

Exhibit 8

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 FUZZYSHARP TECHNOLOGIES, INC,

16 Plaintiff,

17 v.

18 NVIDIA CORPORATION,

19 Defendant.
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Case No. 12-cv-6375-JST

**DEFENDANT NVIDIA
CORPORATION'S MOTION TO
DISMISS PLAINTIFF FUZZYSHARP'S
AMENDED COMPLAINT PURSUANT
TO FED. R. CIV. P. 12(b)(6)**

Date: July 11, 2013
Time: 2:00 p.m.
Dept: Courtroom 9, 19th Floor
Judge: Jon S. Tigar

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. ISSUE STATEMENT PURSUANT TO L.R. 7-4(a)(3)**

- 3 1. Should Fuzzysharp’s Amended Complaint be dismissed with prejudice for failure to
4 state a claim because Fuzzysharp alleges only ongoing infringement of expired
5 patents?
- 6 2. Should Count Two of Fuzzysharp’s Amended Complaint be dismissed in its entirety
7 with prejudice because Fuzzysharp disregarded this Court’s prior Dismissal Order and
8 failed to correct fatal errors in its pleadings?
- 9 3. Should Fuzzysharp’s claims of willful infringement be dismissed with prejudice
10 because Fuzzysharp was unable or unwilling to plead facts supporting its allegations
11 as required by this Court’s prior Dismissal Order?

12 **II. INTRODUCTION**

13 Fuzzysharp’s Amended Complaint is its third attempt to allege colorable claims of patent
14 infringement against NVIDIA. Two years after dismissing its first suit, Fuzzysharp initiated the
15 present case with a complaint fraught with errors and unsupported by facts. Although Fuzzysharp
16 has now dropped its inadequately pled claims of indirect infringement, its Amended Complaint is
17 still fatally flawed, suffering from many of the same deficiencies that previously resulted in
18 dismissal of its complaint.

19 Once again, Fuzzysharp alleges that NVIDIA (or Intel) “*is engaged* in wilful (sic) . . .
20 infringement” of the asserted patents. Docket No. 29 (FAC) at ¶¶ 17, 19 (emphasis added).
21 Such allegations should be dismissed for two reasons. First, Fuzzysharp cannot, as a matter of
22 law, accuse NVIDIA of ongoing infringement because the asserted patents expired nearly six
23 months before Fuzzysharp filed suit. Second, Fuzzysharp has not pled facts that show NVIDIA
24 acted despite a high likelihood of infringing a known and valid patent, as required for willful
25 infringement. In responding to this Court’s determination that its willfulness pleadings were
26 insufficient, Fuzzysharp simply added an incorrect allegation that it sued NVIDIA in this District
27 on September 10, 2010. Docket No. 29 (FAC) at ¶ 15. Ignoring the errors in this statement,
28 Judge Armstrong’s ruling that the patents were invalid made mere notice of the patents

1 insufficient to support an inference that NVIDIA acted despite an objectively high likelihood that
2 its actions constituted infringement of a valid patent.

3 Moreover, Count Two of Fuzzysharp's Amended Complaint still alleges infringement of
4 an otherwise unidentified "'0479" patent by "Defendant Intel," a non-party to this action.
5 See Docket No. 29 (FAC) at ¶ 19. Fuzzysharp should not be afforded yet another opportunity to
6 articulate its claims at NVIDIA's expense when it is either unwilling or unable to cure
7 previously-identified deficiencies.

8 **III. FUZZYSHARP'S FAILED ATTEMPTS TO ASSERT CLAIMS AGAINST NVIDIA**

9 As set forth in NVIDIA's prior motion, Fuzzysharp first sued NVIDIA on U.S. Patent
10 Nos. 6,172,679 and 6,618,047 (the "'679 patent" and "'047 patent") on November 16, 2009,
11 just one month before all asserted claims of those patents were found invalid by Judge
12 Armstrong. See Freedman Decl., Ex. A (Docket Sheet for *Fuzzysharp Techs. Inc. v. NVIDIA et*
13 *al.*, Case No. 5:10-cv-01844 (N.D. Cal. filed Nov. 16, 2009) ("*NVIDIA I*"); see *Fuzzysharp*
14 *Techs. Inc. v. 3D Labs, Inc.*, No. C 09-5948 SBA, 2009 WL 4899215 (N.D. Cal. Dec. 11, 2009),
15 at *5 ("*3DLabs*"), vacated 447 Fed. App'x. 182 (Fed. Cir. 2011); see also Docket No. 18
16 (Motion) at 13-14; Docket No. 24 (Reply) at 3-5.¹ Following Judge Armstrong's invalidity ruling
17 in *3DLabs*, NVIDIA twice requested that Fuzzysharp dismiss its claims. Each time, Fuzzysharp
18 refused to do so, forcing NVIDIA to engage in a year of unnecessary litigation before Fuzzysharp
19 finally voluntarily dismissed its case when faced with the possibility of sanctions. See Freedman
20 Decl., Ex. A (*NVIDIA I* Docket Sheet); Ex. B (*NVIDIA I*, Docket No. 83 (Nov. 1, 2010 Notice of
21 Voluntary Dismissal)); Ex. C (*NVIDIA I*, Docket No. 86 (Nov. 4, 2010 Order)); Ex. D
22 (Transcript of Nov. 1, 2010 Proceedings Before Judge Ware in *NVIDIA I*) at 2-3, 10-11.

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25 ¹ To the extent necessary, NVIDIA respectfully requests that this Court take judicial notice of
26 Plaintiff's prior litigation, including the proceedings of *NVIDIA I* and *3DLabs*. See *Intrix-Plex*
27 *Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (internal quotations
28 omitted) (noting that "[a] court may take judicial notice of matters of public record without
converting a motion to dismiss into a motion for summary judgment, as long as the facts noticed
are not subject to reasonable dispute").

1 Cir. 2009)) (internal quotations and alterations omitted)).

2 **V. CONCLUSION**

3 NVIDIA respectfully requests that the Court dismiss the entirety of Fuzzysharp's
4 Amended Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).
5 The Amended Complaint, which alleges only ongoing infringement of expired patents, should be
6 dismissed with prejudice because it does not state a claim upon which relief can be granted.
7 In the alternative, all claims of willful infringement should be dismissed with prejudice because
8 Fuzzysharp has not and cannot allege facts to support such claims. Count Two should also be
9 dismissed with prejudice because Fuzzysharp failed to correct the same errors that resulted in
10 dismissal of its first complaint, and Fuzzysharp should no longer be permitted to assert the
11 '047 patent against NVIDIA.

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13 Dated: May 31, 2013

Orrick, Herrington & Sutcliffe LLP

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