

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NEUROVISION MEDICAL
PRODUCTS, INC.,

Plaintiff,

vs.

NUVASIVE, INC. and DOES 1 through
10, Inclusive,

Defendants.

Case No. 09-CV-6988 R (JEMx)

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
ATTORNEY'S FEES AND
COSTS**

Hearing Date: March 21, 2011
Hearing Time: 10:00 a.m.
Courtroom: 8

Trial Date: October 19, 2010

Before the Honorable Manuel L. Real

AND RELATED COUNTERCLAIMS.

1 Plaintiff Neurovision Medical Products, Inc.’s (“Plaintiff”) motion for
2 attorney’s fees – Doc. No. 200 – came before this Court for hearing on March 21,
3 2011. Having considered the motions, the parties’ supporting and opposing
4 documents, the pleadings and papers filed in this action, the evidence presented at
5 the trial in this matter and any argument of counsel presented at the hearing on the
6 motions,

7 IT IS HEREBY ORDERED that Plaintiff’s motion is GRANTED, but the
8 amount of the fees requested by Plaintiff is reduced, as set forth below.

9 This is an “exceptional case” under the Lanham Act because, *inter alia*,
10 defendant NuVasive, Inc. (“Defendant”) infringed upon Plaintiff’s trademark
11 willfully. *See Lindy Pen, Inc. v. Bic Pen Corp.*, 982 F.2d 1400 (9th Cir. 1993).
12 Accordingly, as recognized in *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th
13 Cir. 2008), this Court may in its discretion award Plaintiff its reasonable attorney’s
14 fees. Based on the evidence presented at trial and the jury’s findings, this Court
15 exercises its discretion and awards attorney’s fees and costs to Plaintiff and against
16 Defendant.

17 Pursuant to *Toussaint v. McCarthy*, 826 F.2d 901 (9th Cir. 1987), it is
18 plaintiff’s burden to document the hours worked and the reasonableness of
19 plaintiff’s counsel’s rate. It is then defendant’s burden to rebut that the number of
20 hours worked and the hourly rate were reasonable.

21 Plaintiff has largely carried its burden. Defendant largely has not. Plaintiff
22 submitted competent evidence that its counsel’s rates are commensurate with those
23 of attorneys of comparable skill, reputation and experience in the Central District of
24 California performing similar work. *See Welch v. Metro Life Insurance Co.*, 480
25 F.3d 942 (9th Cir. 2007). The Court disagrees that the paralegal time claimed by
26 Plaintiff’s counsel is more properly classified as secretarial work. Additionally, the
27 Court rejects Defendant’s blanket allegation that all work performed by Rincon
28 Venture Law Group, after Browne Woods George appeared in the case, was

1 duplicative. Defendant did not carry its burden of actually identifying duplicative
2 work or time entries. That said, Rincon Venture Law Group's total fee request is
3 reduced by 10 percent to account for the redacted time entries that obfuscate their
4 subject matter. And the award is reduced by \$36,669.70 for the failure to attach
5 Rincon Venture's June 2010 time records to the original moving papers. While the
6 records were attached to Plaintiff's reply papers, Plaintiff did not satisfy its burden
7 of documenting the hours expended in its motion papers.

8 Finally, Plaintiff has adequately documented its additional claimed costs.
9 Plaintiff has shown that it is the prevailing practice to bill those costs separate from
10 an attorney's hourly rate and that its counsel in this case billed those costs separate
11 from their hourly rate. Therefore, pursuant to *Grove v. Wells Fargo Financial*
12 *California, Inc.*, 606 F.3d 577, 583 (9th Cir. 2010), the additional costs claimed by
13 Plaintiff are taxable to Defendant, and the Court exercises its discretion to tax those
14 costs to Defendant.

15 Plaintiff claimed \$1,203,663 in attorney's fees and \$55,151 in additional
16 costs. For the reasons stated above, Plaintiff is awarded attorney's fees in the
17 amount of \$1,132,899 and additional costs in the amount of \$55,151. The clerk
18 previously awarded taxable costs to Plaintiff in the amount of \$29,179.70. (Doc.
19 No. 214.)

20 Therefore, the Court hereby orders the clerk to fill in the amount of
21 \$1,217,229.70 on the blank line on page 2, line 25 of the Judgment (Doc No. 187).

22
23
24
25 Dated: May 5, 2011


The Hon. Manuel L. Real
Judge of the United States District Court

1 Submitted by:

2 RINCON VENTURE LAW GROUP
3 K. Andrew Kent

4 BROWNE WOODS GEORGE LLP
5 Peter W. Ross
6 Benjamin D. Scheibe
7 Keith J. Wesley

8 By /s/ Peter W. Ross
9 Peter W. Ross
10 Attorneys for Plaintiff and Counter-Defendant
11 NEUROVISION MEDICAL PRODUCTS, INC.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 2121 Avenue of the Stars, 24th Floor,
Los Angeles, California 90067.

5 On May 5, 2011, I served the foregoing document described as: **[PROPOSED]**
6 **ORDER GRANTING PLAINTIFF’S MOTION FOR ATTORNEY’S FEES
AND COSTS** on the parties in this action by serving:

7 Anthony L. Press, Esq.
8 Scott C. Moore, Esq.
9 Morrison & Foerster, LLP
555 West Fifth Street
Los Angeles, CA 90013-1024

10 **By Envelope** - by placing the original a true copy thereof enclosed in sealed envelopes
11 addressed as above and delivering such envelopes:

12 **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and
13 processing correspondence for mailing. Under that practice it would be deposited with the U.S.
14 postal service on that same day with postage thereon fully prepaid at Los Angeles, California in
the ordinary course of business. I am aware that on motion of the party served, service is
presumed invalid if postal cancellation date or postage meter date is more than one day after date
of deposit for mailing in affidavit.

15 **By Personal Service:** I delivered such envelope by hand to the offices of the addressee(s).

16 **By Federal Express:** I caused the envelope(s) to be delivered to the Federal Express box at
17 2121 Avenue of the Stars, Los Angeles, California 90067, on _____, for delivery on
the next-business-day basis to the offices of the addressee(s).

18 **By Facsimile Transmission:** On _____ at _____ .m., I caused the above-named
19 document to be transmitted by facsimile transmission, from fax number 310-275-5697, to the
20 offices of the addressee(s) at the facsimile number(s) so indicated above. The transmission was
reported as complete and without error. A copy of the transmission report properly issued by the
transmitting facsimile machine is attached hereto.

21 **By E-Mail Electronic Transmission:** Based on a court order or an agreement of the parties
22 to accept service by e-mail or electronic transmission, I caused the documents to be sent to the
23 person(s) at the e-mail address(es) so indicated above. I did not receive, within a reasonable time
after the transmission, any electronic message or other indication that the transmission was
unsuccessful.

24 Executed on May 5, 2011, at Los Angeles, California.

25 **FEDERAL** I declare that I am employed in the office of a member of the bar of this
26 court at whose direction the service was made.

27 _____
G. Diane Torosyan