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The Hon. Leonard P. Stark
J. Caleb Boggs Federal Building
U.S. District Court for the District of Delaware
844 N. King Street, Unit 26, Room 6100
Wilmington, DE 19801-3556

Re: ***Leader Technologies, Inc. v. Facebook, Inc.*, Civ. No. 08-862-JJF-LPS**

Dear Judge Stark:

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LTI Should Be Prohibited From Taking the "Apex" Deposition of Mr. Zuckerberg

"Courts throughout the country have prohibited the deposing of corporate executives who have no direct knowledge of a plaintiff's claim when other employees with superior knowledge are available to testify." *Roman v. Cumberland Ins. Group*, 2007 WL 4893479, at *1 n.1 (E.D. Pa. 2007) (citing cases). The principle, commonly referred to as the "apex" doctrine, is grounded on the recognition that high-ranking corporate executives are uniquely vulnerable to discovery abuse. "Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. 2007).

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Courts accordingly consider the following in considering whether to allow an "apex" deposition should go forward: (1) whether the executive has unique knowledge superior to that of lower level employees; and (2) whether the party seeking the deposition has attempted to obtain the relevant information by less intrusive means, such as interrogatories and depositions of lower level employees. *See, e.g. Simon v. Pronational Ins. Co.*, 2007 WL 4893478, at *1 (S.D. Fla. 2007); *Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 483 (10th Cir. 1995) (upholding protective order to block deposition of chairman where plaintiff sought that deposition prior to taking the deposition of any other personnel); *see also Salter v. Upjohn Co.*, 593 F.2d 649, 650-51 (5th Cir. 1979); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681-82 (7th Cir. 2002).

LTI cannot make either showing.

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Second, LTI cannot show that it has attempted to obtain its requested discovery through less intrusive means. LTI has yet to take a single deposition, notwithstanding that deposition discovery has been open for almost three months. LTI waited until late January to notice any depositions. Facebook has agreed to produce five percipient employee witnesses and produce one or more Rule 30(b)(6) corporate designees.

LTI could not possibly show that it needs the deposition of Facebook's CEO before it has taken the depositions of these current and former employees.

LTI's Baseless Willfulness Theory Does Not Warrant An Intrusive CEO Deposition

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A plaintiff claiming willful infringement is required to show, at a minimum, that the defendant had actual knowledge of *the patent*. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) ("[T]o establish willful infringement, a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement *of a valid patent*.") (emphasis added); *see also State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985) ("to willfully infringe *a patent*, the patent must exist and one must have knowledge of it."). LTI's patent did not issue until November 21, 2006. Therefore, whether or not Facebook can even be accused of willfully infringing the patent turns

solely on Facebook's knowledge of LTI's patent on or after November 21, 2006.

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. Federal Circuit law is also clear that access to materials marked "patent pending" is insufficient to support a claim of willful infringement. *State Indus.*, 751 F.2d at 1236 ("A 'patent pending' notice gives one no knowledge of [an existing patent]. Filing an application is no guarantee any patent will issue and a very substantial percentage of applications never result in patents. What the scope of the claims in patents that do issue will be is something totally unforeseeable.").

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Moreover, the fact that LTI has yet to take a single deposition militates strongly against an apex deposition. As one court noted: "Courts generally refuse to allow the immediate deposition of high-level executives, the so-called 'apex deponents,' before the depositions of lower level employees with more intimate knowledge of the case." *Mehmet v. PayPal, Inc.*, 2009 WL 921637, at *2 (N.D. Cal. 2009) (citing cases). LTI's motion should therefore be denied.

Very truly yours,

Steven L. Caponi (I.D. No. 3484)

Enclosures
cc: Clerk, U.S. District Court
Counsel of Record