PROTECTIVE ORDER MATERIAL
REDACTED

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WIZ, INC.,
Petitioner,

v.

ORCA SECURITY LTD.,
Patent Owner.

IPR2024-01191
Patent No. 11,775,326

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

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I. STATEMENT OF PRECISE RELIEF REQUESTED

Petitioner Wiz, Inc. moves to exclude Patent Owner's ("PO's") exhibits 2134-2137, 2148, 2400-2422, and 2424-2428 for failing to meet the admissibility requirements of the Federal Rules of Evidence ("F.R.E."). *See* 37 C.F.R. §42.64(c). Wiz has previously preserved these objections. Paper 31, 1-7.

II. STATEMENT OF REASONS FOR THE RELIEF REQUESTED

Exhibits 2134-2137, 2148, 2400-2422, and 2424-2428 are relied upon in the Patent Owner Response (POR) to support secondary-considerations arguments. Many are relied upon for the purported truth of their assertions and should be excluded as hearsay. PO also misused its knowledge of confidential Wiz information gained through the related district court information, poisoning its IPR discovery efforts to obtain the same information. The resulting exhibits present unfair prejudice, risk confusion, and waste time, and they should be excluded.

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

1. The Exhibits are Inadmissible Hearsay

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

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

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

The POR relies upon the exhibits in question as follows:

Exhibit	**POR page(s)**	**Reliance**
2134	34	Long-felt need
2135	None	Long-felt need
2136	35-36	Long-felt need
2137	36	Long-felt need
2148	36-37	Long-felt need
2406	3, 41-42, 45, 49, 64	[redacted]
2412	6-7, 40, 42-43, 46	[redacted]
2414	40, 47-48, 57, 61	[redacted]
2416	57, 61	[redacted]

<u>Exhibit 2134</u>: Cited for long-felt need, EX2134 appears to be an article whose author is not a witness here. Arguing that, as public cloud services developed, many organizations increasingly adapted their applications to use multiple cloud platforms (POR, 34), PO treats EX2134 as truthfully asserting that "[c]loud adoption t[ook] off" around 2012. EX2134, 2.

Exhibit 2135: This appears to be a blog post obtained from paloaltonetworks.com and written by Ankur Shah, who is not a witness here. The POR does not cite EX2135, and Dr. Kaeli quotes it in a paragraph alleging PO solved a long-felt need. EX2073, ¶163. Dr. Kaeli quotes the author's statement that agentless scanning "extend[ed] coverage to both active ***and dormant***" VMs. EX2135, 3. Dr. Kaeli provides no analysis and simply presents the statement as fact. The statement is thus relied on for the truth of the matter asserted.

Exhibit 2136: Cited for long-felt need, EX2136 appears to be a survey summary sponsored by Palo Alto Networks. EX2136, 1-3, 33-34. Neither the authors nor the survey respondents are witnesses here. Arguing that virtualization technologies were "vulnerable to cyber threats" (POR, 35), PO quotes EX2136's statement that "cybersecurity professionals remain concerned about security of data, systems, and services in the cloud." EX2136, 2. Alleging a long-felt need to address undetected vulnerabilities (POR, 36), PO quotes EX2136's statement that "traditional security tools are often not suited for the challenges of dynamic, virtual and distributed cloud environments" and that respondents said "traditional security solutions either don't work at all in cloud environments or have only limited functionality." EX2136, 2, 3. PO thus relies on the supposed truth of (1) the author's assertions that traditional tools had shortcomings and that respondents made the alleged statements and (2) the secondhand statements. This is double

hearsay. F.R.E. 805; *U.S. v. Cervantes*, 107 F.4th, 459, 472 (5th Cir. 2024) (statement "to person X about what person Y said to person Z is double hearsay").

Exhibit 2137: Cited for long-felt need, EX2137 appears to be an article whose author is not a witness here. Alleging a long-felt need to address undetected vulnerabilities (POR, 36), PO relies on the supposed truth of EX2137's statement that the "journey to obtain the right level of visibility and control over the cloud workloads is still a challenge." EX2137, 1.

Exhibit 2148: Cited for long-felt need, EX2148 appears to be version 2 of a web article whose author, Chris Ray, is not a witness here. EX2148, 1. PO cites EX2148 to support its argument that Mr. Shua recognized a need and redefined the industry. POR, 36-37 (citing EX2148). The corresponding testimony of Mr. Shua quotes EX2148's "Solution Overview" statements, including an assertion that PO's "innovative SideScanning technology enables deep workload inspection without requiring agent deployment." EX2148, 15; EX2074, ¶95. This overview also appears to relay statements from an unidentified individual at PO, making it double hearsay. EX2148, 24 (no asterisk indicates vendor participation), 15 (no asterisk).

Exhibit 2406: [redacted]

[redacted]

[redacted]

[redacted]

<u>Exhibits 2412, 2414, and 2416</u>: [redacted]

[redacted]

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[redacted]

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

PO's witness testimony does not negate the above hearsay issues. As explained below, PO frequently fails to cite to corresponding witness testimony when addressing the inadmissible hearsay, and the limited testimony cited by PO fails to remedy the hearsay problems evident in the POR.

First, PO often cites no witness testimony when citing these exhibits. PO does not cite EX2135, and PO cites EX2134 and EX2136-2137 without accompanying cites to witness testimony. POR, 34-36. Many of the POR's citations to EX2406, EX2412, and EX2414 also lack accompanying citations to

testimony. POR, 3, 6, 41-42, 45-47, 49, 64. Moreover, Mr. Shua only addresses EX2148, and Dr. Kaeli does not cite EX2148 or page 16 of EX2412.

Mr. Shua's testimony does not cure PO's hearsay reliance on EX2148. EX2074, ¶95. PO does not rely on Mr. Shua as an expert witness, nor does Mr. Shua claim to serve as one here. EX1402, 234:20-235:8 ("I can't say that I'm an expert"). As a lay witness, Mr. Shua's testimony is "not admissible" if based "on the truth of the facts asserted within [a] statement" unless he has "first-hand knowledge" of those statements. *Taxinet Corp. v. Leon*, 114 F.4th 1212, 1225 (11th Cir. 2024); F.R.E. 602 (prevents "testifying to the subject matter of the hearsay statement" without personal knowledge); *supra*, §II.A.1. Mr. Shua never asserts he has "first-hand knowledge" of the inadmissible hearsay of EX2148 discussed above. EX2073, ¶95; F.R.E 701; *supra*, §II.A.1.

Dr. Kaeli's testimony also fails to cure the above hearsay issues. As noted above, PO often fails to cite Dr. Kaeli's testimony when citing these exhibits, relying instead on periodic incorporation of large swaths of his testimony. POR, 6-7, 37, 40, 42-43, 57, 61-62. Even if the Board were to consider that testimony, F.R.E. 703 does not allow circumvention of evidentiary rules by having an expert act as a "mouthpiece" for hearsay. *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1375 (Fed. Cir. 2021); *United States v. Mejia*, 545 F.3d 179, 198 (2d Cir. 2008) (testimony improper because expert "did not analyze his source materials so

much as repeat their contents"). Yet that is precisely what Dr. Kaeli does here, quoting their contents with little, if any, corresponding analysis. EX2073, ¶¶158-59 (quoting EX2134; EX2136), 161 (quoting EX2136-2137), 163 (quoting EX2135), 165 (quoting EX2412), 168-70 (quoting EX2135; EX2406; EX2412), 173-74 (quoting EX2406; EX2412; EX2414; EX2416), 178 (quoting EX2406), 213 (quoting EX2414; EX2416). Dr. Kaeli's testimony thus reveals that he is not properly relying on these exhibits to form his technical opinions in areas of his expertise. F.R.E 703. Rather, he simply acts as a mouthpiece for inadmissible hearsay, repeating the assertions in the exhibits as fact.

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

PO's use of exhibits 2400-2422 and 2424-2428 ("Wiz Confidential Documents") contrary to its prior agreements unfairly prejudices Wiz, confuses the issues, and wastes time. These non-probative documents should be excluded.

These problems stem from PO's disregard for prior agreements regarding how it would use Wiz Confidential Documents. Before receiving the documents in district-court litigation, PO agreed that it would not use them for "any other purpose" beyond that litigation. EX2057, ¶7. In negotiating the stay order following institution of these IPRs, PO further agreed that the district court was the appropriate venue to resolve disputes over using the other party's protected information in the IPRs. EX2058; *see also* EX1112, ¶4 (PO proposing language

for that purpose). Despite this, PO sought and obtained discovery of these documents here, and Wiz continues to suffer unfair prejudice due to PO's ongoing use of the fruits of this poisonous tree, including reliance on these non-probative documents in an attempt to cast Wiz in a negative light and preemptively litigate infringement.

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

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

PO's use of Wiz Confidential Documents presents the same type of unfair prejudice recognized in these cases. PO agreed not use the documents for "any other purpose" beyond the district court litigation (EX2057, ¶7), and it agreed that

disputes over the use of these documents in the IPR were properly resolved before the district court. EX2058 ("[W]e want to ensure that if disputes over [confidential or AEO] information arise, there is a mechanism in place for the district court to evaluate them notwithstanding a stay."); EX1112, ¶4 (stay-order provision proposed by PO for this purpose). Similar to *Jazz*, PO then violated its agreements by using the documents to craft discovery requests outside that litigation without using the agreed-upon process. *See* EX2053 (listing protected documents). As recognized in *Meyer*, PO's use of these documents in a manner contrary to PO's prior agreements subjects Wiz to unfair prejudice. This unfair prejudice is exacerbated by PO's use of these documents to smear Wiz and confuse the issues with accusations of conspiracy and infringement. *Id.*, 53-55 (alleging conspiracy), 57-60 (arguing Wiz "practices" claims), 65, 66 n.14 (infringement accusations).

These documents should be excluded. Exclusion is appropriate when the evidence's probative value is "substantially outweighed" by the dangers of, *inter alia*, unfair prejudice, confusing the issues, or wasting time. F.R.E. 403; *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 78 (Fed. Cir. 2012) (excluding evidence because its probative value was "dubious"). The dangers are significant. Forcing Wiz to respond to arguments based on illegitimate document use unfairly prejudices Wiz, as explained above. The prejudice is particularly significant here since, as explained above, PO uses the documents to smear Wiz,

confuse the issues, and waste time with misplaced conspiracy and infringement allegations. POR, 53-55, 57-60, 65, 66 n.14.

These significant dangers substantially outweigh any probative value the documents might have. This is not a close call since the documents' probative value is minimal given that PO relies on them for secondary considerations without proving nexus. *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373-74 (Fed. Cir. 2019) (no meaningful weight absent nexus); *E.g.*, EX1400, ¶¶59-64 (no presumption), 65-76 (evidence directed to known features). Any probative value of EX2406, EX2412, EX2414, and EX2416 is further undercut by the hearsay problems explained above. That the misplaced conspiracy and infringement arguments are presented under the guise of "access + substantial similarity" copying arguments does not cure the significant dangers discussed above. Indeed, the documents have no probative value for copying since [redacted] refutes PO's copying inference. EX1400, ¶¶95-110; EX1414.

III. CONCLUSION

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

Respectfully submitted,

Dated: October 01, 2025

/ Matthew A. Argenti /
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Petitioner's Motion to Exclude was served on October 01, 2025, at the following electronic service addresses:

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