

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LEADER TECHNOLOGIES, INC., a
Delaware corporation,

Plaintiff and Counterdefendant,

v.

FACEBOOK, INC., a Delaware
corporation,

Defendant and Counterclaimant.

Civil Action No. 1:08-cv-00862-JJF

PUBLIC VERSION

CONFIDENTIAL - FILED UNDER SEAL

**MEMORANDUM IN SUPPORT OF DEFENDANT
FACEBOOK, INC.'S MOTIONS IN LIMINE**

OF COUNSEL:

Heidi L. Keefe (*pro hac vice*)
Mark R. Weinstein (*pro hac vice*)
Jeffrey Norberg (*pro hac vice*)
Melissa H. Keyes (*pro hac vice*)
Elizabeth L. Stameshkin (*pro hac vice*)
COOLEY GODWARD KRONISH LLP
5 Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155

BLANK ROME LLP
Steven L. Caponi (DE Bar #3484)
1201 N. Market Street, Suite 800
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464

*Attorneys for Defendant and
Counterclaimant Facebook, Inc.*

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I. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Leader Technologies, Inc. (“LTI”) filed its complaint against defendant Facebook, Inc. (“Facebook”) in this patent infringement action on November 19, 2008 alleging infringement of a single patent: U.S. Patent No. 7,139,761 (the “’761 patent”). Discovery is closed and trial is set for June 28, 2010. (D.I. 30, Rule 16 Scheduling Order).

The parties have agreed by stipulation to file pre-trial motions no later than May 20, with responses due on May 27 and no replies. For the convenience of the Court, Facebook has separated its pre-trial motions into two categories, 11 individual evidentiary motions *in limine*, which appear in this brief, and three individual *Daubert* motions, which appear in a separate brief being submitted concurrently herewith. Because several of the individual motions rely on the same documents, all evidence in support of Facebook’s pre-trial motions is being submitted attached to a single declaration: the Declaration of Melissa Keyes in Support of Facebook’s Pre-Trial Motions (“Keyes Decl.”).

II. FACEBOOK’S MOTIONS *IN LIMINE*

A. Motion *in Limine* No. 1: To Preclude any Doctrine of Equivalents Argument

Through this motion, Facebook seeks an order prohibiting LTI from presenting any evidence or making any argument at trial that the Facebook website infringes its patent under the doctrine of equivalents.

Throughout the course of discovery, LTI has alleged that the Facebook website infringes the ’761 patent both literally and under the doctrine of equivalents. However, LTI has provided no meaningful analysis of how the Facebook website infringes under the doctrine of equivalents. Despite providing four supplemental responses to Facebook’s interrogatory requesting an explanation of how each such accused element of the Facebook website is alleged to infringe under the doctrine of equivalents, LTI has

failed to provide any analysis,

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Conclusory statements devoid of any analysis are insufficient as a matter of law to support an allegation of infringement under the doctrine of equivalents. *Aquatex Indus., Inc. v. Techniche Solutions*, 479 F.3d 1320, 1324 (Fed. Cir. 2007) (*en banc*) (“only conclusory statements regarding equivalence, without any particularized testimony and linking argument as to the ‘insubstantiality of the differences’ between the claimed invention and the accused device” were held to be insufficient to survive a motion for summary judgment) (internal quotations and citation omitted); *Honeywell Int’l Inc. v. Universal Avionics Sys. Corp.*, 347 F. Supp. 2d 129, 134-35 (D. Del. 2004) (plaintiff’s expert’s statements that “there is no substantial difference between” the asserted claim and the accused device was conclusory and insufficient to rebuff a directed verdict of non-infringement). *See also PC Connector Solutions LLC v. SmartDisk Corp.*, 406 F.3d 1359, 1364 (Fed. Cir. 2005) (“The evidence and argument on the doctrine of equivalents cannot merely be subsumed in plaintiff’s case of literal infringement.”) (quoting *Lear Siegler, Inc. v. Sealy Mattress Co.*, 873 F.2d 1422, 1425 (Fed. Cir. 1989)). In order to properly assert a claim for infringement under the doctrine of equivalents, LTI would

have been required to “provide particularized testimony and linking argument on a limitation-by-limitation basis,” which it certainly has not done. *Aquatex*, 479 F.3d at 1328-29.

The Supreme Court and the Federal Circuit have both recognized that, due to the complexities of the doctrine of equivalents, evidence of equivalence must be proffered by someone skilled in the art, e.g., “through testimony of experts or others versed in the technology.” *Id.* at 1329 (internal quotations and citation omitted). Under Federal Rule of Civil Procedure 26(a)(2)(B), an expert’s report “must contain [] a complete statement of all opinions the witness will express and the basis and reasons for them.” The opportunity for Dr. Vigna to provide a limitation-by-limitation analysis passed on April 8, 2010 when expert reports were due pursuant to the Rule 16 Scheduling Order issued by the Court in this litigation. As explained in the co-pending motion relating specifically to Dr. Vigna’s testimony, LTI’s expert has not come close to providing the particularized testimony and linking argument that Federal Circuit law requires. Any attempts to supplement an inadequate expert report with such analysis has been held to be an “attempt to circumvent the expert discovery schedule established by [the] Court.” *MOSAID Techs., Inc. v. Samsung Elecs. Co.*, 362 F. Supp. 2d 526, 544 (D.N.J. 2005).

Because LTI has disclosed no particularized analysis of its infringement theory under the doctrine of equivalents, LTI’s analysis is insufficient as a matter of law and any evidence presented or argument at trial regarding infringement under the doctrine should therefore be prohibited.

B. Motion *in Limine* No. 2: To Preclude Evidence or Argument Beyond the Three “Use Cases” Disclosed in LTI’s Expert Report

Facebook seeks an order to prevent LTI, its attorneys or its expert, Giovanni Vigna, Ph.D., from offering any evidence or argument on infringement by Facebook beyond the three “use cases” disclosed in Dr. Vigna’s April 8, 2010 report.

1. Background Regarding Dr. Vigna’s Report and Deposition

On April 8, 2010, LTI served on Facebook the Disclosure of Expert Testimony for Giovanni Vigna, Ph.D. Pursuant to Fed. R. Civ. P. 26(A)(2) (the “Vigna Report”).

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Throughout his report, Dr. Vigna repeatedly used improper equivocal language,

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Thus, while Dr. Vigna discussed only three use cases in his report, Dr. Vigna may be attempting via such equivocations to open the door for presentation of entirely different, undisclosed use cases or infringement theories at trial – use cases that Facebook has had no opportunity to rebut or investigate.

On May 3, 2010, Facebook deposed Dr. Vigna and attempted to clarify these equivocations. At his deposition, Dr. Vigna was exceedingly evasive, refusing to answer even the most straightforward questions, claiming that he did not understand what was being asked of him. When asked—no fewer than 30 times—whether he planned on presenting any additional use cases at trial, he gave a variety of non-responsive answers, demanded Facebook’s counsel repeat straightforward questions numerous times, and, all in all, adamantly refused to limit himself to the use cases presented in his report. *See id.*, Ex. 4 at 92:9-108:21. However, Dr. Vigna did not testify about a single additional use case. *See id.*

2. Dr. Vigna’s Testimony Should be Limited to the Use Cases in His Report

Rule 26(a)(2)(B) requires an expert report to set forth:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the data or other information considered by the witness in forming them.

Thus, an expert may not testify at trial regarding any opinions not contained in his 26(a)(2)(B) disclosure. *See Inline Connection Corp. v. AOL Time Warner Inc.*, 472 F. Supp. 2d 604, 615 (D. Del. 2007) (“Pursuant to FRCP 26(a)(2)(B), an expert report shall contain a *complete* statement of all opinions to be expressed. . . . FRCP 37(c)(1) provides a ‘strong inducement for disclosure of material that the disclosing party *would expect* to use as evidence’”) (citing Fed. R. Civ. P. 37 Advisory Committee Notes, 1993 Amendments).

Dr. Vigna should not be permitted to exceed the bounds of his expert report when he testifies at trial.¹ Despite being given numerous opportunities at his deposition to disclose any other “use cases” he intended to present at trial, Dr. Vigna did not disclose any.

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Thus, Dr. Vigna should not be permitted to testify that any set of actions on the Facebook website allegedly infringe the patent aside from the three use cases set forth in his expert report, described in paragraphs 36-60. *See id.*, Ex. 1 ¶¶ 35-42, 44-51, 53-59.

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Essentially, LTI cannot piggyback on Dr. Vigna's "exemplary" but limited use cases to invite the jury to leap to a broader conclusion, unsupported by expert testimony, that any other use of the site allegedly infringes. As expert testimony is for all practical purposes a requirement for cases involving complex technology, such as this one, allowing LTI's counsel or witnesses to make broad generalizations about infringement unsupported by expert testimony would be misleading to the jury. *See AquaTex*, 473 F.3d at 1329 n.7 ("Even where literal infringement is involved, expert testimony is generally required in cases involving complex technology."); *see also Am. Patent Dev. Corp. v. Movielink, LLC*, 637 F. Supp. 2d 224, 237-38 (D. Del. 2009) (granting summary judgment of non-infringement when no expert testimony of infringement was presented). In addition, allowing LTI to make suggestions that the entire website infringes would be highly

prejudicial to Facebook,² and not at all probative without the proper evidentiary support of expert testimony. *See* Fed. R. Evid. 403.

For the foregoing reasons, Facebook respectfully requests that the Court grant its motion to exclude assertions that any use scenario not disclosed in the Vigna Report allegedly infringes the '761 patent.

C. Motion *in Limine* No. 3: To Preclude LTI from Using the Term “Platform” to Refer to Facebook’s Product.

Facebook requests that this Court preclude LTI from using the term “Platform” to reference Facebook’s product because the term “Platform” is likely to cause jury confusion. ¹

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Two of the asserted claims in this litigation include the term “web-based computing platform.” *See, e.g., id.*, Ex. 24 at Claim 9. However, when used in the claims, the term “platform” as part of the phrase “web-based computing platform” bears

² For instance, should a jury find infringement of the '761 patent after assertions regarding additional undisclosed use cases, the jury might grant a higher damages number than is warranted by the three limited use cases.

no relation to Platform as the term is used by Facebook and in Facebook's documents. In discovery, LTI has occasionally referred to Facebook's architecture as "Facebook's platform" and Facebook believes LTI intends to do so at trial as well.

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Accordingly, Facebook respectfully requests that this Court exclude any reference to Facebook's architecture as "the Facebook platform" under Rule 403.

D. Motion *in Limine* No. 4: To Preclude Evidence or Argument Relating to Internal Use of Accused Systems by Facebook Employees

Facebook seeks an Order prohibiting LTI's damages Expert Russell L. Parr from offering any opinion regarding damages related solely to Facebook's "internal use" of the Facebook website.

LTI has asserted that the Facebook website infringes the '761 patent under two theories: (1) use of the website by end-users, who are members of the public; and (2) internal use of the website by Facebook employees, e.g., for testing purposes. *See Keyes Decl., Ex. 7 at 9.*

LTI's only proffered evidence in support of its damages plea is Mr. Parr's Expert Damages Report. While Mr. Parr's Expert Damages Report addresses the reasonable royalty allegedly owed to LTI based on plaintiff's first theory of infringement, it does not offer any calculation of damages under plaintiff's second theory (that of internal use by Facebook employees). *See id., Ex. 2.*

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Pursuant to Rule 26(a)(2)(B), an expert report “must contain [] a complete statement of all opinions the witness will express and the basis and reasons for them.” Mr. Parr’s failure to address LTI’s second theory of infringement in his report amounts to a total failure by LTI to articulate any claim for damages based on alleged internal use by Facebook or its employees.

The Federal Rules restrict use at trial of information not timely disclosed under Rules 26(a) and 26(e). Fed. R. Civ. P. 37(c)(1). LTI has had ample opportunity to articulate its claims for damages, yet has failed to do so. Such failure should serve to prohibit LTI from surprising Facebook at trial with an eleventh hour disclosure of a brand new damages theory. *See LG Display Co. v. AU Optronics Corp.*, 265 F.R.D. 189, 192-93 (D. Del. 2010).

For the foregoing reasons, Facebook respectfully requests that the Court hold LTI to its damages assessment as articulated in the Expert Damages Report of Russell L. Parr, CFA, ASA, and grant Facebook’s motion to exclude any evidence or opinion about damages based on internal use of the Facebook website by Facebook employees.

E. Motion *in Limine* No. 5: To Exclude the Deposition Errata of Jeffrey R. Lamb

Facebook seeks an order precluding the introduction of or reference to the deposition errata sheet of Jeffrey R. Lamb. The motion is based upon the grounds that the deposition errata is a sham affidavit.

A threshold validity issue in this case is whether LTI may properly claim priority to an earlier filing date of a provisional application for the ’761 patent. It is black letter law that a later non-provisional application may only lay claim to an earlier provisional

application's filing date if the provisional application supports each and every limitation of the issued patent's claims under 35 U.S.C. § 112. *Trading Techs. Int'l., Inc. v. eSpeed, Inc.*, 595 F.3d 1340, 1359 (Fed. Cir. 2010). Thus, the scope of the disclosures of the provisional application are critical in determining the validity of the '761 patent.

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After his deposition, however, Mr. Lamb submitted an errata sheet, attempting to change his testimony to now read:

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³ The term "board" is synonymous with "workspace," which is in the asserted claims.

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Although deponents are permitted to provide clarifications to their testimony through submission of an errata sheet, substantive changes are not permitted. *See Donald M. Durkin Contracting, Inc. v. City of Newark*, No. Civ. A. 04-163 GMS, 2006 WL 2724882, at *5 (D. Del. Sept. 22, 2006) (excluding deposition errata sheet that substantively altered testimony because “[t]he errata sheet ‘clarifications’ in this case are akin to a student who takes her in-class examination home, but submits new answers only after realizing a month later that the import of her original answers could possibly result in a failing grade.”).

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LTI’s revisions to Mr. Lamb’s testimony amount to an artful attempt to change a “no” answer to a “yes.” Suppose a witness answered a question as to whether he had read a book by responding, “I did not read the book.” The witness, after his deposition, changes his answer to say, “I did not read just the book.” The former is an unequivocal admission that the witness did not read the book, but the latter answer either implies that the witness read the book and other things as well, or is so ambiguous that it is essentially meaningless.

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Mr. Lamb states in his “reasons for corrections on errata sheet” that he was merely trying to clarify that he was only answering the specific question asked of him. This explanation is unavailing.

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Mr. Lamb's original response answered the specific question asked of him, and needs no clarification.

Whether changing the meaning of his answer or changing the meaning of the question asked, Mr. Lamb's corrections are substantive and therefore improper. Moreover, the only corrections Mr. Lamb made to his testimony are those involving his

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This can be no coincidence.

Clearly Mr. Lamb and his counsel, who not coincidentally also represent LTI in this matter, became concerned about the import of his testimony as to such a critical aspect of the case, and sought to improperly rewrite his testimony to attempt to remove damaging admissions. LTI's subsequent arguments that these changes are not substantive is belied by the fact that LTI insists on being able to rely on them.

Based on the foregoing, Defendant respectfully requests that this Court exclude any testimony or documentary evidence of the deposition errata sheet of Jeffrey Lamb.

F. Motion *in Limine* No. 6: To Exclude LTI's Late-Produced Non-Disclosure Agreements

Facebook requests that this Court preclude LTI from referring to or relying on thousands of non-disclosure agreements ("NDAs"), which LTI withheld until more than three months after the close of document discovery and after the close of deposition discovery.

Facebook requested these NDAs in requests for production issued at the outset of the case,

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LTI's withholding of these NDAs has prejudiced Facebook by preventing any discovery on numerous potentially case dispositive invalidity issues, such as whether any of the thousands of newly disclosed third parties received invalidating commercial offers for

sale or public disclosures of the alleged invention *before* they signed an NDA – either of which would invalidate the patent under 35 U.S.C. §102(b). Having prevented Facebook from taking any meaningful discovery on these previously withheld NDAs, LTI should not be allowed to refer to or rely on them at trial.

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Immediately following this production Facebook sought to reopen discovery and move the trial date to allow Facebook a full and fair opportunity to seek discovery from the newly identified third-parties. Rather than fully reopen discovery, Magistrate Judge Stark issued two orders:

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Facebook has now issued subpoenas to several of these third-parties, but to date Facebook has yet to obtain documents or testimony from even a single one despite diligent efforts to do so.

Rule 37 provides this Court with broad discretion to fashion an appropriate remedy for LTI's failure to comply with its discovery obligations. *See Bridgestone Sports Co. v. Acushnet Co.*, No. 05-132 JJF, 2007 WL 521894, at *4-5 (D. Del. Feb. 15, 2007) (Farnan, J.) (excluding prior art references not disclosed before the Court ordered deadline). In determining whether to exclude evidence under Rule 37, 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 (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 905 (3d Cir. 1977)). Each of these factors weighs in favor of excluding LTI's late produced discovery.

Regarding the first three factors, it is difficult to imagine a more prejudicial scenario than LTI's exceedingly late disclosure of more than 1300 new third parties having potentially invalidating information just three months prior to trial, with no opportunity to take follow-up discovery. Each of these newly disclosed third parties may have discovery that invalidates every claim at issue in this litigation. Yet, Facebook has been denied any opportunity to investigate these potential defenses because of the belated timing of LTI's production.

Regarding the last two factors, LTI clearly considers the newly produced NDAs to be highly material to its defense of Facebook's §102(b) counterclaim as LTI will undoubtedly argue that any pre-critical date demonstrations of the alleged inventions did

⁴ Facebook has filed an objection to Judge Stark's most recent order on this topic. That objection is still pending.

not constitute public uses because LTI had NDAs with the parties receiving demonstrations. The materiality of these NDAs, however, weighs strongly in favor of a finding that LTI engaged in bad faith in withholding them.

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LTI's litigation counsel are experienced patent litigators who must have been aware of the importance of these types of NDAs to a §102(b) claim, and yet inexplicably elected not to produce these documents even though they were responsive to Facebook's document requests. *See Bridgestone*, 2007 WL 521894, at *4 (sophistication of counsel considered in excluding late produced discovery). LTI has elected to withhold documents upon which it apparently intends to rely at trial until after Facebook could not possibly conduct full discovery regarding these parties, defenses or documents. Both of these factors therefore weigh heavily in favor of exclusion.

Accordingly, Facebook respectfully requests that this Court preclude LTI from referring to or relying in any way on the 2,338 NDAs it produced months after the close of document discovery.

G. Motion in Limine No. 7:

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Facebook seeks an order precluding the introduction of any evidence, or mention of other litigation involving Facebook or its CEO Mark Zuckerberg, or the circumstances surrounding those disputes. This motion is based upon the grounds that these other unrelated disputes are irrelevant to the issues in this case, and clearly more prejudicial than any minimal probative value.

LTI's only allegation in this case is that Facebook has infringed its patent. The only evidence relevant to the infringement claim is that which relates to the functionality of the Facebook website, as compared to the LTI patent, from the time the patent issued.

Fed. R. Evid. 401. Facebook has never been involved in another lawsuit with LTI nor has it ever been sued before regarding the '761 patent. The existence or circumstances of any other lawsuits involving Facebook and/or Mr. Zuckerberg are completely irrelevant and establish nothing about any fact of consequence to this infringement action. The Court should therefore preclude any evidence of or reference to such litigation, including but not limited to:

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Accordingly, such evidence is irrelevant and should be excluded. Fed. R. Evid. 402.

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However, none of those lawsuits had anything to do with either the '761 patent or LTI.

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Finally, even if evidence related to these prior litigations held some remote relevance here, the introduction of such evidence would be substantially more prejudicial than probative. *See Blancha v. Raymark Indus.*, 972 F.2d 507, 516 (3d Cir. 1992) (“Evidence relating to previous litigation involving the parties . . . [is a] likely subject[] of exclusion.”); Fed. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .”).

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Similarly here, any probative value of such evidence to this case, which Facebook contends is none, would be substantially outweighed by the unfair prejudice it would create.

Based on the foregoing, Defendant respectfully requests that this Court exclude any testimony or documentary evidence, or mention of, any other litigation involving Facebook, Inc. or Mark Zuckerberg, and the circumstances surrounding those disputes,

H. Motion *in Limine* No. 8:

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Facebook is one of the most high profile success stories in recent memory. As such, there has been enormous interest in the founding and meteoric rise of the company, including countless press articles, novels, and even an upcoming film.

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I. Motion in Limine No. 9:

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J. Motion *in Limine* No. 10: To Preclude LTI Testimony on Topics for which Mr. McKibben Claimed Privilege at Deposition

Facebook seeks an order precluding testimony or reference to testimony by LTI's founder, named co-inventor and 30(b)(6) designee Michael McKibben regarding what he considered to be novel or distinguishing about his invention.

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Mr. McKibben should be prohibited from testifying on this topic.

During discovery Facebook took the deposition of Mr. McKibben, the first named inventor of the patent-in-suit, who also appeared as LTI's 30(b)(6) designee on the topic of "the circumstances surrounding the alleged invention" of each claim LTI alleges is infringed by Facebook. Keyes Decl., Ex. 20 at Topic 1.

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Under Rule 30(b)(6), LTI is bound by Mr. McKibben's testimony that all information regarding what was new or distinguishing about the alleged invention is privileged. *See Donald M. Durkin Contracting, Inc.*, 2006 WL 2724882, at *5 (corporate designees must be prepared to give binding answers). Allowing Mr. McKibben to testify on this topic at trial would be prejudicial to Facebook because LTI's assertion of the privilege during the 30(b)(6) deposition denied Facebook any meaningful opportunity to cross-examine Mr. McKibben on this subject, or to explore further discovery based on Mr. McKibben's answers. LTI should not be permitted to offensively use at trial information that it shielded from discovery based on the privilege. *See Lucent Techs., Inc. v. Newbridge Networks Corp.*, 168 F. Supp. 2d 181, 261 (D. Del. 2001) (excluding evidence withheld during discovery as privileged). Mr. McKibben should therefore be prohibited from testifying at trial on this topic.

K. Motion *in Limine* No. 11: To Preclude References to Hurricane Katrina, Terrorism or Virginia Tech

Facebook moves to exclude any evidence, testimony, or attorney argument regarding the role LTI claims it and/or its LeaderPhone and LeaderAlert products played in assisting the government in responding to Hurricane Katrina or fighting terrorism, as well as any speculation as to how LeaderAlert might have saved lives during the Virginia Tech shooting of April 16, 2007.

LTI has produced numerous documents that claim that the government of Louisiana used LeaderPhone and LeaderAlert during the Hurricane Katrina disaster. LTI has admitted that “[p]rimarily LeaderPhone” was involved in the response to Katrina, as well as adaptations of LeaderPhone and LeaderAlert. *See* Keyes Decl., Ex. 21 at 299:17-301:13. LTI has also produced documents that allege that LTI’s LeaderPhone and/or LeaderAlert products have been used by the Federal Government in fighting terrorism, as well as documents that allude to ways in which a system such as LeaderAlert could have saved lives at Virginia Tech.

LTI admitted that LeaderPhone and LeaderAlert do not practice the ’761 patent. *See id.*, Ex. 11 at 36:16-37:4, 39:4-12. Thus, any discussion of LTI in conjunction with Hurricane Katrina, fighting terrorism, or campus emergencies like Virginia Tech should not be permitted, as these subjects have no relevance to any of the claims or defenses in this case. *See* Fed. R. Evid. 401-402. The sole reason that LTI would apparently introduce evidence, testimony, or argument about these topics would be to play to jurors’ emotions. As introduction of such irrelevant evidence would also be highly confusing and prejudicial to Facebook, evidence, testimony, and attorney argument related to this topic should be excluded. *See* Fed. R. Evid. 403.

Based on the foregoing, Facebook respectfully requests that the Court exclude and testimony or documentary evidence, or mention of any evidence, regarding LTI in conjunction with Hurricane Katrina, fighting terrorism, or campus emergencies like Virginia Tech.

Dated: May 20, 2010

By: /s/ Steven L. Caponi
Steven L. Caponi (DE BAR #3484)
Blank Rome LLP
1201 Market Street, Suite 800
Wilmington, DE 19801
(302) 425-6400
FAX: (302) 425-6464

OF COUNSEL:

Heidi L. Keefe

Mark R. Weinstein

Jeffrey Norberg

Melissa H. Keyes

Elizabeth L. Stameshkin

Cooley LLP

3000 El Camino Real

5 Palo Alto Square, 4th Floor

Palo Alto, CA 94306

*Attorneys for Defendant and
Counterclaimant Facebook, Inc.*