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MESIKA MAGIC & YIGAL MESIKA

**THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

MESIKA MAGIC, a California
corporation, YIGAL MESIKA, an
individual

Plaintiffs,

vs.

PENGUIN MAGIC, INC., a Nevada
corporation, CRAIG PETTY, a resident
of the United Kingdom, DOES 1-10,
inclusive,

Defendants

Case No.: 2:25-cv-07943-MWF-(MBKx)

**OPPOSITION TO PENGUIN MAGIC
INC.'S MOTION FOR ATTORNEYS'
FEES AND COSTS**

Date: October 21, 2026

Time: 10:00 A.M.

Judge: Hon. Michael W. Fitzgerald

Courtroom: 5A, 5th Floor

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Cases

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<i>Christian Research Inst. v. Alnor</i> (“CRI”), 165 Cal. App. 4th 1315 (2008)	7, 8
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<i>Ketchum v. Moses</i> , 24 Cal. 4th 1122 (2001)	7
<i>Mogck v. Unum Life Ins. Co. of Am.</i> , 289 F. Supp. 2d 1181 (S.D. Cal. 2003)	11
<i>Nadarajah v. Holder</i> , 569 F.3d 906 (9th Cir. 2009)	13
<i>Resolute Forest Prods., Inc. v. Greenpeace Int’l</i> , 302 F. Supp. 3d 1005 (N.D. Cal. 2017)	7
<i>Robinson v. Plourde</i> , 717 F. Supp. 2d 1092 (D. Haw. 2010)	11
<i>Rosenfeld v. U.S. Dep’t of Justice</i> , 904 F. Supp. 2d 988 (E.D. Cal. 2012)	13
<i>Salgado v. T-Mobile USA, Inc.</i> , 2020 WL 3100085, at *7 (E.D. Cal., June 11, 2020) ..	6, 11, 12, 13

Statutes

Cal. Civ. P. Code § 425.16(c)(1)	4, 6
Cal. Civ. P. Code § 425.17(c)	10

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Rule 12(b)(6)	5
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs MESIKA MAGIC and YIGAL MESIKA (collectively, “Plaintiffs”) respectfully oppose the Defendant PENGUIN MAGIC, INC.’s (“Penguin Magic”) Motion for Attorneys’ Fees and Costs (the “Motion”) for \$162,704.89 in attorneys’ fees and \$4,102.75 in costs under Fed. R. Civ. P. 54(d)(2) and Cal. Civ. P. Code § 425.16(c)(1).

While Cal. Civ. P. Code § 425.16(c)(1) provides for mandatory attorneys’ fees to a prevailing defendant on an anti-SLAPP motion, this Court’s August 4, 2026 Order (Dkt. 68) imposed exceptionally strict boundaries on what Penguin may seek. Specifically, this Court authorized Penguin’s counsel to move for fees incurred strictly in “drafting any sections of their Motions” that pertain directly to anti-SLAPP applicability and the specific speech-based counts dismissed on those grounds (Dkt. 68 at 29-30).

Rather than respecting this narrow judicial mandate, Penguin has submitted an egregiously inflated fee petition demanding \$199,791.64 in fees and costs. To manufacture this windfall, Penguin deployed an unsupportable, arbitrary 94.9% “word-count” apportionment formula across the entire litigation. Penguin uses this word-count fiction to impermissibly sweep in pre-litigation correspondence, a disposed first-round motion where anti-SLAPP merits were never reached, purely commercial business claims, non-drafting senior partner strategy updates, administrative overhead, and out-of-state travel.

As detailed below, Penguin’s fee motion fails under multiple independent legal standards. By rejecting Penguin’s flawed word-count premise, enforcing the strict wording of the August 4 Order, stripping away non-compensable litigation phases, and penalizing Polsinelli’s unyielding meet-and-confer posture under *Abittan v. Hansen*

Law Firm, P.C., slip opinion, Case No. 25-cv-05427-SVK, Dkt. No. 80 (N.D. Cal., May 4, 2026) this Court should reduce Penguin's lodestar by over \$132,600, capping any final award at no more than \$67,171.92 (or alternatively \$82,045.12).

The dismissal itself was driven not by the anti-SLAPP ruling but by an independent Rule 12(b)(6) and if Penguin Magic had filed only the 12(b)(6) motion, the outcome would have been identical.

The fee request makes no attempt to apportion between the anti-SLAPP prongs and the entirely distinct Rule 12(b)(6) motion despite Ninth Circuit authority requiring such apportionment.

For the reasons herein, the Court should deny Penguin Magic's Motion in full, or in the alternative, substantial cuts must be made.

SUMMARY OF PLAINTIFFS' PROPOSED LODESTAR REDUCTIONS

Overreach Category	Penguin Request	Recommended Cut	Legal & Factual Grounding
1. Pre-Motion Correspondence	\$14,645.92	-\$14,645.92 (100%)	Violates Court order limiting fees strictly to 'drafting sections of their Motions.'
2. Round 1 Motion to Dismiss	\$72,973.62	-\$72,973.62 (100%)	Court granted leave to amend & declined anti-SLAPP merits (<i>CRI v. Alnor</i>).
3. Flawed SAC Re-Briefing	\$75,085.35	-\$41,296.94 (55%)	SAC was 'largely analogous'; billing 80 hrs again is excessive (cut to

PLAINTIFFS' OPPOSITION TO PENGUIN MAGIC'S MOTION ATTY FEES

			20 hrs drafting).
4. Excessive Hearing Prep/Duplicative and Interoffice Billing	Included above	Included in R1/R2	Billed 26.5 hrs for 1 hearing; cut to reasonable 5 hrs total. Multi-partner cross-billing & interoffice meetings (<i>Mogck, Salgado</i>)
5. Non-Drafting Partners & Clerical	\$10,954.34	-\$10,954.34 (100%)	Weiss/Kirley partner strategy; Han/Miller clerical overhead (<i>Nadarajah; Davis</i>).
6. Chicago Travel Costs	\$2,483.95	-\$2,483.95 (100%)	Unreasonable out-of- state travel; Polsinelli has local LA co-counsel.
7. Fees-on-Fees Motion	\$32,984.00	-\$32,984.00 (100%)	Denied in full under <i>Abittan</i> for unyielding posture & inflated petition.

Note: Primary Recommendation (Scenario A) denies Fees-on-Fees under *Abittan* (Total Award: **\$67,171.92**). Alternative Scenario B applies a 50% cut to Fees-on-Fees (Total Award: **\$83,663.92**).

II. LEGAL STANDARD GOVERNING ANTI-SLAPP FEE AWARDS

California's anti-SLAPP fee-shifting provision, Cal. Civ. P. Code § 425.16(c)(1), is intended to reimburse a prevailing defendant for fees incurred in moving to strike

PLAINTIFFS' OPPOSITION TO PENGUIN MAGIC'S MOTION ATTY FEES

1 protected claims.

2 However, “[t]he defendant may recover fees and costs only for the motion to
3 strike, not the entire litigation.” *Christian Rsch. Inst. v. Alnor*, 165 Cal. App. 4th 1315,
4 1320 (2008) (“CRI”). Additionally, where the Court grants in part and denies in part an
5 anti-SLAPP motion, “the Defendants are entitled to recover attorney fees and costs
6 incurred in moving to strike the claims on which ... they prevailed, but not fees and
7 costs incurred in moving to strike the remaining claims.” *Resolute Forest Prods., Inc.*
8 *v. Greenpeace Int’l*, 302 F. Supp. 3d 1005, 1027 (N.D. Cal. 2017).

9 Moreover, California courts and the Ninth Circuit strictly enforce apportionment
10 and reasonableness. As the California Supreme Court established in *Ketchum v. Moses*,
11 24 Cal. 4th 1122, 1133 (2001), “The Legislature... did not intend recovery of fees and
12 costs as a windfall.” Trial courts must exclude hours that are inefficient, duplicative,
13 padded, or clerical. Furthermore, where a fee applicant submits an outrageously
14 inflated request, “a severer reaction is needful,” permitting the court to heavily reduce
15 or entirely deny fee categories. *Christian Research Inst. v. Alnor* (“CRI”), 165 Cal.
16 App. 4th 1315, 1322 (2008).

17 III. ARGUMENT

18 **A. The Court’s August 4, 2026 Order Narrowly Limited Recovery to “Drafting** 19 **Sections of the Motions,” Not General Defense Efforts**

20 Penguin's motion incorrectly assumes it is entitled to recover all fees “reasonably
21 related to defending the action.” This directly contradicts the Court's August 4, 2026
22 Order, Dkt. No. 68. The Court did not authorize general defense reimbursement.
23 Instead, it expressly authorized Penguin to move for fees incurred strictly in “drafting
24 any sections of their Motions that pertain to (1) the applicability of the anti-SLAPP
25

1 statute; and (2) the counts identified as arising from protected speech.” (Dkt. 68, at 29-
2 30).

3 “Drafting sections of the Motions” is not synonymous with every litigation
4 activity a lawyer claims contributed to those motions from the filing of the original
5 complaint. Penguin acknowledges that the Court imposed a specific limitation, yet
6 relies on broad anti-SLAPP case law to erase that restriction. This Court must enforce
7 its own order and reject any billing that falls outside actual brief drafting.

8 **(1) Penguin’s Request for Pre-Motion Correspondence Fees Is Unauthorized**
9 **(\$14,645.92)**

10 Penguin seeks \$14,645.92 (17.3 apportioned hours) for drafting a six-page pre-
11 litigation meet-and-confer letter in September 2025. Pre-litigation correspondence sent
12 before a complaint is answered or a motion is drafted cannot, as a matter of law,
13 constitute “drafting sections of their Motions.” California law does not permit anti-
14 SLAPP fee shifting for pre-motion letters aimed at preventing a filing. Because pre-
15 motion work falls entirely outside the Court's narrow order, this \$14,645.92 category
16 must be reduced to \$0.00.

17
18 **(2) Fees Incurred on the First Motion to Dismiss Are Not Compensable (\$72,973.62)**

19 Penguin demands \$72,973.62 (84.6 apportioned hours) for its First Motion to
20 Dismiss (Dkt. 25). This request fails because Penguin was not a prevailing anti-SLAPP
21 party in its first Motion to Dismiss. In its March 12, 2026 Order (Dkt. 42), this Court
22 granted the motion under Rule 12(b)(6) with leave to amend and explicitly stated that it
23 “d[id] not reach the two-prong analysis provided by the anti-SLAPP statute.” (Dkt. 42,
24 at 12).

25 Under California law, a defendant is not entitled to anti-SLAPP fees for an
earlier pleading round when the court declined to rule on anti-SLAPP merits and

1 granted leave to amend on 12(b)(6) grounds. As confirmed in *CRI v. Alnor*, 165 Cal.
2 App. 4th at 1320, a defendant recovers fees “only for the motion to strike, not the
3 entire litigation.” Work on a disposed motion resolved on ordinary pleading
4 deficiencies is non-compensable litigation overhead. This entire \$72,973.62 must be
5 excluded.

6 **(3) Penguin’s 94.9% “Word Count” Methodology Is Conceptually Flawed and Must Be**
7 **Rejected**

8 To establish its apportionment, Penguin counted words across four briefs,
9 concluded arbitrarily, out of thin air, 94.9% concerned compensable topics, and applied
10 that fraction across the board to every activity, including tasks having nothing to do
11 with writing briefs. This methodology is fundamentally flawed. See Declaration of
12 Arkady Itkin, paragraph 3. The word length of an argument bears no rational
13 relationship to the time spent researching or drafting it. See Declaration of Arkady
14 Itkin, paragraph 3 (“As an empirical measure of billable attorney effort, word counts
15 bear no rational relationship to actual labor.”). Short, complex legal arguments can
16 require dozens of research hours, while long factual recitations require minimal legal
17 effort, including copying-and-pasting from a prior motion to dismiss. See Declaration
18 of Frederic M. Douglas, paragraph 12 for discussion as to how Penguin Magic’s
19 calculations are artificially inflated as to percentages.

20 Penguin admits it never determined how much attorney time was actually spent
21 on compensable work versus non-compensable work. Furthermore, applying a brief
22 word-count ratio to pre-motion correspondence, administrative filing, and travel
23 expenses is absurd. Because the 94.9% premise lacks an empirical basis in actual
24 billable work allocation, the Court should reject it entirely.

25 Moreover, Penguin's word count improperly sweeps in Counts 7 and 8. See
Declaration of Arkady Itkin, paragraph 3. Count 7 focused on false commercial

1 reviews on retail store pages and Count 8 focused on physical product copying of
2 LOOPS (the “TIES” knockoff). See Declaration of Frederic M. Douglas, paragraphs
3 10, 11. Under Cal. Civ. P. Code § 425.17(c), commercial product copying and retail
4 descriptions do not constitute protected speech. Including these commercial business
5 claims in the compensable numerator was an overreach. Excluding Counts 6-8 and 10
6 reduces any proper apportionment rate to no more than 60% to 70%.

7 **(4) Penguin’s Billed Hours for the Renewed Motion Are Grossly Excessive Given the**
8 **“Largely Analogous” Pleading**

9 Penguin claims to have billed 82.1 hours (\$75,085.35 apportioned) on its
10 Renewed Motion to Dismiss (Dkt. 49). Yet the Court observed that the Second
11 Amended Complaint was “largely analogous” to the First (Dkt. 68 at 3). Billing 80+
12 hours on a second motion as if starting from scratch is unreasonable. Since the legal
13 research and framework were already complete, drafting the renewed motion should
14 have required no more than 20 hours. See Declaration of Arkady Itkin, paragraph 4.

15 Furthermore, Penguin's specific billing for motion hearing preparation is
16 outrageously inflated. On the first motion, Mark Deming billed 22.7 hours preparing
17 for the February 2, 2026 hearing, plus 3.8 hours “assessing the hearing and tentative
18 ruling,” totaling 26.5 hours around a single hearing after the briefs were fully
19 submitted. See Declaration of Arkady Itkin, paragraph 5. This 3.8 hours for
20 “assessing” the tentative ruling is abusive. The tentative ruling was distributed at the
21 February 2, 2026 hearing in hard copy, so no “assessing tentative ruling” was
22 necessary. See, Declaration of Frederic M. Douglas, concurrently filed, at paragraphs
23 13-14.

24 On the renewed motion, counsel again billed 12+ hours for hearing prep.
25 Hearing preparation for a fully briefed motion should take 1 to 2 hours (and no more
than 5 hours total). The Court should slash these padded hearing preparation hours.

(5) Pervasive Interoffice Conferences, Internal Communications, and Duplicative Multi-Attorney Review Must Be Stricken Under Mogck, Robinson, and Salgado

Hearing preparation for a fully briefed motion should take 1 to 2 hours (and no more than 5 hours total). Spending 26.5 hours relating to a single hearing is grossly excessive and inefficient. See Declaration of Arkady Itkin, paragraph 5. The Court should slash these padded hearing preparation hours.

In addition to padding hearing preparation hours, Polsinelli's billing ledger (Exhibit A, Dkt. No. 72-3) is replete with improper interoffice communications, partner-to-partner consultations, and duplicative multi-attorney review. See Declaration of Arkady Itkin, paragraph 6. Federal courts in California firmly establish that an adversary cannot be billed for internal attorney communications or multi-lawyer duplication. See Declaration of Frederic M. Douglas, paragraphs 8, 9. In *Salgado v. T-Mobile USA, Inc.*, 2020 WL 3100085, at *7 (E.D. Cal., June 11, 2020), the court explicitly held: "In general, counsel should not bill for attending the same meetings, internal communications, and communicating with each other, as such time is unnecessary... Duplicated tasks should not be included in a lodestar calculation." Similarly, in *Robinson v. Plourde*, 717 F. Supp. 2d 1092, 1099 (D. Haw. 2010), the court enforced the general rule that "two professionals cannot bill for attending the same meeting... Thus, when a party's counsel meet with one another, the Court deducts the duplicative time billed." See also *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1195 (S.D. Cal. 2003) (disallowing hours where attorneys inappropriately billed for communicating with one another and where multiple attorneys each billed for reviewing the exact same court ruling).

A review of Polsinelli's itemized ledger (Exhibit A, Dkt. No. 72-3) reveals systemic violations of these principles across every phase of the litigation:

1 **1. Triple-Partner Billing for Initial Complaint Analysis (August 25, 2025):** On
2 August 25, 2025, three high-rate shareholders—J. Morgan Kirley (\$840/hr; 0.6 hrs),
3 Adam S. Weiss (\$1,070/hr; 1.3 hrs), and Mark T. Deming (\$885/hr; 2.2 hrs)—billed a
4 combined \$3,842.00 on a single day for analyzing the exact same complaint and
5 holding the exact same client conference. Under *Robinson* and *Mogck*, three senior
6 partners cannot all bill an opponent for attending the same meeting and analyzing the
7 same document. See Declaration of Frederic M. Douglas, paragraph 9.

8 **2. Four-Lawyer Overlapping Revisions on Single Briefs (Nov. 18-19 & Dec. 12-15,**
9 **2025):**

10 On November 18-19, 2025, Associate Miya Yusa, Shareholders Adam Weiss
11 and Mark Deming, and Principal Adam Daniels all separately billed to “revise” the
12 draft a First Motion to Dismiss. Likewise, between December 12 and 15, 2025, after
13 Principal Josh Rayes spent 16.4 hours drafting the First Motion Reply, Deming, Kirley,
14 Weiss, and Daniels all billed to “revise” Rayes's draft. Under *Salgado*, piling four
15 senior attorneys onto the draft of an experienced principal constitutes non-compensable
16 overstaffing.

17 **3. Multi-Attorney Double and Triple Billing for Assessing Orders (Feb. 2, 2026):**

18 On February 2, 2026, Weiss (\$472.00), Rayes (\$420.00), and Deming
19 (\$3,705.00) billed over \$4,597.00 to “assess” the court's tentative order. *Mogck*
20 explicitly forbids entries where multiple attorneys each bill for reviewing the exact
21 same judicial ruling. The tentative ruling was distributed at the February 2, 2026
22 hearing in hard copy, so no “assessing tentative ruling” was necessary. See,
23 Declaration of Frederic M. Douglas, concurrently filed, at paragraphs 13-14.

24 **4. Daily Interoffice 'Strategizing' Loop (July 16-22, 2026):**

25 Between July 16 and July 22, 2026, Weiss and Deming engaged in a multi-day
loop of internal interoffice consultations, billing daily for 'Strategizing' and
'Strategizing about post-hearing briefing.' Under *Mogck* and *Salgado*, interoffice cross-

1 billing and internal consultations are non-compensable firm overhead that must be
2 excluded.

3 Because these pervasive internal communications and duplicative entries inflate
4 every phase of Polsinelli's ledger, this Court should enforce *Mogck* and *Salgado* by
5 excising these overlapping hours or applying an additional 20% to 30% across-the-
6 board lodestar reduction.

7 **(6) Penguin's Billed Hours for Non-Drafting Partners "Strategizing" and Clerical Staff**
8 **Time Must be Excluded (\$10,954.34)**

9 The Polsinelli firm deployed eight timekeepers, including five
10 partners/shareholders. Shareholders Adam Weiss (\$1,180/hr) and Morgan Kirley
11 (\$925/hr) billed substantial hours for "senior strategy review" and "client counseling"
12 (Deming Decl., Dkt. No. 72-2, ¶ 4). Internal partner strategy and client updates do not
13 constitute "drafting sections of the Motions" as ordered. Under Ninth Circuit law,
14 duplicative partner oversight is non-compensable overhead. *Rosenfeld v. U.S. Dep't of*
15 *Justice*, 904 F. Supp. 2d 988, 1002 (E.D. Cal. 2012). Cutting Weiss and Kirley's
16 remaining renewed-motion hours saves \$8,637.80.

17 Additionally, Penguin seeks \$2,316.54 for non-attorney IP Specialist Jasmine
18 Han (\$325/hr) and Paralegal Joncilee Miller (\$335/hr) for "docketing, filing, and
19 record assembly." In *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009), the
20 Ninth Circuit explicitly held that filing and document-organization work is clerical and
21 must be subsumed into law firm overhead rather than billed to an adversary. See also
22 *Davis v. City & Cty. of San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992). See
23 Declaration of Arkady Itkin, paragraph 7. All clerical hours (\$2,316.54, pre-
24 apportionment) must be stricken.
25

1 **B. Out-Of State Travel Expenses Are Unreasonable and Non-Recoverable**
2 **(\$2,483.95)**

3 Penguin requests \$4,102.75 in travel expenses for Chicago partner Mark Deming
4 to fly to Los Angeles. Travel costs for the first motion (\$1,618.79) are non-recoverable
5 as that phase is excluded. The remaining \$2,483.95 for the July 16, 2026 hearing
6 (including an \$1,811.80 flight and \$374.65 hotel) was completely unreasonable.
7 Polsinelli PC maintains a prominent Los Angeles office¹ with local co-counsel Adam
8 Daniels² (Principal, 15+ yrs experience, \$885/hr) of record. Flying in a Chicago partner
9 at vast expense to argue a routine pleading motion when qualified local counsel was
10 present was an unnecessary luxury. *Davis*, 976 F.2d at 1543. See Declaration of
11 Arkady Itkin, paragraph 8. Travel costs must be denied.

12 **C. Penguin's "Fees-On-Fees" Request Should Be Denied in Full Under Abittan**
13 **(\$32,984.00)**

14 Penguin demands an additional \$32,984.00 for 33.2 hours billed strictly to
15 prepare the present fee petition (a 4,877-word brief). Billing \$33,000 for a boilerplate
16 fee petition using familiar case law and existing billing records is egregiously inflated.
17 See Declaration of Arkady Itkin, paragraph 9.

18 Crucially, in *Abittan v. Hansen Law Firm, P.C.*, 2026 WL 1215531, at *3 (N.D.
19 Cal., May 4, 2026), the federal court denied all fees for negotiating and bringing the
20 fee motion because the defendants refused to compromise during meet-and-confers,
21 failed to propose reasonable apportionments, and filed an inflated petition. Here,
22 Penguin's attorneys maintained an unyielding position during the Local Rule 7-3
23 conference, demanding a 94.9% windfall and insisting that product copying is

24 ¹ See Polsinelli firm website, listing 89 staff members at its Los Angeles office, at
25 [https://www.polsinelli.com/people?search\[post_type\]=person&search\[office_location\]](https://www.polsinelli.com/people?search[post_type]=person&search[office_location]=14663)
 =14663.

² See Mr. Daniels' profile at <https://www.polsinelli.com/adam-p-daniels/>.

1 “protected speech.” See Declaration of Frederic M. Douglas, paragraph 6. Because the
2 law firm forced an avoidable motion by demanding an unreasonable fee, this Court
3 should follow *Abittan* and deny the entire \$32,984.00 fee-petition request. At a
4 minimum, the fee-petition request should be cut by 50% to \$16,492.00.

5 6 **IV. CONCLUSION**

7 For the foregoing reasons, Plaintiffs Mesika Magic and Yigal Mesika
8 respectfully request that this Court reject Penguin's overreaching demands. The Court
9 should systematically reduce the lodestar to reflect the strict parameters of its August
10 4, 2026 Order, entering a final attorneys' fee and cost award of no more than
11 \$67,171.92 (primary recommendation under *Abittan*) or \$83,663.92 (Alternative
12 Scenario B).

13 September 30, 2026

Respectfully submitted,

16 /s/ Frederic M. Douglas

17 Frederic M. Douglas
18 Attorney for Plaintiffs
19 MESIKA MAGIC and YIGAL MESIKA

20 The undersigned counsel of record for Plaintiffs certifies that this brief
21 contains 2,919 words, which complies with the word limit of L.R. 11-6.1.

22 /s/ Frederic M. Douglas

23 Frederic M. Douglas
24 Attorney for Plaintiff
25 MESIKA MAGIC and YIGAL MESIKA
September 30, 2026