*, *Duncan*

*Parking*, Paper 18, 3 (noting that requesting party was aware that it could approach the district court before filing motion).

Indeed, PO expressly identified the district court's processes as the means for seeking submission of protected documents in the IPR. In negotiating the stay order in district court, PO proposed language explicitly preserving its ability to approach the district court to "facilitate the disclosure" of protected documents in the IPRs without violating the stay. EX1112, ¶4. When asked to explain the purpose of this language, PO clarified that it ensures that "there is a mechanism in place for the district court to evaluate" disputes over submitting protected documents in IPRs. EX2058, 1-3 (discussing language originally presented in ¶3). Thus, other means not only exist, ***PO itself*** successfully negotiated their ongoing availability.

The restrictions of the protective order further demonstrate that the other means available to PO in district court are the appropriate means for resolving this dispute. Though ignoring that its actions in pursuing this motion are themselves violations of the protected order (EX1113), PO blames the protective order for PO's inability to articulate the purported usefulness of the Requested Documents. Mot., 5. But these restrictions show why the other means available to PO in district court—where PO has no such restrictions—are better suited for resolving this dispute.

**d. *Garmin* Factor 4 – Easily Understandable Instructions Are Not Dispositive**

The Board has routinely denied discovery requests that include a list of Bates numbered documents. *See., e.g.*, *Polygroup I*, 3, 13 (denying discovery of ten Bates numbered documents); *Intex*, Paper 41, 7, 15, 17 (similar).

**e. *Garmin* Factor 5 – PO's Request is Overly Burdensome**

*Garmin* Factor 5 also weighs against discovery. Relevant burdens include financial burden and burden on human resources. *Garmin*, 14. PO's vague, overbroad request has required Wiz to spend, and continue to spend, substantial financial and human resources responding to PO's request. If discovery is granted, Wiz will then be forced to spend additional substantial efforts redacting the Requested Documents to protect its confidential information.

PO's overbroad and vague explanation as to usefulness is unduly burdensome. "Requests should be sensible and reasonably tailored." *Id*. As explained above, PO relies on an unredacted portion of its Rog 11 response which facially describes the inclusion of alleged copying evidence beyond the scope of what reasonably could be construed as relating to secondary considerations, while at the same time lacks any discussion of other aspects of the discovery sought (e.g., industry skepticism and praise). *See supra* §II.a. PO effectively shifts the burden to Wiz to rebut PO's vague allegations of usefulness. This is no small task considering the Requested Documents total over 6,500 pages. Furthermore, Wiz

has incurred financial cost to regain and maintain access to the Requested Documents after the production database was archived following the litigation stay. Nor is the fact that PO identifies the documents it seeks by specific Bates number sufficient to remove burden concerns. *Polygroup II*, 7 (denying request for Bates numbered documents where, *inter alia*, "Patent Owner does not take into account costs in the present proceedings").

Additionally, should PO's request be granted, Wiz will be required to spend considerable resources to preserve the confidentiality of those documents, including by identifying appropriate redactions when they are filed as exhibits. "Although the status of information as confidential does not prohibit its discovery, the efforts undertaken to maintain that information as confidential, nevertheless, must be considered." *Duncan*, Paper 18, 4 (denying discovery motion and noting "cost and effort" in respect to redaction efforts); *see also Polygroup I*, 7 (denying discovery motion in view of "the burden of redacting information" sought by request); *Apple, Inc. v. SightSound Techs., LLC*, CBM2013-00020, Paper 40, 6 (denying discovery request that would require "implementing complex confidentiality protections … and would be unduly burdensome").

## III. CONCLUSION

Wiz respectfully requests that PO's motion for additional discovery be denied.

Dated: March 12, 2025

Respectfully submitted,

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

## Exhibit List

| Exhibit No. | Description |
|---|---|
| 1001 | U.S. Patent No. 11,775,326 to Shua |
| 1002 | Declaration of Dr. Angelos Stavrou |
| 1003 | *Curriculum Vitae* of Dr. Angelos Stavrou |
| 1004 | File History of U.S. Patent Application No. 18/055,181 ('326 Pat.) |
| 1005 | Scheduling Order (Dkt. No. 33), *Orca security ltd. v. Wiz, Inc., No. 1:23cv-00758-GBW (DDE)* |
| 1006 | Second Amended Complaint for Patent Infringement (Dkt. No. 15), *Orca security ltd. v. Wiz, Inc., No. 1:23cv-00758-GBW (DDE)* |
| 1007 | U.S. Patent No. 11,216,563 B1 to Veselov |
| 1008 | U.S. Publication No. 2013/0191919 A1, published July 25, 2013, to Basavapatna |
| 1009 | Wolf, "Virtualization: From the Desktop to the Enterprise" APRESS (2005) |
| 1010 | Waldspurger, "Memory Resource Management in VMware ESX Server," USENIX, Proceedings of the 5th Symposium on Operating Systems Design and Implementation (Dec. 9-11, 2002) |
| 1011 | Goldberg, "Survey of Virtual Machine Research," COMPUTER, Vol. 7, No. 6 (June 1974) |
| 1012 | U.S. Patent No. 10,944,811 B2 to Doctor |
| 1013 | Wood, "Black-box and Gray-box Strategies for Virtual Machine Migration" NSDI '07: 4th USENIX Symposium on Networked Systems Design & Implementation, USENIX |
| 1014 | Klemperer, "Efficient Hypervisor Based Malware Detection," Carnegie Mellon University (May 2015) |

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| 1015 | vSphere Web Services SDK Programming Guide, VMWare, Inc. (April 17, 2018) |
| 1016 | Souppaya, "Application Container Security Guide," NIST Special Publication 800-190 (Sept. 2017)<br>https://doi.org/10.6028/NIST.SP.800-190 |
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| 1021 | "NIST Cloud Computing Standards Roadmap," NIST Special Publication 500-291, Version 2 (July 2013). |
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| 1034 | Tang, "VirtAV: An Agentless Runtime Antivirus System for Virtual Machines," KSII Transactions on the Internet and Information Systems, Vol. 11, No. 11 (Nov. 2017) https://doi.org/10.3837/tiis.2017.11.026 |
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| 1049 | Huseinovic – VM Memory Forensics. |
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| 1052 | VMware VirtualCenter User’s Manual version 1.4, VMware, Inc. (July 7, 2006) |
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| 1056 | U.S. Publication No. 2015/0033221 A1 to Chari |
| 1057 | Archived copy of "CWE-200: Information Exposure," published by MITRE and archived on January 26, 2019, by the Internet Archive's "Wayback Machine" https://web.archive.org/web/20190126150012/https://cwe.mitre.org/data/definitions/200.html |
| 1058 | Archived copy of "CWE-311: Missing Encryption of Sensitive Data," published by MITRE and archived on January 17, 2019, by the Internet Archive's "Wayback Machine" https://web.archive.org/web/20190117150049/https://cwe.mitre.org/data/definitions/311.html |
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| 1063 | U.S. Publication No. 2014/0245376 A1 to Hibbert |
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| 1076 | U.S. Patent No. 10,055,576 B2 to Milner |
| 1077 | U.S. Patent No. 9,824,216 B1 to Khalid |
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| 1080 | U.S. Patent No. 7,831,739 B2 to Lambeth |
| 1081 | U.S. Publication No. 2010/0169948 A1 to Budko |
| 1082 | United States District Courts—National Judicial Caseload Profile (December 31, 2023) |

| Exhibit No. | Description |
|---|---|
| | https://www.uscourts.gov/sites/default/files/fcms_na_distprofile1231.2023_0.pdf |
| 1083 | Amended Scheduling Order (Dkt. No. 90), *Orca security ltd. v. Wiz, Inc., No. 1:23cv-00758-GBW (DDE)* |
| 1084 | U.S. Patent No. 9,749,349 B2 to Czarny |
| 1085 | U.S. Publication No. 2017/0048266 A1 to Hovor |
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| 1106 | International Telecommunication Union, "Common vulnerability scoring system 3.0," Recommendation ITU-T X.1521 (Mar. 2016) https://www.itu.int/rec/dologin_pub.asp?lang=e&id=T-REC-X.1521-201603-I!!PDF-E&type=items |
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| 1109 | Archived copy of "Binslayer: Accurate Comparison of Binary Executables," by Bourquin et al., published by 2nd ACM SIGPLAN Program Protection and Reverse Engineering Workshop (2013), and archived on November 3, 2018, by the Internet Organization's "Wayback Machine" https://web.archive.org/web/20181103234309/https://kar.kent.ac.uk/37627/1/a4-bourquin.pdf [*served, not filed*] |
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| 1111 | Supplemental Declaration of Dr. Angelos Stavrou [*served, not filed*] |
| 1112 | Stipulation and Order for Stay Pending *Inter Partes Review* (Dkt. No. 233), *Orca Security Ltd., v. Wiz, Inc.*, 1:23-cv-00758-JLH (D. Del. January 16, 2025) |
| 1113 | Email exchange between counsel for Wiz, Inc., counsel for Orca Security Ltd., and the PTAB Clerk (Feb. 24, 2025–Feb. 25, 2025) |

## CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6, the undersigned certifies that on March 12, 2025, a copy of the foregoing document was served by electronic mail, as agreed to by the parties, to the following individuals:

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Raghav Baja
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Douglas E. Lumish
Blake R. Davis
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