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The Hon. Leonard P. Stark
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:

Facebook respectfully requests an order excluding

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LTI's late disclosures will unfairly prejudice Facebook unless the Court enters an order excluding them. Alternatively, Facebook seeks an order reopening discovery to take discovery on these belated disclosures since they are critical to the case and may impact expert reports, motions, trial, etc.

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Under 35 U.S.C. § 102(b), a patent claim is invalid if the alleged invention described in the claim was on sale or in public use more than one year before the patent application was filed. Facebook asserted this defense in its first Answer (D.I. 5),

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The discoverability of documents depends on whether they are relevant to any claim or defense, or are reasonably calculated to lead to the discovery of admissible evidence to a claim or defense. Fed. R. Civ. P. 26(b)(1). Facebook asserted Section 102 invalidity as a defense more than a year ago and issued early document requests aimed at obtaining this discovery.

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This Court has broad discretion to fashion a remedy for LTI's failure to comply with discovery obligations. *See* Fed. R. Civ. P. 37; *Bridgestone Sports Co. v. Acushnet Co.*, No. 05-132 JJF, 2007 WL 521894, (Farnan, J.) (D. Del. 2007). In determining whether to exclude evidence, courts examine several factors, including "(1) the prejudice or surprise to a party against whom the evidence is offered; (2) the ability of the injured party to cure the prejudice; (3) the likelihood of disruption to the trial schedule; (4) bad faith or willfulness involved in not complying with the disclosure rules; and (5) the importance of the evidence to the party offering it." *Id.* at *4.

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Lamb "Errata"

Facebook also requests that this Court strike Jeffrey Lamb's "errata" that substantively rewrites his testimony.

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While Federal Rule 30(e) generally allows changes to deposition transcripts, changes providing a substitute and contradictory narrative to what was testified under oath exceed the scope of that rule. *See M. Durkin Contracting, Inc. v. City of Newark,* No. 04-163 GMS, 2006 WL 2724882 (Sleet, J.) (D. Del. 2006). As both Judge Sleet and the 10th Circuit have noted, "a deposition is not a take home exam" – a party may not change his or her deposition answers after the fact simply because he realizes that his answers might result in a failing grade. This Court therefore has the authority to strike such sham changes. *Id.* at *5 (citing *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 (10th Cir. 2002)).

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Alternatively, Facebook should be allowed to reopen Mr. Lamb's deposition for the purpose of cross-examining Mr. Lamb about his new testimony, including inquiry into his communications with counsel regarding these changes.

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Facebook respectfully may need to ask for an extension regarding expert reports, motions and trial depending on what that deposition yields.

Respectfully submitted,

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

Cc: Clerk of Court (via hand delivery and e-filing)
Philip A. Rovner, Esquire (via e-service)