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23 SUPERIOR COURT OF THE STATE OF CALIFORNIA
24 COUNTY OF LOS ANGELES

25 **Ashley Chung**, an individual, and **Claude**
26 **Chung**, an individual,
27
28 Plaintiffs,

v.

Penske Media Corporation, a Delaware
Corporation, **Cristina Cheever**, an
individual, and **Does 1–50**, inclusive,
Defendants.

This document relates to:
AND CONSOLIDATED ACTION

Lead Case No.: 18STCV10039

Consolidated with Case No.: 19STCV02905,
Benson v. Penske Media Corp., et al.

**Plaintiffs’ Joint Memorandum of Points &
Authorities in Opposition to Defendant Penske
Media Corporation’s Motion for Summary
Judgment**

Date: December 10, 2021
Time: 10:30 a.m.
Dept.: 62
Judge: Hon. Michael L. Stern

Chung Complaint Filed: December 26, 2018
Benson Complaint Filed: January 28, 2019
Trial Date: July 24, 2023

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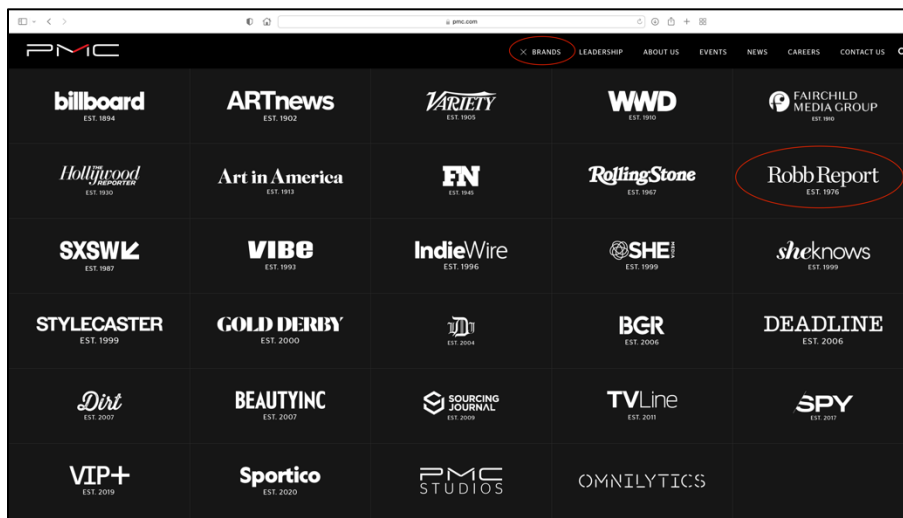
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1 **BACKGROUND**

2 **1. Robb Report is a key part of PMC’s global media enterprise.**

3 PMC holds itself out as “the world’s premier publishing and media organization” (PCOE
4 519),¹ with a “monthly audience of more than 310 million” people worldwide. (*Ibid.*) PMC reaches
5 its audience through roughly 30 publications “across a number of different sectors such as
6 entertainment, fashion, music, luxury, art, technology.” (PCOE 238, 519.) The list of publications in
7 PMC’s media empire includes everything from household names (e.g., *Rolling Stone*, *Variety*, *Vibe*),
8 to more niche products (e.g., *Dirt*, *ARTnews*, *sheknows*).

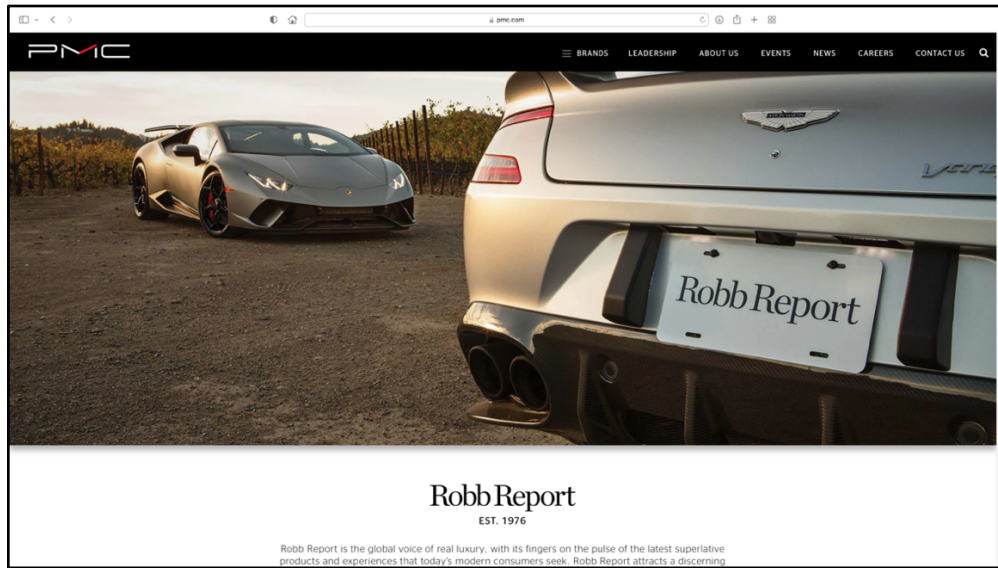


18 (PCOE 521.)

19 *Robb Report* is one of PMC’s publications. On its website, PMC describes *Robb Report* as a
20 journal for “a discerning audience with a shared appreciation” for “true luxury,” and “features content
21 from the world’s foremost experts” on “the latest superlative products” in “every luxury category.”
22 (PCOE 521.) According to PMC, *Robb Report* is “[w]idely regarded as the single most influential
23 journal of living life to the fullest” (PCOE 521), and what “the most successful people rely on to
24 discover the ideas, opinions, products, and experiences that will matter most to them.” (PCOE 525.)
25 In other words, *Robb Report* is for people interested in sprawling mansions, big yachts, private jets,
26 fast cars, expensive watches, designer suits, exotic travel, and gourmet food.

27

28 ¹ Citations to “Plaintiffs’ Compendium of Evidence” appear as (PCOE XXX). Citations to “Plaintiffs’ Additional Material Facts” in their separate statements appear as (PAMF #X). Citations to PMC’s memorandum of points and authorities appear as (Def.’s Memo. at p. X).



(PCOE 521A.)

2. PMC exerted control over Robb Report and its employees.

But PMC does not publish *Robb Report* for purely hedonistic reasons. As “the global voice of real luxury” (PCOE 521), *Robb Report* gave PMC access to a powerful audience: “[M]ore than 1 million global CEOs and business thought-leaders in markets that impact the world.” (PCOE 525.) In other words, PMC uses *Robb Report* to influence the world’s influencers.

Given its prominent role in PMC’s global media enterprise, it is no surprise that PMC exerts significant control over *Robb Report*. PMC is the majority owner (50.1%) of Robb Report Media, LLC (“Robb Report”), the PMC subsidiary that publishes *Robb Report*. (PCOE 065.) And under Robb Report’s operating agreement, “the Officers ... in control of the day-to-day operations of [Robb Report] ... hold similar roles at PMC.” (PCOE 037; PAMF #8–17.) For example:

Officer	PMC	Robb Report
CEO	Jay Penske	Jay Penske
COO	George Grobar	George Grobar
General Counsel	Todd Greene	Todd Greene
Deputy General Counsel	Judith Margolin	Judith Margolin
Senior VP of Finance	Ken DelAlcazar	Ken DelAlcazar
Executive VP, Operations & Finance	Thomas Finn	Thomas Finn
VP of Finance / Controller	Young Ko	Young Ko
Senior VP of Business Development	Craig Perrault	Craig Perrault
Senior Director of Human Resources	Anne Doyle	Anne Doyle

1 Even the one Robb Report manager who was *not* a PMC employee (David Arnold) reported
2 directly to PMC’s “Executive Vice President, Operations and Finance.” (PAMF #18.)

3 The overlap between PMC and Robb Report’s officers is particularly significant here because
4 PMC has effectively neutralized Robb Report’s Board of Directors.

5 Robb Report’s operating agreement calls for a five-member Board, with PMC and Robb
6 Report’s other owner (Robb Intermediate Holdings) each filling two seats. (PCOE 034–035.) The
7 crucial, tie-breaking fifth seat must be filled by a joint selection “who is not an employee” of either
8 PMC or Robb Intermediate Holdings. (PCOE 035.) But despite an obligation “to ensure that the
9 number of managers constituting the Board is at all times five (5) members,” PMC has allowed the
10 Board to persist indefinitely with just *four* members. (PCOE 228, 360–361.) The resulting deadlock
11 effectively gives PMC officers free-reign over Robb Report. (PAMF #19–21.)

12 Given PMC’s control over Robb Report, it is no surprise PMC openly regards Robb Report
13 not as a separate company, but as an “operating unit” within PMC itself. (PCOE 438; PAMF #22.) For
14 example:

- 15 • PMC’s “Executive Vice-President of Operations and Finance” set Robb
16 Report’s budget. (PAMF #23.)
- 17 • PMC’s finance department served as Robb Report’s bookkeeper and
18 accountant, and prepared its financial statements. (PAMF #24.)
- 19 • PMC’s HR department handled HR for Robb Report. (PCOE 246–247.)
- 20 • PMC’s IT department handled IT for Robb Report. (PCOE 353.)
- 21 • PMC’s risk-management department handled risk-management for Robb
22 Report. (PCOE 455.)
- 23 • PMC provides Robb Report’s only liability-insurance policy. (PCOE 091.)
- 24 • PMC’s legal department served as Rob Report’s in-house counsel, and thus
25 approved all of Robb Report’s “licensing agreements,” “debt acquisition,”
26 and employment contracts. (PCOE 379–382.)

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1 Given that PMC regards Robb Report as a “business unit” within PMC, it is no surprise PMC
2 controls many aspects of the employment relationship with Robb Report employees:

- 3 • PMC recruits and interviews Robb Report employees. (PAMF #31.)
- 4 • PMC sends Robb Report employees their offer-letters on PMC letterhead
5 signed by PMC’s HR director. (PAMF #32.)
- 6 • PMC issues an employee handbook to all Robb Report employees. (PAMF
7 #33.)
- 8 • PMC maintains all of the HR records for Robb Report employees. (PAMF
9 #34.)
- 10 • PMC provides Robb Report employees with their health, dental, vision,
11 disability, and life-insurance coverage, and workers-compensation benefits.
12 (PAMF #35.)
- 13 • PMC maintains 401k plans for Robb Report employees. (PAMF #36.)
- 14 • PMC handled payroll for Robb Report employees and issued their checks.
15 (PAMF #37.)
- 16 • PMC had to approve salary increases and bonuses for Robb Report
17 employees. (PAMF #38.)
- 18 • PMC provided fringe benefits to Robb Report employees, including PMC’s
19 “corporate apartment” in Los Angeles. (PAMF #39.)
- 20 • PMC’s “Travel & Entertainment Expense Policy” applied to Robb Report
21 employees, and Robb Report employees had to submit their expense
22 requests to PMC for approval and reimbursement. (PAMF #40.)

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3. PMC acted as one of Cheever’s employers.

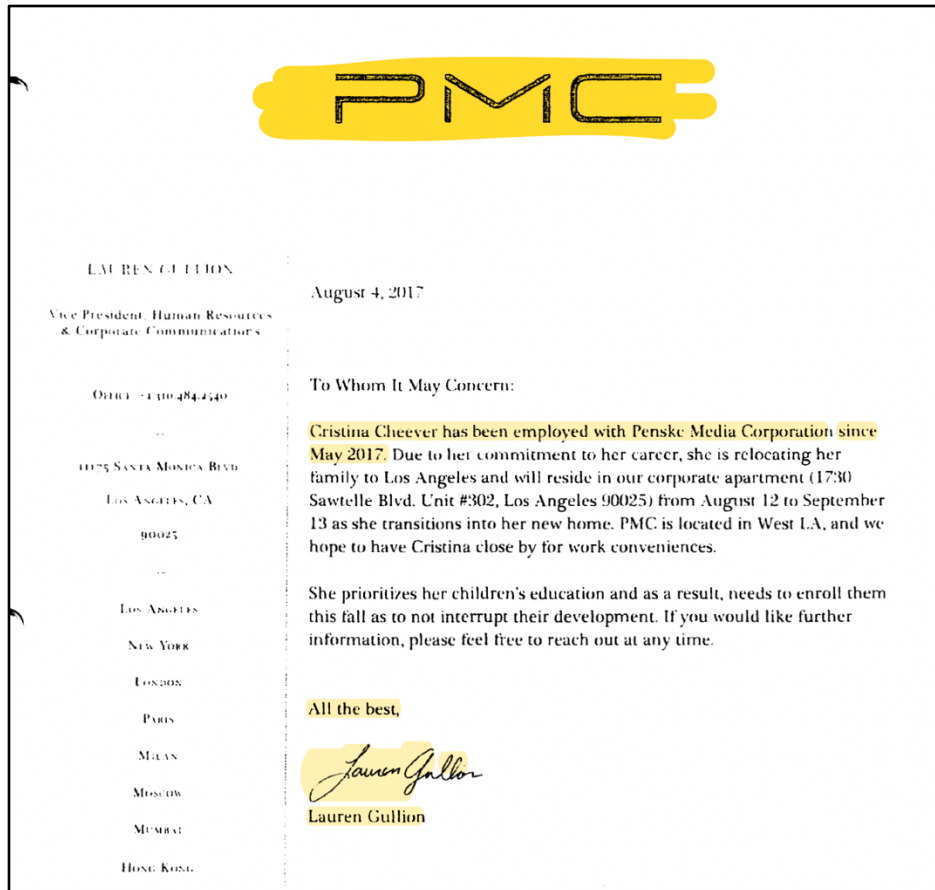
Cristina Cheever was one of the employees assigned to *Robb Report*. Not surprisingly, PMC controls many aspects of Cheever’s employment experience:

- PMC’s CEO (Penske) and COO (Grobar) interviewed Cheever. (PAMF #42.)
- PMC conducted Cheever’s reference check, which a PMC employee documented on PMC letterhead. (PCOE 171.)
- PMC’s HR department sent Cheever her offer-letter on PMC letterhead signed by PMC’s HR director. (PCOE 079–081; PAMF #44.)
- PMC approved Cheever’s salary increases and commissions. (PAMF #45.)
- PMC provided Cheever’s workers-compensation benefits. (PCOE 103.)

1 And PMC controls aspects of Cheever’s day-to-day job:

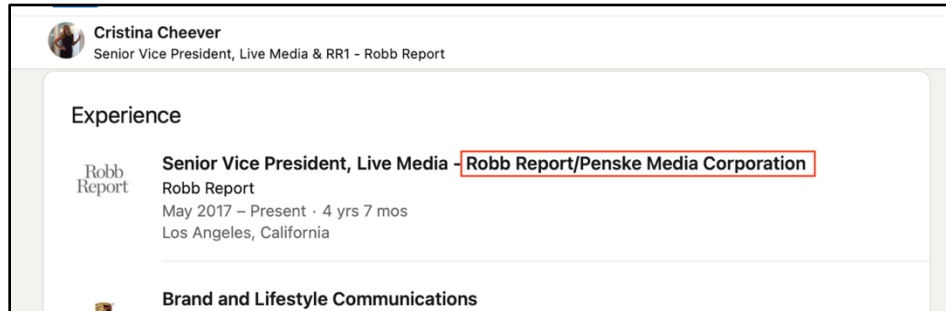
- 2 • Cheever “reports directly to ... *PMC’s Chief Operating Officer*” (Grobar)
3 according to her offer-letter. (PCOE 079, italics added.)
- 4 • Cheever is required to follow PMC’s policies and procedures. (PAMF #49.)
- 5 • Cheever is required to follow PMC’s “Travel & Entertainment Expense
6 Policy” and submit expenses to PMC. (PAMF #50.)
- 7 • Cheever had regular meetings with PMC officers regarding the live events
8 she was hired to oversee. (PAMF #51.)

9 Not surprisingly, PMC held Cheever out as a PMC employee. For example, in an effort to help
10 Cheever secure temporary housing near PMC headquarters in Los Angeles, PMC’s HR director
11 (Lauren Gullion) provided a letter on PMC letterhead stating that “Cheever has been employed with
12 **Penske Media Corporation** since May 2017.” (PCOE 089, boldface added.) The letter further stated
13 that “**PMC** is located in West L.A., and we hope to have Cristina close by work for convenience.”
14 (*Ibid.*, boldface added.)



(PCOE 089.)

1 Also not surprisingly, Cheever held PMC out as her employer. For example, in her profile on
2 a popular social-media networking website (“LinkedIn”), Cheever lists her employer as “Robb
3 Report/Penske Media Corporation.” (PCOE 523, boldface added.)



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9 (PCOE 523.)

10 As “Senior Vice President, Live Media” for “Robb Report/Penske Media Corporation,”
11 Cheever was “responsible for managing and running” Robb Report’s “Live Media & Events division,”
12 which PMC described as the “most dynamic part of Robb Report business operations.” (PAMF #57.)
13 Cheever was responsible for *Robb Report*’s “Car of the Year Event,” a showcase for high-performance
14 cars. (PCOE 326.) Among other things the event involved driving events on public roads.

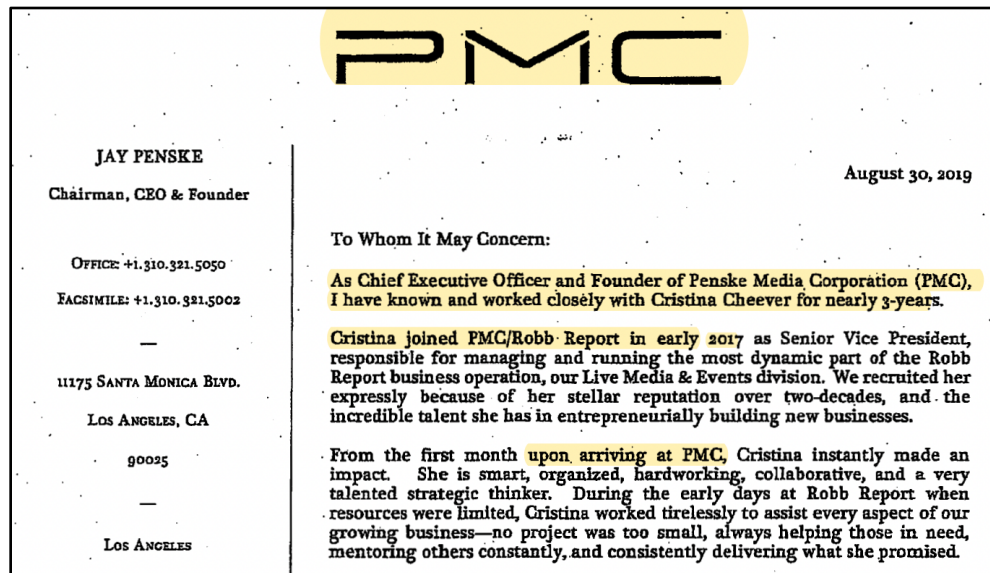
15 With a mix of fast cars and hedonism, collisions were inevitable. Indeed, there were two
16 crashes at the 2018 event alone. The first occurred when a driver lost control of a Ferrari 812 Superfast,
17 rendering it a total loss. (PAMF #58.) The second occurred when Cheever was showcasing a Mustang
18 for a representative of Korean Airlines (Chung), a PMC advertiser. Driving 80 mph on a narrow road
19 with a 55 mph speed limit (PCOE 480–481), Cheever lost control and smashed into Taryn and Phillip
20 Benson. Taryn, Phillip, and Chung all suffered catastrophic injuries that will require lifetime care.



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28 (PCOE 529.)

1 Cheever was also injured in the crash. Cheever received workers-compensation benefits under
2 PMC’s policy with Argo Insurance. (PAMF #46.) To obtain those benefits, Cheever filed an
3 application with Argo in which Cheever represented that she was injured in an “Employment Related
4 Accident,” and listed “**Penske Media Corp.**” as her employer. (PCOE 105, boldface added.)

5 Cheever was criminally prosecuted for the crash. In an effort to garner sympathy from the
6 judge overseeing Cheever’s case, PMC’s CEO (Penske) submitted a letter on Cheever’s behalf in
7 which he characterized Cheever as a PMC employee. (PCOE 517.) Specifically, writing on PMC
8 letterhead and identifying himself only as **PMC’s CEO**, Penske stated that Cheever “**joined**
9 **PMC/Robb Report in early 2017,**” had an impact on others “**upon arriving at PMC,**” and had “the
10 qualities we desire most in **an employee at PMC.**” (PCOE 517, boldface added.)



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20 (PCOE 517.)

21 The one Robb Report manager who was *not* a PMC officer (David Arnold) wanted to fire
22 Cheever. (PCOE 475.) But the PMC’s officers in charge of Robb Report wanted to keep her. (PCOE
23 253–255.)

24 PMC’s officers got their way: Cheever was retained and PMC’s General Counsel (Todd
25 Greene) issued her a letter of reprimand. (PAMF #64.) Cheever was placed on probation, which PMC’s
26 CEO (Penske) and General Counsel (Greene) supervised. (PAMF #65.) As a condition of her
27 probation, Cheever was required to undergo internal training by PMC’s HR department, and had
28 regular safety meetings with PMC officers regarding risk-management at live events. (PAMF #66.)

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STANDARD OF REVIEW

In California, litigants enjoy a right to a jury in civil cases. (Cal. Const., art. I, § 16 [“Trial by jury is an inviolate right and shall be secured to all”].) Because it deprives that right, “[s]ummary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing party.” (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 436.)

A trial court’s role in reviewing a motion for summary judgment is to determine whether disputed questions of fact exist, “not to decide the merits of the issue themselves.” (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441.) This involves a two-step process:

First, a defendant seeking summary judgment must show there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant cannot meet that burden with “conclusory assertions.” (*Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 173.) Instead, the defendant has an affirmative duty to “present facts to negate an essential element or to establish a defense.” (*Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 462.) If it fails to do so, the motion for summary judgment *must* be denied without further analysis. (*Ibid.*)

Second, if the defendant presents evidence that negates an essential element of the plaintiff’s case (or establishes an affirmative defense), the burden shifts to the plaintiff to “demonstrate the existence of a triable, material issue of fact.” (*Archdale, supra*, 154 Cal.App.4th at p. 462.)

In conducting this two-part analysis, a trial court must view all evidence “in the light most favorable to the opposing party.” (*Aguilar, supra*, 25 Cal.4th at p. 843.) To that end, a trial court must [1] strictly construe the moving party’s evidence (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97); [2] liberally construe the opposing party’s evidence (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 191); and [3] resolve any doubts about the evidence in favor of the opposing party. (*Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1259.)

Finally, a summary judgment cannot be based on evidence a moving party offers in support of its reply. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

1 Whether PMC stood in such a relationship with Robb Report—and should therefore be treated
2 as one of Cheever’s employers—is ultimately a question of fact for the jury. (*Castaneda, supra*, 229
3 Cal.App.4th at p. 1019; see also *Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1404
4 [“The existence of an employment relationship is a question for the trier of fact.”]; *Violette v. Shoup*
5 (1993) 16 Cal.App.4th 611, 619 [agency is a “a question of fact”].)

6 As the moving party, PMC had the initial burden to show that no such relationship exists here.
7 (*Aguilar, supra*, 25 Cal.4th at p. 850.) And yet, all PMC’s motion offers on that fact-intensive question
8 is a single paragraph consisting of conclusory legal assertions without evidentiary support:

9
10 7 Plaintiffs cannot demonstrate that Ms. Cheever was an employee of PMC. The undisputed
11 8 evidence shows that Ms. Cheever was an employee of Robb Report, prior to, at the time of, and
12 9 subsequent to the accident. PMC did not control or direct Ms. Cheever's work, including with
13 10 respect to the 2018 Car of the Year event. PMC never provided any employment income to Ms.
14 11 Cheever, Robb Report is a limited liability company separate and distinct from PMC, and Ms.
15 12 Cheever was never an employee employed by PMC.

(Def.’s Memo. at p. 8.)

16 But “conclusory statements ... are insufficient to furnish a basis for granting summary
17 judgment.” (*Krantz, supra*, 89 Cal.App.4th at p. 173; *Aguilar, supra*, 25 Cal.4th at p. 855, fn. 23.)
18 Thus, PMC’s conclusory assertions that “Ms. Cheever was never an employee employed by PMC,”
19 “PMC did not control or direct Ms. Cheever’s work,” and that “Robb Report is ... separate and distinct
20 from PMC” (Def.’s Memo. at p. 8), are insufficient to “shift the burden of proof to [P]laintiff[s].”
21 (*Krantz, supra*, 89 Cal.App.4th at p. 173.) PMC’s motion should be denied on that basis alone.²

22 In any event, a reasonable jury viewing the evidence in a light most favorable to Plaintiffs
23 could find that PMC and Robb Report both acted as Cheever’s “employers.” Here again, *Castaneda*
24 is instructive: Indeed, the same facts that led the Second District to conclude that “[t]here are triable
25 issues of fact concerning Ensign’s role in the employment relationship” there (*Castaneda, supra*, 229
26 Cal.App.4th at p. 1021), also apply to PMC’s role in the employment relationship here.

27
28 ² Indeed, as set forth in Plaintiffs’ concurrently filed objections, the only evidence PMC offers in support of its motion is an attorney declaration consisting of inadmissible legal conclusions.

1 **First**, because “[p]ossession ordinarily brings with it the right of supervision and control”
2 (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 369), and “the right of supervision and
3 control ‘goes to the heart of the ascription of tortious responsibility,’” (*ibid.*, quoting *Connor v. Great*
4 *Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 874), *Castaneda* emphasized that “Ensign owns
5 Cabrillo,” and that this fact alone could “refute[] Ensign’s claims of lack of control and responsibility.”
6 (*Castaneda, supra*, 229 Cal.App.4th at p. 1020.) So too here, PMC owns a controlling interest (a
7 50.1% majority) of Robb Report’s stock. (PAMF #67.)

8 **Second**, *Castaneda* emphasized that Cabrillo was one of several “‘cluster’ or ‘portfolio’
9 companies” in Ensign’s “business enterprise,” and that Ensign exercised “centralized control over its
10 cluster companies.” (*Castaneda, supra*, 229 Cal.App.4th at pp. 1020–1021.) So too here, Robb Report
11 was one of several “business units” in PMC’s media enterprise, and PMC’s control over Robb Report
12 here has many of the same features as Ensign’s control over Cabrillo in *Castaneda*.

13 For example, *Castaneda* emphasized that the “corporate officers between Ensign and its
14 clusters” overlapped, resulting in “interwoven structural control and management” between Cabrillo
15 and Ensign. (*Castaneda, supra*, 229 Cal.App.4th at pp. 1020–1021.) So too here, “the Officers ... in
16 control of the day-to-day operations of [Robb Report]” all “hold similar roles at PMC.” (PAMF #8–
17 17.) Moreover, because PMC’s Board of Directors was deadlocked (PAMF #19–21), PMC’s officers
18 effectively had free-reign over Robb Report.

19 *Castaneda* also emphasized that Ensign “uses a ‘service center approach’” to its cluster
20 companies, in which Ensign “provides centralized information technology, human resources,
21 accounting, payroll, legal, risk management, educational and other key services” to Cabrillo and
22 Ensign’s other cluster companies. (*Castaneda, supra*, 229 Cal.App.4th at p. 1021.) So too here, PMC
23 uses a service-center approach in which it fulfilled all of Robb Report’s information technology,
24 human resources, accounting, payroll, legal, and risk-management needs. (PAMF #22–29.)

25 *Castaneda* also emphasized that Ensign and Cabrillo “share the same corporate address in the
26 same suite in Mission Viejo, California.” (*Castaneda, supra*, 229 Cal.App.4th at p. 1020.) So too here,
27 PMC and Robb Report share PMC’s headquarters in Los Angeles and New York. (PCOE 231–233;
28 PAMF #69.)

1 **Third**, the Second District emphasized evidence that Ensign controlled some “aspects of the
2 employment relationship” with Cabrillo employees. (*Castaneda, supra*, 229 Cal.App.4th at p. 1019.)

3 *Castaneda* emphasized that “[a] staff person at Ensign’s ‘corporate office’ recruit[ed]
4 employees” for Cabrillo. (*Castaneda, supra*, 29 Cal.App.4th at p. 1020.) So too here, PMC handled
5 talent-acquisition for Robb Report, including recruiting, personnel management, employee relations
6 and HR management issues. (PAMF #70.)

7 *Castaneda* also emphasized that Ensign required all new employees of its cluster companies
8 “to sign an Ensign handbook.” (*Castaneda, supra*, 229 Cal.App.4th at p. 1023.) So too here, PMC
9 required all employees to acknowledge receipt of (and to follow) PMC’s policies and procedures.
10 (PAMF #71.)

11 *Castaneda* also emphasized that “Ensign handled issues of employee discipline at Cabrillo.”
12 (*Castaneda, supra*, 229 Cal.App.4th at p. 1023.) So too here, PMC could terminate Robb Report
13 employees. (PCOE 248.)

14 *Castaneda* also emphasized that “[e]mployees [at Cabrillo] do not receive paychecks from
15 Cabrillo,” and instead received checks from “Ensign Facility Services, Inc.” (*Castaneda, supra*, 29
16 Cal.App.4th at p. 1023.) So too here, Robb Report employees receive paychecks from PMC, not Robb
17 Report. (PCOE 428–429.)

18 *Castaneda* also emphasized “evidence showing that traditional employee benefits, including
19 medical, dental, vision and 401(k) savings plans were not the responsibility of Cabrillo,” and that
20 employees of Ensign’s various cluster companies received their benefits through the “Ensign HR e-
21 Center.” (*Castaneda, supra*, 229 Cal.App.4th at p. 1023.) So too here, PMC provides medical, dental,
22 vision, life, and accidental death-and-dismemberment coverage to all Robb Report employees, as well
23 as their FSA, HSA and 401k benefits. (PAMF #74.)

24 *Castaneda* also emphasized that Ensign provided fringe benefits to Cabrillo employees,
25 including “an ‘employee emergency fund’ for employees who experienced ‘economic hardship.’”
26 (*Castaneda, supra*, 229 Cal.App.4th at p. 1022.) So too here, PMC provided fringe benefits to Robb
27 Report employees, including access to a “corporate apartment.” (PAMF #39.)
28

1 **Fourth**, the Second District emphasized that Ensign had held out the employees at “the
2 Cabrillo facility” as “*our employees.*” (*Castaneda, supra*, 29 Cal.App.4th at p. 1022.)

3 So too here, in August 2017, PMC’s HR director (Lauren Gullion) issued a letter on PMC
4 letterhead stating that “Cheever has been *employed with Penske Media Corporation* since May 2017.”
5 (PCOE 089, italics added.) The letter further stated that “*PMC* is located in West L.A., and we hope
6 to have Cristina close by work for convenience.” (PCOE 089, italics added.)

7 Also, in August 2019, PMC’s CEO (Jay Penske) issued a letter on PMC letterhead stating that
8 Cheever “*joined PMC ... in early 2017,*” had an impact “upon *arriving at PMC,*” and had “the qualities
9 we desire most in *an employee at PMC.*” (PCOE 517, italics added.)

10 Similarly, PMC held another Robb Report employee (Luke Bahrenburg) out to the public as
11 “head of luxury sales at Penske Media Corporation.” (PCOE 446–448.)

12 **Fifth**, the Second District emphasized that “[e]vidence that an employee believes there is ‘an
13 employer-employee relationship’ is a relevant factor.” (*Castaneda, supra*, 29 Cal.App.4th at p. 1022.)
14 So too here, Cheever’s “LinkedIn” profile lists her employer as “Robb Report/**Penske Media**
15 **Corporation.**” (PCOE 523, boldface added.)

16 In sum, under *Castaneda*, a reasonable jury could find that PMC was one of Cheever’s
17 “employers.” PMC’s anticipated counter-arguments lack merit.

18 **First**, PMC may argue that *Castaneda* had additional factors that are not present here.

19 But even if true, it does not alter the analysis. California law states that, in assessing whether
20 an employer–employer relationship exists, “[n]o one factor is necessarily decisive,” and that it is up
21 to the jury “to determine the weight and importance to give to each of the[] [various] factors based on
22 all of the evidence.” (CACI No. 3704 [“Existence of ‘Employee’ Status Disputed”].)

23 Indeed, the Second District was only partially through its analysis when it concluded that
24 “[t]here are triable issues of fact concerning Ensign’s role in the employment relationship.”
25 (*Castaneda, supra*, 229 Cal.App.4th at p. 1021.) Although the Second District continued to identify
26 *other* aspects of Ensign’s role with Cabrillo and *Castaneda* that supported its conclusion, the court
27 made clear this was simply “*additional* evidence from which a trier of fact could reasonably infer that
28 *Castaneda* and others who worked at Cabrillo were Ensign employees.” (*Id.* at p. 1023, italics added.)

1 **Second**, PMC will insist that Robb Report is “a limited liability company separate and distinct
2 from PMC.” (Def.’s Memo. at p. 8.)

3 But “[t]he parties’ use of a label to describe their relationship does not control and will be
4 ignored where the evidence of their actual conduct establishes a different relationship exists.” (*Futrell*
5 *v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1434; accord *S.G. Borello & Sons, Inc. v.*
6 *Department of Industrial Relations* (1989) 48 Cal.3d 341, 356.) And here, PMC treated Robb Report
7 less as a separate company, and more as an “business unit” within PMC’s operation. (PAMF #22–29.)

8 The Court of Appeal’s decision in *Sonora Diamond* is instructive here.

9 There, a school district sued a mine (Sonora Mining) and its parent company (Diamond) for
10 breach of a real-estate contract. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523,
11 529.) Diamond moved to quash service of process “on the ground the trial court was without personal
12 jurisdiction over Diamond.” (*Ibid.*) The district opposed. Invoking the principle that “an agent’s
13 liability ... may be imputed to even an innocent principal” (*Spahn v. Guild Industries Corp.* (1979) 94
14 Cal.App.3d 143, 156), the district asserted “that jurisdiction existed” under an “agency” theory, “based
15 upon the details of the relationship between Sonora Mining and Diamond.” (*Id.* at pp. 529, 540.)

16 The Court of Appeal acknowledged that even where a parent and subsidiary maintain “separate
17 corporate formalities,” the subsidiary may nonetheless “be deemed to be the agent of the parent.”
18 (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 541.) Here, *Sonora Diamond* drew a key distinction
19 “between holding companies and operating companies.” (*Id.* at p. 545.)

20 As the court explained, “the parent is merely a holding company” where its “only business
21 pursuit is the investment in the subsidiary.” (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 543.) By
22 contrast, a parent is an “operating company”—and thereby stands in a principal–agent relationship
23 with its subsidiary—when “the subsidiary can legitimately be described as ... an incorporated
24 department of the parent.” (*Id.* at p. 541; see also Civ. Code, § 2299 [“An agency is actual when the
25 agent is really employed by the principal.”].)

26 After *Sonora Diamond*, parent companies frequently try to dodge tort liability by insisting they
27 are mere holding companies of the subsidiary at fault.

1 Ensign tried that tactic in *Castaneda* when it insisted “Ensign is a holding company that ... is
2 not engaged in the direction, management or control of Cabrillo or its employees.” (*Castaneda, supra*,
3 229 Cal.App.4th at p. 1018.) The Second District rejected that claim based on “evidence showing that
4 Ensign [had] its centralized control over its cluster companies.” (*Id.* at p. 1020.)

5 PMC tries this same ploy here when it characterizes Robb Report as a “a limited liability
6 company separate and distinct from PMC” (Def. Memo. at p. 8), and repeatedly characterizes its
7 involvement with Robb Report as a mere “investment.” (E.g., Def.’s Memo. at pp. 3, 4, 11.) But if
8 there is any doubt that PMC is an “operating company” not a mere “holding company” after comparing
9 this case to *Castaneda*, it can be laid to rest by contrasting PMC with Robb Report’s other owner,
10 “Robb Intermediate Holdings.” (Def.’s Mem. at p. 9.)

11 At the risk of stating the obvious, “Robb Intermediate Holdings” is a “holding company.” It is
12 owned by “Rockbridge Growth Equity,” a private-equity firm. (PCOE 527.) It owns a *minority* interest
13 in Robb Report (49.9%), and appoints two members to a deadlocked Board of Directors (PAMF #77.)
14 Thus, at best, Robb Intermediate Holdings had ““broad oversight typically indicated by [the] common
15 ownership and common directorship’ present in a normal parent-subsidary relationship.” (*Sonora*
16 *Diamond, supra*, 83 Cal.App.4th at p. 542, quoting *Calvert v. Huckins* (E.D. Cal. 1995) 875 F.Supp.
17 674, 679.) But the similarities between PMC and Robb Intermediate Holdings end there.

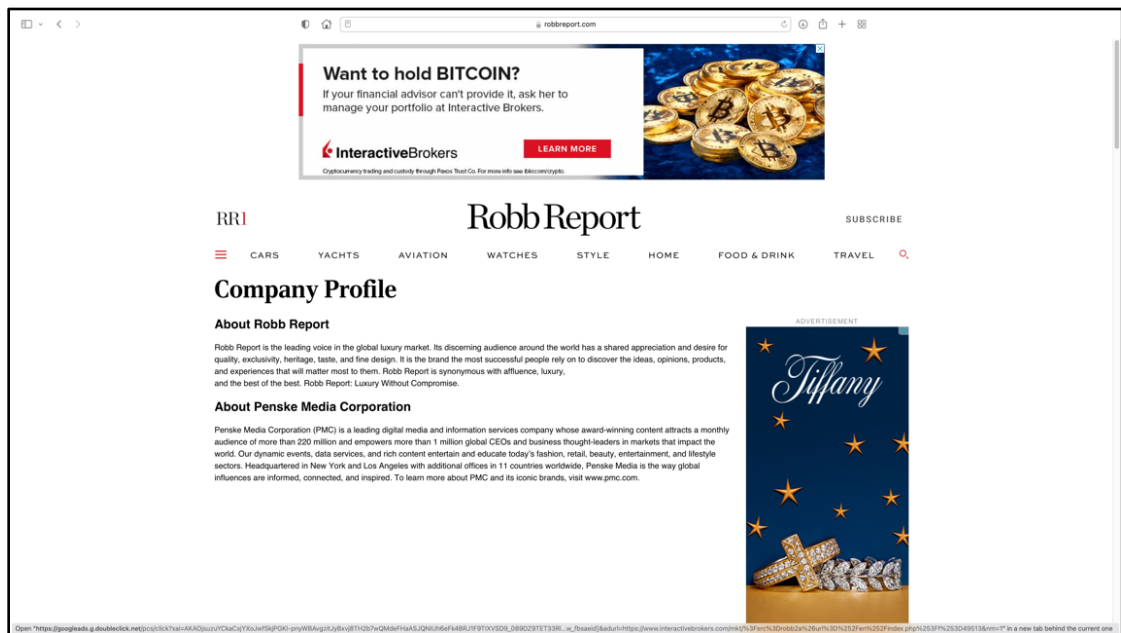
18 Robb Intermediate Holdings does *not* have any employees serving as officers of Robb Report.
19 By contrast, “the Officers ... in control of the day-to-day operations of [Robb Report]” all “hold
20 similar roles at PMC.” (PCOE 037; PAMF #8–17.)

21 Robb Intermediate Holdings does *not* provide any centralized support services to Robb Report.
22 By contrast, PMC provides all of Robb Report’s information technology, human resources,
23 accounting, payroll, legal, and risk-management needs. (PAMF #22–29.)

24 Robb Intermediate Holdings does *not* fulfill any traditional employment functions for Robb
25 Report employees. By contrast, PMC recruits, interviews, and hires Robb Report employees (PAMF
26 #78); sets their policies and procedures (PAMF #79); handles payroll (PAMF #80); and provides them
27 with health, dental, vision, disability, and life-insurance coverage, as well as workers-compensation
28 and 401k benefits. (PAMF #81.)

1 Robb Intermediate Holdings does not hold out any Robb Report employees as employees of
2 Robb Intermediate Holdings. By contrast, PMC holds out Cheever and other employees at Robb
3 Report as employees of PMC. (PCOE 089; PAMF #52–54, 75.)

4 Finally, Robb Intermediate Holdings is notably absent from the “Company Profile” page on
5 Robb Report’s website. (PCOE 525.) By contrast, PMC is prominently listed under Robb Report:



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16 (PCOE 525.)

17 In short, Robb Intermediate Holdings “is merely a holding company whose only business
18 pursuit is the investment in [Robb Report].” (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 543.) In
19 contrast, PMC “moved beyond the establishment of general policy and direction for [Robb Report],”
20 and instead treated Robb Report as “an incorporated department of [PMC].” (*Id.* at pp. 541, 543.)

21 **Third**, PMC will argue that “PMC did not control or direct the actions of Robb Report with
22 respect to the 2018 Car of the Year Event.” (See Green Decl., ¶ 19.)

23 But that is not accurate: PMC approved the budget for that event. (PCOE 389.) It is also
24 irrelevant: The evidence shows that PMC employed Cheever by virtue of Robb Report’s status as a
25 “business unit” within PMC’s digital-media enterprise. (*Castaneda, supra*, 229 Cal.App.4th at p.
26 1019.) Thus, if Cheever’s actions during the 2018 “Car of the Year Event” were within the course and
27 scope of Robb Report’s business (and there is no dispute they were), then they were within the course
28 and scope of PMC’s business as well. (*Sonora Diamond, supra*, 83 Cal.App.4th at p. 541.)

1 **Fourth**, PMC will likely claim that Plaintiffs are only interested in PMC because their damages
2 are likely to exceed insurance and assets available to Robb Report, and PMC is a deep-pocket.

3 But even if that were true, it would only be more reason to treat PMC as Cheever’s “employer.”
4 Indeed, as the Supreme Court explained, two of “the three policy justifications for the respondeat
5 superior doctrine,” are [1] “to give greater assurance of compensation for the victim,” and [2] “to
6 ensure that the victim’s losses will be equitably borne by those who benefit from the enterprise that
7 gave rise to the injury.” (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1013.)³

8 * * *

9 In sum, under California law, “an employer” includes any entity “who directly *or indirectly*,
10 ... *employs or exercises control over* ... [an employee].” (*Castaneda, supra*, 229 Cal.App.4th at p.
11 1019.) Under *Castaneda*, a reasonable jury could find that PMC met that definition based on evidence
12 [1] PMC owned Robb Report; [2] PMC exerted control over Robb Report; [3] PMC fulfilled many
13 traditional functions of an employer with Robb Report employees; [4] PMC held Cheever out as its
14 employee (including in a letter to a judge in Cheever’s criminal case); and [5] Cheever held PMC out
15 as her employer. None of PMC’s possible counter-arguments justify a contrary conclusion.

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24 ³ PMC and Robb Report precluded discovery into Robb Report’s finances. (E.g., PAMF
25 #87.) Thus, Plaintiffs cannot confirm if Robb Report maintains separate assets, and if so, whether
26 Robb Report is undercapitalized. While those issues might be relevant to an alter-ego theory, they are
27 irrelevant to the agency-based, co-employer analysis under *Castaneda*. (*Sonora Diamond, supra*, 83
28 Cal.App.4th at p. 541, fn. 9 [“[T]he agency approach does not include, among other factors, the
elements of wrongdoing and injustice material to the alter ego doctrine.”].) But even if co-mingled
assets or undercapitalization were relevant here, PMC cannot obtain summary judgment on those
grounds. (*Krantz, supra*, 89 Cal.App.4th at p. 174 [“[I]n cases in which the opposing party (usually
the plaintiff) has been thwarted in the attempt to obtain evidence that might create an issue of material
fact, or discovery is incomplete, the motion for summary judgment should not be granted.”].)

1 **2. PMC is judicially estopped from denying Cheever was a PMC employee.**

2 Regardless of whether a jury could find that PMC was one of Cheever’s employers, this Court
3 should find that PMC was one of Cheever’s employers under the doctrine of judicial estoppel.

4 “Judicial estoppel prevents a party from asserting a position in a legal proceeding that is
5 contrary to a position previously taken in the same or some earlier proceeding.” (*Jackson v. County*
6 *of Los Angeles* (1997) 60 Cal.App.4th 171, 181, quoting *Cleveland v. Policy Management Systems*
7 *Corp.* (5th Cir.1997) 120 F.3d 513, 517.) The “clear purpose” of the doctrine is “to protect the integrity
8 of the judicial process.” (*Cleveland, supra*, 120 F.3d at p. 517.) “Consequently, judicial estoppel is
9 especially appropriate where a party has taken inconsistent positions in separate proceedings.”
10 (*Jackson, supra*, 60 Cal.App.4th at p. 181.)

11 In its motion for summary judgment, PMC asserts that “Ms. Cheever was never an employee
12 employed by PMC.” (Def.’s Memo. at p. 8.) But in the criminal case arising out of the subject crash,
13 PMC claimed that Cheever has *always been* a PMC employee.

14 Notable here is a letter PMC filed with the court to garner sympathy for Cheever in sentencing.
15 There, Jay Penske—describing himself only as the “Chief Executive Officer and Founder of **Penske**
16 **Media Corporation (PMC)**,” and writing on PMC letterhead—represented that he has “worked
17 closely by [Cheever’s] side for the last 3 years.” (PCOE 517, boldface added.) Penske further
18 represented that “Cristina **joined PMC** ... in early 2017,” that Cheever had an impact “[f]rom the first
19 month upon **arriving at PMC**,” and that Cheever “exhibit[ed] many of the qualities we desire most
20 in an employee at PMC.” (*Ibid.*, boldface added.)

21 In short, the crux of PMC’s motion for summary judgment—that “Ms. Cheever was never an
22 employee employed by PMC” (Def.’s Memo. at p. 8)—is directly contrary to a position PMC took in
23 a prior proceeding. Accordingly, to ensure “the integrity of the judicial process” (*Cleveland, supra*,
24 120 F.3d at p. 517), PMC must be treated as Cheever’s employer under the doctrine of judicial
25 estoppel.

26 **CONCLUSION**

27 For either of the foregoing reasons, this Court should **deny** PMC’s motion for summary
28 judgment.

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Dated: November 23, 2021

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